

IN THE SPIRIT OF FLEXIBILITY": an overview of Renzi's reforms (the so-called jobs act) to 'improve' the italian labour market

NO ESPÍRITO DA FLEXIBILIDADE: uma visão geral das reformas de Renzi (o trabalho chamado) para "melhorar" o mercado de trabalho italiano

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SUMMARY: 1. The new "indefinite contract with increasing protection" (*contratto di lavoro a tempo indeterminato a tutele crescenti*): a captivating formula conceals pejorative rules on dismissal in indefinite contracts. – 2. Reduced protection for dismissal and effects on the employment contract structure: the employer's strengthened power (of withdrawal and disciplinary) and the resulting employee interest squeeze. 3. Indefinite contracts and the employer's strengthened powers in performