Measures to protect unlawfully dismissed employees. The Italian Legislative Model compared to the one in force in Malta*

Angela Bruno

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1. Introduction.

A research study on the procedures to protect an unlawfully dismissed employee entails the need to examine a particularly complex legislative framework, both on the Italian side and on the European side.

On the one hand, this is due to the fact that a common "corpus" of rules directly applicable within the EU, which equally protects all the unlawfully dismissed EU Member States' employees, does not currently exist.

Art. 153.1.d) of the Treaty on the Functioning on the European Union grants the European Institutions the right to adopt harmonizing directives and common minimum standards of protection regarding the "*protection of workers where their employment contract is terminated*".

However, such a provision has not been implemented yet, and might not be implemented in the future, since the exercise of the legislative power by the European Institution on dismissal issues is subject to the unanimity rule[497].

On the other hand, each EU Member State is free to determine the protection rules it wants to grant – pursuant to Art. 30 of the Charter of Fundamental Rights – to the unlawfully dismissed employee (i.e.: reinstatement, rehiring, payment of an indemnity, and so on) with the only restrictions deriving from the principles and the rules of the European Law regarding specific aspects of the termination of employment relationships. These include, among others, the restriction to dismiss an employee who refuses the transformation of his/her employment from full-time into part-time (or *vice-versa*, see Art. 5.2. of EU Directive 97/81), as well as the prohibition to dismiss cause of a transfer of undertaking (please, see Art. 4.1 of the Directive 2001/23) as well as the prohibition to dismiss for discriminatory reasons (see EU Directives 2006/54, 2000/43 e 2000/78)[498].

The present study focuses on the comparison between the protective measures granted to unlawfully dismissed employees under the Italian Law and the Maltese one. In particular, it is firstly aimed at trying to find a response to the issue whether the protective "measures" granted to

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[497] Please, see G. HEERMA VAN VOSS, *Common ground in European dismissal Law, Keynote Paper, 4th Annual Legal Seminar European Labour Law Network, 24-25 November 2011, Protection against Dismissal in Europe-Basic Features and Current Trends*, in www.labourlawnetwork.eu; N. F. HENDRICKX, *European Labour Law after the Lisbon Treaty: (Re-visited) Assessment of Foundamental Social Rights*, in R. Banplain, F. Hendrickx, *Labour Law between change and tradition: Liber Amicorum Antoine Jacobs*, in *Bulletin of Comparative Labour Relations*, 2011, no. 78, 75 ss.; M.V. BALLESTRERO, *Europa dei mercati e promozione dei diritti*, in *Working Papers Centro studi di Diritto del Lavoro Europeo "Massimo D'Antona"*, INT, 2007, 55, in http://www.lex.unict.it/eurolabor/ricerca/wp/wp_int.htm; P. K. MADSEN, Flexicurity*: A New Perspective on Labour Markets and Welfare States in Europe*, in *Tilburg Law Review*, 2007, no. 1-2, 57 ss.; MUTARELLI M.M., *Il ruolo potenziale dei diritti sociali fondamentali nel Trattato costituzionale dell'Unione Europea*, in *WP C.S.D.L.E. "Massimo D'Antona*", INT, 2007, no. 54; F. HENDRICKX, *Flexicurity and the EU Approach to the Law on Dismissal*, in *Tilburg Law Review*, 2007, 14, no. 1-2, 90 ss.; N. BRUUN, *Protection against unjustified dismissal (Article 30)*, in *B.Bercusson (ed.), European Labour Law and the EU Charter of Fundamental Rights, Baden-Baden,* 2006, 337 ss.; M.T. CARINCI, *Il rapporto di lavoro al tempo della crisi: modelli europei e flexicurity "all'italiana" a confronto*, in *Giorn. Dir. Lav. Rel. Ind*., 2012, no. 36, 4 ss.; S. GIUBBONI, *Lavoro e diritti sociali nella "nuova" Costituzione europea. Spunti comparatistici*, in *WP C.S.D.L.E. "Massimo D'Antona*", INT, 2004, no. 5; M. GRANDI, *Il diritto del lavoro europeo. Le sfide del XXI Secolo*, in *Dir. Rel. Ind*., 2007, 1022 ss.

[498] L. CALCATERRA, *Diritto al lavoro e diritto alla tutela contro il licenziamento ingiustificato. Carta di Nizza e Costituzione italiana a confronto*, in *W.P. C.S.D.L.E. "Massimo D'Antona"*, INT, 2008, no. 58, 28 ss.; G. BALDACCHINO, *European Labour Law: Some Reflections on a Cultural Collision*, in *The Employer (Journal of the Malta Employers' Association)*, January 2001, 27 ss.; Id., *Malta & the European Union: A Comparative Study on Social Policy, Employment & Industrial Relations, Malta, Malta Employers' Association*, 2000; Id., *Competitiveness versus Social Cohesion: Employment-Creation Policies in Malta & the European Union, paper presented at the Annual EDRC Conference, May 1999,* in *P.G. Xuereb, ed. Getting Down to Gearing Up for Europe, Malta*, EDRC, 1999, 259 ss.

Italian unlawfully dismissed employees (considering the way in which the provided protective measure is actually applied by the judges) may be deemed "stronger" than those granted to the Maltese ones or *vice-versa*.

Secondly, that study is also aimed at understanding whether the differences between the Maltese Law (please, see Section 81 of the Employment and Industrial Relations Act-EIRA) and the Italian Law (please, see Art. 18 of the Law No. 300 of 1970, so-called Workers' Statute) are nowadays more apparent than real.

Finally, the present study constitutes:

a) an "attempt" to show that, although a common *corpus* of rules directly applicable within EU - which equally protects all the unlawfully dismissed employees - does not currently exist, it is also true that EU Member States are actually implementing by themselves a "new universal" European Law;

b) an "example" of how different legislative models (i.e.: the Italian legislative model and the Maltese one) could blend together.

2. Remedies applied in case of unfair dismissal: the Italian "*hyper-regulation*" against the Maltese "*deregulation*".

Before examining criteria taken into consideration by the Maltese judges and the Italian ones in order to apply measures granted to unlawfully dismissed employees, it is important to examine the most significant differences between the Law in force in Malta and the one in force in Italy.

Firstly, both the unlawfully dismissed Italian employees and the Maltese ones are entitled to be reinstated-rehired or to be paid a compensation aimed at restoring the damage suffered by reason of the unfair dismissal (please, see Art. 18 of the Law No. 300 of 1970 and Section 81 of the EIRA).

However, the Law in force in Italy expressly prescribes whether the judge has to order the reinstatement/rehiring of the employee or the payment of an indemnity for damages in favour of that employee, while - in accordance with the Law in force in Malta - that option is always up to the judge (please, see Section 81 of the EIRA).

In other words, the Italian judge, unlike the Maltese one, is prevented from deciding whether to order the reinstatement (i.e.: the so-called "*tutela reale*"), the re-hiring (i.e.: the so-called "*tutela obbligatoria*"), or the payment of the indemnity for damages on the basis of his/her discretionary evaluations.

In particular, pursuant to the current Art. 18, par. 4th, of the Law No. 300 of 1970, in case of unfair disciplinary dismissal for *"just cause"* or for *"subjective reasons"*, the dismissed employee is entitled to be reinstated if "*the contested behaviour does not subsist or*" whether "*that behavior could have been sanctioned with a conservative measure according to the provision of the bargaining agreement or … the applicable disciplinary codes".* By the way, the same employee has the right to opt for the payment of an indemnity instead of the reinstatement equal to fifteen months of salary compared to the overall actual annual compensation.

The Italian Law also prescribes that - in all "*other cases*" - if the judge ascertains the lack of "*just cause*" or subjective reasons of the served dismissal, he/she may simply order the employer to

pay a global indemnity for damages ranging between a minimum of twelve up to a maximum of twenty-four months of salary compared to the overall actual annual compensation (please, see the above-mentioned Art. 18, par. 5th). The same judge has the duty to explain, through his/her decision, the *criteria* which he/she has decided to apply in order to quantify the amount of compensation[499].

Moreover, the Italian judge has to order the employer (i.e.: it is mandatory!) to pay to the unlawfully dismissed employee an indemnity aimed at restoring the damage suffered by the employee during the period comprised between the date of dismissal and the judge's order (i.e.: of reinstatement, rehiring or compensation), including social security contribution payment and deducting the salary that the employee earned or might have earned during the same period (please, see again Art. 18, par. 2nd).

Similar regulations are provided in case of unfair dismissal for lack of business/financial reasons (i.e.: the so-called "*objective reasons*"). In fact, regarding this latter case, whether the judge ascertains that *"the contested behavior that grounded the dismissal for objective reasons does not clearly[500] subsist"*, he/she has the faculty to order (i.e.: it is not mandatory!) the reinstatement of the dismissed employee[501], while – in all the other cases – the judge has to order the employer to pay an indemnity for damages as provided under Art. 18, par. 6th (please, see again Art. 18, par. 7th)[502].

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[499] For an exhaustive framework on this matter, please see: AA.VV., *La Riforma del lavoro. Primi orientamento giurisprudenziali dopo la Riforma Fornero*, 2013, Giuffrè, Milano; M. BARBIERI, D. DALFINO, *Il licenziamento individuale nell'interpretazione della legge Fornero, aggiornato al d.l. 28 giugn0 2013, n. 76 c.d. Pacchetto Lavoro*, 2013, Cacucci, Bari; F. CARINCI, *Il nodo gordiano del licenziamento disciplinare*, in *Lav. Giur.*, 2013, 5 ss.; F. CARINCI, *Il nodo gordiano del licenziamento disciplinare*, in *Lav. Giur.*, 2013, 5 ss.; C. CESTER, *I licenziamenti dopo la legge n. 92 del 2012,* 2013, Cedam, Padova; C. CESTER, *I licenziamenti dopo la legge n. 92 del 2012,* 2013, Cedam, Padova; M. CINELLI, G. FERRARO, O. MAZZOTTA, *Il nuovo mercato del lavoro dalla riforma Fornero alla legge di stabilità 2013*, 2013, Giappichelli, Torino; C. COLOSIMO, *Prime riflessioni sul sindacato giurisdizionale nel nuovo sistema di tutele in caso di licenziamento illegittimo: l'opportunità di un approccio sostanzialista*, in *Dir. Rel. Ind*., 2012, 1024 ss.; M. PERSIANI, S. LIEBMAN, *Il nuovo diritto del mercato del lavoro. La legge n. 92 del 2012 (c.d. Riforma Fornero) dopo le modifiche introdotte dalla legge n. 99 del 2013*, 2013, Utet, Padova; M. PERSIANI, S. LIEBMAN, *Il nuovo diritto del mercato del lavoro. La legge n. 92 del 2012 (c.d. Riforma Fornero) dopo le modifiche introdotte dalla legge n. 99 del 2013*, 2013, Utet, Padova; AA.VV., *Commentario alla riforma Fornero (l. n. 92/2012 e l. n. 134/2012)-Licenziamenti e rito speciale, contratti, ammortizzatori e politiche attive*, a cura di Carinci F._Miscione M., in *Dir. Prat. Lav*., 2012, suppl. al n. 33; AA.VV., *Il diritto del lavoro dopo la «riforma Fornero» (l. n. 92/2012 e l. n. 134/2012),* in *Lav. Giur.,* 2012, 843 ss.; M. BARBIERI, D. DALFINO, *Il licenziamento individuale nell'interpretazione della legge Fornero, aggiornato al d.l. 28 giugn0 2013, n. 76 c.d. Pacchetto Lavoro*, 2013, Cacucci, Bari; C. CESTER, *Il progetto di riforma della disciplina dei licenziamenti: prime riflessioni*, in *Arg. Dir. Lav*., 2012, 547 ss.; M. CINELLI, G. FERRARO, O. MAZZOTTA, *Il nuovo mercato del lavoro dalla riforma Fornero alla legge di stabilità 2013*, 2013, Giappichelli, Torino; C. COLOSIMO, *Prime riflessioni sul sindacato giurisdizionale nel nuovo sistema di tutele in caso di licenziamento illegittimo: l'opportunità di un approccio sostanzialista*, in *Dir. Rel. Ind*., 2012, 1024 ss.; M. PERSIANI, S. LIEBMAN, *Il nuovo diritto del mercato del lavoro. La legge n. 92 del 2012 (c.d. Riforma Fornero) dopo le modifiche introdotte dalla legge n. 99 del 2013*, 2013, Utet, Padova.

[500] According to some scholars, the adjective "*clear*" would be not considered as relevant in that context but superfluous. In this regard, see V. SPEZIALE, *La riforma del licenziamento individuale tra diritto ed economia*, in *Riv. It. Dir. Lav.*, 2012, 560 ss.; S. MAGRINI, *Quer pasticciaccio brutto (dell'art. 18)*, in *Arg. Dir. Lav.*, 2012, 537 and C. PONTERIO, *Il licenziamento per motivi economici*, in *Arg. Dir. Lav.*, 2013, 80 ss. *Contra*, see A. VALLEBONA, *L'ingiustificatezza qualificata del licenziamento: fattispecie e oneri probatori*, in *Riv. Rel. Ind.*, 2012, 624 ss., considering that "*the fact*" mentioned by the Law should not be considered as a "*material fact*" and – therefore – the judge could evaluate whether the fact "*does not clearly subsist*" or not.

[501] According to some scholars, the Italian judge would not have "*the power*" to discretionally opt for the reinstatement or the award of compensation, but he would have the duty to reinstate the unfairly dismissed employee. On this matter, see, A. PALLADINI, *La nuova disciplina in tema di licenziamenti*, in *Arg. Dir. Lav.*, 2012, I, 668 ss. *Contra,* see M. PERSIANI, *Il fatto rilevante per la reintegrazione del lavoratore illegittimamente licenziato,* in *Arg. Dir. Lav.*, 2013, 1.

[502] This Regulation has been criticized by some scholars considering that the Italian judge has the power to discretionally choose between the reinstatement and the award of compensation. In this regard, please see A. PERULLI, *Fatto e valutazione giuridica del fatto*

Moreover, the Law in force in Italy prescribes that the Italian judge has the duty (i.e.: it is mandatory!) to rule the reinstatement of the dismissed employee if the dismissal is deemed as discriminatory[503] or if it has been served during the maternity leave, during the wedding period, during the period of incapacity for work or in breach of Art. 2110 Cod. Civ. and in case of dismissal based on an unlawful reason as provided under Art. 1345 of the Italian Civil Code (please, see Art. 18, par. 1st and 7th).

In particular, regarding these latter circumstances, Art. 18, par. 1st, of the Law No. 300 of 1970 as amended by the Law No. 92 of 2012, provides that, irrespective of the number of workers employed by the company, employees – including managers - are entitled to be reinstated in their workplace besides the payment of an indemnity for damages equal to the salary which they would have earned from the date of the dismissal until the actual reinstatement, and not less than five months of salary (deducting the salary they might have earned during that period and including the payment of the relevant social security contribution). Such employees have the right to opt for the payment of an indemnity instead of the reinstatement equal to fifteen months of salary compared to the overall actual annual compensation.

The Italian Legislator has also specified that workers employed in "small" enterprises are not entitled to be reinstated whether they have been unlawfully dismissed. In fact, Art. 8 of the Law No. 606 of 1966, as amended by Art. 2 of the Law No. 108 of 1990, prescribes that – in such cases - the so-called "*tutela obbligatoria*" (i.e.: rehiring) has to be applied, allowing the employer to choose between the rehiring of the unfairly dismissed employee and the payment of an indemnity.

Furthermore, the Law in force in Italy prescribes that – in cases of dismissal deemed ineffective because of the lack of an immediate indication of the actual grounds for dismissal when such a dismissal has been served – the employee has just the right to be paid a global indemnity for damages ranging between a minimum of six months up to a maximum of twelve months of salary compared to the overall actual annual compensation (please, see Art. 18, par. 6th). The Italian Law specifies that such a regulation has to be applied also in the event that the dismissal has been served to the employee without observing the procedure provided by Art. 7 of the Law No. 300 of 1970 or in breach of the procedure of dismissing prescribed by Art. 7 of the Law No. 604 of 1966 with regards to cases of dismissal for objective reasons.

Therefore, the "role" of Italian judges seems significantly limited by the "role" of Italian Legislator, since the latter one expressly specifies "if, how and when" such judges have to apply protection measures.

On the other hand, as mentioned earlier, Section 81 of the EIRA prescribes that, in case of unfair dismissal, Maltese judges do not have the duty to order the reinstatement/rehiring of the dismissed employee or to make an order of compensation. In fact, the Maltese Legislator only prescribes that:

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nella nuova disciplina dell'art. 18 St. Lav.: ratio *ed aporie dei concetti normativi*, in *Arg. Dir. Lav.*, 2012, 791 ss., who - supporting the thesis of V. SPEZIALE, *La riforma del licenziamento individuale tra diritto ed economia*, in *Riv. It. Dir. Lav.*, 2012, I, 560 ss. - has affirmed that the "new" Art. 18 would break Art. 3 Cost.

[503] M.T. CARINCI, *Il licenziamento discriminatorio o «per motivo illecito determinante» alla luce dei principi civilistici: la causa del licenziamento quale atto unilaterale fra vivi a contenuto patrimoniale*, in *Riv. Giur. Lav.,* 2012, I, 641 ss.

α) "*the Tribunal shall not order the reinstatement or re-engagement"* of the employee if he *"is employed in such managerial or executive post as a special trust in the person of the holder of that post or his ability to perform the duties thereof"* (please, see Section 81, par. 1st, of the EIRA);

β) employees are entitled to be reinstated "*in* (their) *former employment*" at the end of the period of "*incapacity for work"* and – therefore – even in the event that such employees have been unfairly dismissed during or after that period (please, see Section 36, par 15th, of the EIRA)[504].

On the other hand, as provided by Section 81 of the EIRA, the Maltese judge – in all the other cases where he ascertains that the dismissal is unfair[505] (i.e.: for lack of a good and sufficient cause, for lack of formal requirements, for lack of grounds founding on redundancy, etc.) - has the duty to *"consider* (..)" whether "*it would be practicable … for the complainant* (i.e.: employee) *to be reinstated or re-engaged by the employer"* or not.

In particular, this evaluation has to be made by the Maltese judge on the basis of his/her discretion "*in accordance with equity*", *"stating the terms on which it considers that it would be reasonable for the complainant to be so reinstated or re-engaged".* Therefore, if the Maltese judge "considers" the order of reinstatement/rehiring as not *"practicable*", he/she may order the employer to pay an indemnity for damages.

In this regard, it is relevant to note that Maltese judges' discretion is extremely accentuated by Section 81, par. 2nd, of the EIRA which allows such judges to "*make an award of compensation to be paid by the employer to the complainant, in respect of the dismissal*" although the unfairly dismissed employee has expressly requested to be reinstated or rehired[506]. Moreover, Maltese judges may arbitrarily state a span of time within the indemnity has to be paid by employers (i.e.: one month, two months, four months, …).

Furthermore, the Maltese Legislator has provided Maltese judges with "the power" to decide the amount of the payment of such an award since Section 81 of the EIRA - unlike Art. 18 of the Law No. 300 of 1970 (related to the so-called "*tutela reale*") and Art. 18 of the Law No 604 of 1966 (related to the so-called "*tutela obbligatoria*") - does not indicate a minimum or a maximum amount for the relevant payment of the indemnity for damages. In fact, Section 81, par. 2nd, of the EIRA only prescribes that, *"in determining the amount of such compensation, the Tribunal shall take into consideration the real damages and losses incurred by the worker who has unjustly dismissed, as well as other circumstances.* This might include many aspects (i.e.: such as: whether

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[504] However, the Maltese judge makes – very often – an order of compensation to be paid by the employer to the unlawfully dismissed employee during the period of incapacity to work. In this regard, see Industrial Tribunal, 6th May 2013, no. 2221, *in re* Joseph Zammit v. Fondazzjoni Wirt Artna.

[505] For a lack of a good and sufficient cause, grounds of redundancy and – generally – when the judge "*finds that the grounds of the complaint are well-founded"*, please, see Art. 81, par. 1st, of the EIRA.

[506] In this regard, see Industrial Tribunal, 21st March 2013, no. 2215, *in re* Eric Micallef v. Bezzina Maritime Services; Id., 19th September 2013, no. 2238, *in re* Thomas Abela v. Preluna Ltd.; Id., 18th September 2012, no 2172, *in re* Roderick Camilleri v. Polidano Grou; Id., 10th July 2012, no. 2160, *in re* Shaun Bonello v. HSBC plc., where the Tribunal has decided to make an order of compensation (respectively, € 4.000,00; € 5.000,00; 3.000,00 and € 1.500,00), although the dismissed employee expressly asked for being reinstated.

or not the dismissed employee has already found another job in a short time[507] and/or the evaluation of the behaviour of that employee during the entire employment[508]), *"including the worker's age and skills as may affect the employment potential of the said worker"* (see again Section 81 of the EIRA). Therefore, any decision regarding the amount of the indemnity to be paid to unlawfully dismissed employees is - once again - up to the discretion of Maltese judges.

The same judge – in case of dismissal for discriminatory reasons - has the faculty to independently decide whether to *"make such order as it deems necessary in order to remedy the breach or … make an award of compensation to be paid by the employer to the complainant"* or – finally - *"make such orders as it may deem necessary in order to remedy the breach"* (see again Section 81 of the EIRA).

Moreover, the Law in force in Malta is silent on the matter of measures to be applied by judges in case of unfair dismissal served during the wedding/maternity leave or the period of incapacity for work or for lack of formal requirements (for instance: dismissal served to the employee without allowing him/her to be heard or – generally – without following the procedure of dismissing prescribed by collective agreements). Therefore, Maltese judges, in accordance with Section 81 of the EIRA, have – also in such cases – the discretion to independently decide whether to order the reinstatement-rehiring of the unlawfully dismissed employee or, alternatively, to make an order of compensation.

In addition, the Law in force in Malta does not say anything in the matter of measures to be applied during the period comprised between the date of dismissal and the date of the decision made by the Industrial Tribunal.

In this context, Maltese judges may (and therefore they are not obliged to) order the employer to pay an indemnity aimed at restoring the damage suffered by the employee during the period comprised between the date of dismissal and the judge's order (of reinstatement, rehiring or compensation), including social security contribution. Such an indemnity often consists in the total amount of all salaries that the employee would have earned during that period.

Therefore, while the protection of unfairly dismissed Italian employees is – at least apparently - committed to the "strict" Italian Law, the protection of the Maltese ones seems mainly committed to Maltese judges.

3. Maltese "*deregulation*" and *"power"* recognized to Maltese judges: what about the principle of equality?

As explained earlier, Section 81 of the EIRA grants Maltese judges with the power to decide – on the basis of his/her discretion and *"in accordance with equity*" - whether to make an order of reinstatement/rehiring of the unlawfully dismissed employee or to make an order of compensation to be paid by the employer to such an employee.

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[507] In this regard, see Industrial Tribunal, 3rd December 2013, no. 2255, *in re* Ronald Azzopardi v. Roosendaal Hotels Ltd; Id., 2nd April 2012, no. 2139, *in re* Robert Aquilina v. Camilmac Services Ltd; Id., 20th March 2012, no. 2136, *in re* Marvin Abdilla v. Engineering for Science & Industry Ltd.

[508] Please, see Industrial Tribunal, 31st January 2011, no. 2047, *in re* Joseph Abela v. Imperial Hotel (Goldvest Co. Ltd.).

On the one hand, such a provision is probably aimed at prompting Maltese judges to take into serious consideration all the circumstances-facts concerning the dispute for the purpose of choosing the most appropriate protective measure.

In other words, Section 81 of the EIRA is probably aimed at allowing such judges to make a decision in accordance with the peculiarities of the dispute to be decided. Actually, after examining decisions of the Industrial Tribunal, it has came to light that many Maltese judges have shown a good "awareness" of deciding the most appropriate measures to be applied. In fact, those judges have very often taken into account various relevant aspects such as the age and the seniority of the dismissed employee, the circumstance that the employee had already found a new job, the behaviour had by the same employee during the entire employment, and so on[509].

On the other hand, granting Maltese judges with such a power may lead to a breach of the principle of equality which should be recognized and therefore applied to all employment relationships. In particular, that principle – expressly mentioned by the Maltese Constitution and the EIRA - should govern any employment and its termination[510].

However, pursuant to Section 81 of the EIRA, (for instance) two – or more – employees who have been dismissed for the same reason (i.e.: for lack of grounds of redundancy, for lack of a good and sufficient cause, for lack of formal requirements, for reasons of discrimination ….) may receive different protection by Maltese judges. In fact, while an employee may be reinstated or rehired by the judge who has to state his/her case, another one may obtain the payment of an indemnity for damages[511].

Moreover, Maltese judges may determine, case by case, different amounts of that indemnity. In fact, as explained earlier (see paragraph no. 2 of the present work), Section 81 of the EIRA does not indicate a minimum or a maximum amount for the relevant payment of the award. Therefore, the Maltese judge can quantify that award on the basis of his/her discretion, taking into account the *criteria* prescribed by the Maltese Law (i.e.: "*real damages and losses incurred by the worker …, other circumstances, …*", please, see Section 81, par. 2nd, of the EIRA). In addition, Maltese judges may, on a case by case basis, also indicate different terms within the indemnity which has to be paid by employers[512].

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[509] Please see First Hall Civil Court, 7th July 2003, *in re* Lorenza Cascun v Healthcare Services Ltd and First Hall, Civil Court, 28th February 2003, *in re* Godwin u Oliver Navarro v Saviour Baldacchino.

[510] Please, see Artt. 14th, 45th (equality between men and women) of Constitution and Art. 1st (equal application of provisions of the EIRA), 26th (gender equality), 27th (equal salary).

[511] Please, see two cases of dismissals served to the employee during the period of incapacity to work decided by the Industrial Tribunal: Industrial Tribunal, 29th April 2013, no. 2218, *in re* Stephen Chircop v. Malta Freeport Terminals (order of reinstatement) and Id., 6th May 2013, no. 2221, *in re* Joseph Zammitv. Fondazzjoni Wirt Artna (order of compensation, € 4.998,00 in three consecutive payments).

[512] In this regard, see the followed cases where the Industrial Tribunal has declared unfair the dismissal served to the employees for lack of a good and sufficient cause: Industrial Tribunal, 30th January 2013, no. 2201, *in re* Robert Cini v. Cube Relocations Ltd. (order of compensation: € 1.021,26); Id., 21st March 2013, no. 2215, *in re* Eric Micallef v. Bezzina Maritime Services (order of compensation: € 4.000,00); Id., 16th May 2013, no. 2225, *in re* Ray Borg v. Advanced Telecommunications Systems Ltd. (order of compensation: € 16.000,00); Id., 19th September 2013, no. 2238, *in re* Thomas Abela v. Preluna Ltd (order of compensation: € 5.000,00). Regarding such decisions, on the one hand, the Industrial Tribunal has not specified parameters followed to determine the amount of the indemnity provided by Art. 81 of the EIRA. On the other hand, the same Tribunal has indicated different terms within the indemnity had

Therefore, Section 81 of the EIRA should be amended in order to indicate the minimum and maximum amount of compensation to be given.

Finally, it does not seem justifiable to provide Maltese judges with the faculty to decide measures to be applied in case of dismissal served to employees during the maternity-wedding-incapacity for work leave or grounded on discriminatory reasons. In fact - for instance - employees dismissed for the same discriminatory reason may be protected by means of *"such* [different] *orders as* [the Industrial Tribunal] *deem*(s) *necessary in order to remedy the breach"* (please, see Section 91 of the EIRA).

On the other hand, judges should apply same protective measures, since such cases involve, not exclusively the right to work, but other essential rights such as the right to maternity, the right to a family, the right to health and the right not to be discriminated at workplace.

In view of this, it is also relevant to remark that the so-called doctrine of precedent is not recognized by the Law in force in Malta. Therefore, the "power" which has been given to Maltese judges is tremendously strengthened since previous judicial decisions are not binding on subsequent proceedings and therefore any judge is free to decide "same" disputes in different "ways".

Furthermore, Maltese judges – unlike the Italian ones – are not even bound to respect guiding law principles affirmed by superior judiciary institutions (such as the Italian Supreme Court) which - through their decisions – might guarantee a uniform interpretation and application of the Maltese Law. However, such an institution does not exist in Malta.

4. The Italian Legislative Model and the Maltese one: how much "real" are the differences between them?

An in-depth analysis of the Maltese Legislative Model and the Italian one require to make a few general considerations.

Although Section 81 of the EIRA grants the Maltese judge with the discretionary power to decide between the order of reinstatement-rehiring and the order of compensation, it is also true that Art. 18 of the Law No. 300 of 1970 seems to grant - even if only indirectly - a similar power to the Italian judge (i.e.: in case of unfair dismissal for lack of just cause, subjective reasons or objective reasons).

In this regard, it has to be noted that Art. 18 of the Law No. 300 of 1970, before the amendments introduced by Art. 1, par. 42th, of the Law No. 92 of 28th June 2012 (i.e.: the so-called Riforma Fornero), provided for the Italian "anomaly" – according to some scholars – according to which the competent judge who declares the dismissal to be null and void, revoked or ineffective, has to order the reinstatement of the employee in the same work position s/he had before (the so-called *"tutela reale*"). The employee was - and actually he/she is still - entitled to waive the right

to be paid by employers to unlawfully dismissed employees (i.e.: within one month, four months, two months, fifteen days, …). Regarding the discretion of Maltese judges to determine the amount of indemnity, see also some Industrial Tribunal, 27th March 2013, no. 2217, *in re* Petra Stock v. Carre Aviation Ltd Unfair Dismissal (order of compensation: € 24.000,00 – six monthly payments); Id., 11th June 2013, no. 2231, *in re* Sharon Grixti v. Dragonara Gaming Ltd. (order of compensation: € 2.600,00 to be paid within one month); Id., 15th October 2013, no. 2246 (order of compensation of € 1.000,00 to be paid within one month). The Industrial Tribunal, through such decisions, has declared unfair the dismissal of some employees for lack of grounds of redundancy without specifying parameters taken into account to determine the amount of the indemnity.

to be reinstated opting for the employer's payment of an indemnity equal to 15 months of salary compared to the overall actual annual compensation (as provided under the 5th paragraph of the previous Art. 18, as amended by Law No. 108 of 1990).

However, the "spreading" of the financial and occupational crisis – that, from 2010 onwards involved many European countries such as Greece, Spain and Slovakia – speeded up also in Italy the legal protections granted to unlawfully dismissed employees.

Therefore, a "crucial point" of the Labour Law Reform implemented by the Law No. 92 of 2012 (i.e.: the so-called "Riforma Fornero") and – more recently – by the Law No. 183 of 2014 (the so-called Jobs Act) is the amendment of Art. 18 of the Law No. 300 of 1970.

Such an amendment tremendously "weakened" the employee's right of reinstatement in case of unlawful dismissal that before he/she was granted with, increasing the "chances" that the Italian judge may make an order of compensation.

In fact, as stated earlier, pursuant to the current Art. 18, in case of unfair disciplinary dismissal for "just cause" or "subjective reasons", the Italian judge does not have to order the reinstatement as – alternatively – he/she may provide for the payment of a global indemnity for damages ranging between a minimum of 15 up to a maximum of 27 months of salary compared to the overall actual annual compensation.

In particular, according to Art. 18, par. 4th, the difference between an order of reinstatement and an order of payment is grounded on the fact that the "*contested behaviour does not subsist or*" in case *"that behaviour could have been sanctioned with a conservative measure according to the provision of the bargaining agreement or … the applicable disciplinary code"* (i.e.: in case of "just cause" or "subjective reasons"). In fact, if the judge ascertains such a fact, he/she has to order the reinstatement of the unlawfully dismissed employee. "*In all the other cases*", if the judge ascertains the lack of the just cause or of the subjective reasons of the served dismissal, he/she may simply order the employer to pay a global indemnity for damages (please, see Art. 18, par. 5th).

In addition, pursuant to Art. 18, par. 7th, the Italian judge has the faculty to decide whether to order the reinstatement of the employee or the payment of the indemnity for damages when he ascertains that *"the behaviour that grounded the dismissal for objective reasons does not clearly subsist*". In other words, if the Italian judge ascertains such a fact, he may order the reinstatement of the dismissed employee as provided by Art. 18, par. 4th.

However, Art. 18 does not provide for a definition or explanation of the following sentences: *"the contested behaviour does not subsist"* (i.e.: disciplinary dismissals) and *"the behaviour that grounded the dismissal for objective reasons does not clearly subsist*" (i.e.: dismissals grounded on economic reasons). Such sentences are very generic and they may be interpreted in many different ways. In addition, the Italian legislator does not list *"all the other cases*" mentioned by Art. 18, par. 5th, allowing the Italian judge to determine such cases.

Moreover, regarding cases of unfair dismissal for lack of just cause or subjective reasons, it is reasonable to ask: is it really possible to recognize a "legal border" between a "*behaviour … [which] does not subsist*" and *"all the other cases"* mentioned by Art. 18, par. 5th (but which cases?) making, respectively, an order of reinstatement or an order of payment of an indemnity

for damages? Which is the *quid pluris* which allows Italian judges to make an order of reinstatement instead of payment of the indemnity?

The Italian Legislator does not answer to such questions[513].

Furthermore, regarding cases of unfair dismissal for lack of objective reasons, what does the expression *"behaviour …*[which] *does not clearly exist*" mean? When should the judge ascertain whether the behaviour exists or do not exist, making, respectively, an order of reinstatement or an order of compensation?

In view of this, it seems that the Italian Legislation has left the judge the task to give meaning to the above-mentioned sentences and, consequently, to decide, case by case - as the Maltese judge is allowed to decide - if the unlawfully dismissed employee is entitled to be reinstated or to be only paid by the employer an indemnity for damages[514].

Moreover, both the Italian Law and the Maltese one do not recognize the right of reinstatement of unlawfully dismissed employees "*employed in such managerial or executive post"* (please, see Section 81, par. 1st, of the EIRA and Art. 18 of the Law No. 300 of 1970).

In conclusion, although a common corpus of rules directly applicable within EU does not exist and despite their apparent differences, the Maltese Legislative model and the Italian one seem – in practice - to blend together.

5. Reinstatement of unlawfully dismissed employees: Maltese case law compared to the Italian one.

As mentioned earlier, according to the Maltese Law and the Italian one, judges may make an order of reinstatement or rehiring of unfairly dismissed employees.

After analyzing Maltese judges' decisions, it came to light that most of the disputes (about 80%) decided by such judges concern "unfair dismissals"[515].

In addition, it is important to note that the Maltese judges have – most of the time - declared "unfair" dismissals served to employees (i.e.: for lack of good and sufficient cause, for lack of grounds of redundancy, for breach of the provisions in the matter of maternity leave, etc.).

Furthermore, the percentage of Maltese unlawfully dismissed employees reinstated-rehired is very low (about 7-10%). In fact, Maltese judges – in most cases – have ordered the employer to pay an indemnity for damages to such an employee instead of making an order of reinstatement-rehiring[516].

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[513] For an exhaustive framework on the matter of the correct meaning of the *"fact does not subsist"* mentioned by Art. 18, see M. PERSIANI, *Il fatto rilevante per la reintegrazione del lavoratore illegittimamente licenziato*, in *Arg. Dir. Lav*., 2013, 1 ss., who affirms such a fact has to be considered as the *"material fact"* and not as a *"juridical fact"*.

[514] With regards to the potential breach of the principle of equality, please see considerations under paragraph no. 6.

[515] Please, see decisions from 1993 till 2013 published on the *"Industrial and Employment Relation swebsite"*, http://industrialrelations.gov.mt/industryportal/industrial_relations/industrial_tribunal/rulings/trib_dec_2013.aspx.

[516] In this regard, see again Industrial Tribunal, 21st March 2013, no. 2215, *in re* Eric Micallef v. Bezzina Maritime Services where the Tribunal has decided to make an order of compensation (€ 4.000,00), although the dismissed employee asked for the reinstatement; Id., 18th September 2012, no. 2172, *in re* Roderick Camilleri v. Polidano Group.

In particular, on the one hand, the Maltese judges have very often ascertained that it would not be *"practicable … for the complainant to be reinstated or re-engaged by the employer"*, taking – probably – into account relevant circumstances such as the breach of trust related to the employment. Therefore, in such cases, they have decided to make an order of compensation to be paid by the employer to the employee even if that employee asked to be reinstated-rehired.

On the other hand, it is relevant to note that – most of the time (about 70%) – Maltese dismissed employees go before the Industrial Tribunal asking for the payment of an indemnity for damages and not for an order of reinstatement-rehiring. In other words, employees are rarely interested in going back to work at the enterprise where they have worked until their dismissal[517].

Therefore, in Malta, the most common protection measure applied by the Industrial Tribunal is definitely the order of compensation.

In this regard, the amount of compensation to be paid by the employer to the Maltese unlawfully dismissed employee seems – often - very low if it is compared to the one which is usually paid to the Italian employee (i.e.: pursuant to Art. 18, par. 3nd, in case of unfair dismissal for lack of just cause or subjective reasons, the indemnity amounts to fifteen months of salary compared to the overall actual annual compensation; pursuant to Art. 18, par. 6th, in case of unfair dismissal for lack of objective reasons, that indemnity ranges between a minimum of 6 up to maximum of twelve months of salary compared to the overall actual annual compensation).

In fact, as earlier mentioned, pursuant to Art. 81 of the EIRA, the Maltese judge has the power to determine the amount of such a compensation on the basis of his/her discretion and in accordance with equity, taking into account *"the real damages and losses incurred by the worker who was unjustly dismissed as well as other circumstances, including the worker's age and skills as may affect the employment potential of the said worker"* (please, see Art. 81, par. 2nd, of the EIRA).

The amount of compensation as determined by Maltese judges is probably often low because such judges try to "strike a balance" between the right of employees to be protected in case of unfair dismissal (i.e.: considering also the time spent by the employee without working after his/her dismissal, his/her behaviour during the entire employment, potential previous warnings, …) and enterprises' interest not to be "burdened" with too high payments. In fact, those payments could probably affect the overall profits of enterprises (i.e.: especially of the small ones) impacting negatively on the other workers employed at the same enterprises.

However, that may probably lead at increasing the percentage of dismissals in Malta. In fact, Maltese employers may "feel free" to easily terminate employments, since, on the one hand, the calculated-risk to be condemned to reinstate-rehire dismissed employees is – nowadays - very low and, on the other hand, the amount of compensation to be paid to such employees is – in most cases – quite low.

In Italy, upon winning their case, a lot of employees decide to be reinstated rather than opting for the indemnity for damages provided by Art. 18, par. 3nd, of the Law No. 300 of 1970.

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[517] In this regard, see Industrial Tribunal, 10th July 2012, no. 2160, *in re* Shaun Bonello v. HSBC plc, where that Tribunal expressly state that the employee has not asked for the reinstatement, but for the compensation.

But why do Italian employees ask – most of the time - to be reinstated at the previous workplace, while the Maltese ones prefer – most of the time – to terminate the employment with the employer who dismissed them? Answering to that question requires to examine the Maltese and Italian economic, social and cultural contexts.

In particular, Maltese employees currently have more chances to be reemployed after being dismissed than the ones given to Italian employees. In fact, in Malta, there are considerable job opportunities as confirmed, on the one hand, by the fact that the percentage of unemployment is very low and – on the other hand – by the fact that a lot of foreigners (including Italians) move to Malta looking for a job.

Therefore, Maltese unfairly dismissed employees do not normally have a real interest in going back to work at the previous enterprise. Often, such employees have already found a new job before taking legal action against their employers or they may find a new job during the trial.

In Italy, the "context" is completely different, since the percentage of unemployment is very high. Therefore, Italian employees, unlike the Maltese ones, tend to find it harder to find a new job shortly after being dismissed. Therefore, such employees ask the judge to make an order of reinstatement going back to the previous enterprise.

Moreover, the Italian Employees' Trade Unions attempted to prevent the Italian Government from approving the so-called Jobs Act which prescribed a new amendment to Art. 18. Such an amendment provide, on the one hand, a "new weakening" of employees' right of reinstatement in case of unlawful dismissal (i.e.: especially in case of unlawful dismissal for lack of objective reasons) and, on the other hand, an increasing number of cases where judges will have to make an order of compensation[518].

6. Final remarks.

Finally, I should like to say one more thing with reference to that study.

Firstly, as earlier said, Art. 18 of the Law No. 300 of 1970 and Section 81 of the EIRA grant, respectively, the Italian judge and the Maltese one with the power to decide between the order of reinstatement and the order of payment of an indemnity for damages.

Moreover, another similarity between those legislative models may be identified in the fact that both the Italian legislator and the Maltese one have provided judges with the power to choose measures to be applied in case of unfair dismissal.

In fact, on the one hand, the Maltese judge is expressly allowed to decide between the order of the reinstatement-rehiring or the order of compensation to be paid by the employer to the unlawfully dismissed employee (please, see again Section 81 of the EIRA).

On the other hand, in case of lack of just cause or subjective reasons, the Italian judge is allowed to decide, case by case, which is the *quid pluris* that - according to Art. 18, par. 4th, of the Law No.

[518] Please, see A. BOSCATI, *La politica del Governo Renzi per il settore pubblico tra conservazione e innovazione: il cielo illuminato diverrà luce perpetua?,* in WP C.S.D.L.E. "Massimo D'Antona", IT, 6 novembre 2014, no. 228; A. GARILLI, *Occupazione e diritto del lavoro. Le politiche del lavoro del governo Renzi,* in WP C.S.D.L.E. "Massimo D'Antona", IT, 20 ottobre 2014, no. 226.

300 of 1970 – may lead such a judge to ascertain whether *"the fact does not subsist"* (and consequently the unlawfully dismissed employee is entitled to be reinstated) or not (and consequently the same employee is entitled to obtain only the payment of an indemnity for damages). The Italian judge is also allowed to decide whether or not to apply such provisions if he/she ascertains that "*the contested behaviour that grounded for objective reasons does not clearly subsist"*.

Unlike such cases, the Italian judge has to make an order of compensation to be paid by the employer to the complainant (please, see Art. 18, par. 5th and 7th).

However, the Italian legislator does not specify what is the *quid pluris* according to which "*the contested behaviour that grounded for objective reasons"* should be considered as "*not clearly subsisted",* granting, in this way, the Italian judge with the power to make any evaluations in this matter and – consequently – to state, case by case, whether to make an order of reinstatement or an order of compensation.

Therefore, another similarity seems to exist between the Italian and the Maltese Legislative models, since both those models provide judges with similar powers.

However, the "real" difference between the Maltese Law and the Italian one in the matter of protection measures to be applied in case of unfair dismissal involve employees' approach to such measures. In fact - as mentioned earlier - Maltese unlawfully dismissed employees very rarely ask the judge to make an order of reinstatement/rehiring. Instead, they prefer to opt for the order of compensation.

Furthermore, Maltese judges seldom decide to order the reinstatement of the unlawfully dismissed employee, considering - *"in accordance with equity*" – such order "*would* [not] *be practicable*". Those judges prefer very often to make an order of compensation to be paid by employers to complainants, even if such complainants have expressly asked to be reinstated.

Firstly, this is due to the fact that the relationship between the employee and the employer has been inevitably damaged by reason of dismissal.

On the other hand, as often pointed out by Maltese judges through their decisions, a lot of employees find a "new" job shortly after being dismissed. Therefore, those employees do not have a real interest in going back to work at the previous enterprise.

On the contrary, Italian dismissed employees very often have a lot of difficulties in finding a new job and – consequently – in coming back to the "Labour Market". In this context, such employees very often ask to be reinstated although they are aware of the breach of trust affecting the relationship with employers. Moreover, the order of reinstatement has always been considered by Italian employees and their Trade Unions as an "untouchable" protection measure.

That leads us to ask a question: which is the most effective protection that may be granted to unlawfully dismissed employees? Does such protection really consist in granting those employees with the chance to be reinstated?

Formulating a thorough answer to such questions goes beyond the scope of this research.

At the moment, it could be only said that the most effective protection should consist in providing employees with concrete chances to be re-employed at a different enterprise from which they have worked before being dismissed. In fact, such employees may be really protected not through

an order of reinstatement or compensation made by judges, but through a new legislative model that essentially can increase chances of finding a new job.

In this regard, it has been considered that, in October, unemployment among under 25s in Italy rose to the record level of 44.2% with many others living in a state of chronic underemployment. 79% of under 30s live in their parental home and the average age for achieving 'economic independence' is 35.

By the way, the so-called Jobs Act has recently "announced" a new amendment to Art. 18, dividing opinion in Italy, with Trade Unions voicing opposition and backing a number of demonstrations by workers against the changes. In fact, Renzi's Jobs Act is a package of policies designed to instill greater flexibility in the Italian Labour Market, commonly seen as one of the most uncompetitive in Europe. In particular, the current Labour Reform should encourage Italian employers to hire new "staff" and help reducing unemployment.

Its key objectives are:

- a reduction of the number of short-term contracts, which increased significantly during the last crisis;
- a simplification of the many rules of the Labour Code;
- a review of the system of protections and safeguards, mainly for senior workers.

As earlier explained, such measures include also a revision of Article 18 of the Workers' Statute which is in place to prevent companies downsizing during a crisis.

In fact, pursuant to the new "most controversial" Art. 18, employees dismissed on the basis of economic reasons will no longer be entitled to ask for reinstatement but they will only qualify for redundancy payments.

In particular, the right of reinstatement will be maintained only for "invalid" and discriminatory dismissals. In fact, in accordance with the provisions of the Jobs Act, in case of unjustified disciplinary dismissals (i.e.: dismissals for "just cause" and for "subjective reasons"), unlawfully dismissed employees will be entitled to be reinstated only in the event that the grounds for the dismissal "*do not exist*".

However, it is not clear how the "weakening" of employee's right of reinstatement may "encourage" Italian employers to easily hire other employees and consequently increase the employment rate. The government's goal is probably to have business return to hiring people with an open-ended contract (a type of employment that today represents just 15% of new hires). But will Italian employers be really encouraged to hire easily employees? And what kind of employment contracts will be offered to such employees?

On the other hand, the regulation provided by the Jobs Act with regards to indefinite-term contract seems much more useful.

In particular, the Jobs' Act is firstly aimed at reducing those types of contracts considered as "precarious" and encouraging employers to hire employees under indefinite-term contracts.

In fact, as demonstrated by OECD research[519], Italy possesses the most flexible Labour Market in the EU. This is certainly evident from the perspective of working contracts. The country has 46 kinds of contractual arrangement, 41 of which can be classified as 'precarious'. This is why the Italian State has tried to instill 'flexibility' many times before through the Treu Law in 1997, the Biagi Law in 2003 and most recently the 2012 Fornero Law[520], which itself was designed to "*facilitate entry into the labour market*".

In this context, Italy's employers have shown in years to dislike offering employees permanent jobs simply because they perceive employment costs to be far too high. Italy's reams of red tape coupled with the difficulty of sacking full-time employees and high taxes make short term contracts which allow employees to be dumped easily when they are no longer useful or when the law requires their contracts become permanent, highly attractive. Moreover, Italian employers have very often abused such "precarious" contracts. In fact, although such contracts are – in the majority of cases – self employment contracts, employers often use them to hide the real employment relationships. Therefore, on the one hand, the worker is prevented from enjoying all the rights recognized to employees by the Law in force in Italy and, on the other hand, the employer incurs lower costs than ones which he would incur in the event that the worker is recognized as an "employee".

The downside is that with these disposable contracts (and employees), Italy has ended up with a massively unstable employment. Italy's employers have gone to great lengths to ensure that employment contacts can be terminated once an employee becomes potentially too costly. On the other side of the coin, there are poorly performing employees who cannot be sacked because of laws in Italy that are overly protective of employees with permanent work contracts. This phenomenon has rendered short term contracts even more appealing for Italian employers.

Therefore, in accordance with the provisions of the Jobs Act, on the one hand, contracts considered as "precarious" should be "organized" (i.e.: reduced in their amount) by means of decrees approved by the Italian Government.

On the other hand, the Italian Jobs Act is aimed at encouraging employers to sign indefinite-term contracts, granting employees with protection measures (i.e.: compensation) in proportion to their seniority (i.e.: the so-called "*contratti a tutele crescenti*").

In particular, while the Italian Government, on one side, has recently approved the first Legislative Decree aimed at providing the necessary measures for the so-called "*increasing tutelage contract*" (i.e.:"*contratto a tutele crescenti*") and the Trade Unions, on the other side, are asking the Government not to decrease the traditional legal protection measures against unfair dismissals, the best way of protecting unlawfully dismissed employees seem guaranteed by means of the "new" following provisions: subsidies to incentivize self re-employment after dismissal and self business (please, see Art. 1, par. 4-b, of the so called "Jobs Act"); shareholding and stakeholding by employees and buyout of societies being affected by a financial crisis (please, see art. 1, par. 2-a/5, and par. 4-b of the so called "Jobs Act"); re-composition of the fragmented "freelance"

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[519] Please, see OECD-Better Policies for better lives, in *http://data.oecd.org/italy.htm#profile-jobs*.

[520] Please, see again A. GARILLI, *Occupazione e diritto del lavoro. Le politiche del lavoro del governo Renzi,* in WP C.S.D.L.E. "Massimo D'Antona", IT, 20 ottobre 2014, no. 226.

work contracts panorama and transformation of undeclared work into regular employment by extending traceable voucher.

In conclusion, will the last Italian Labour Reform actually lead the Italian population to full employment or should we wait for another reform?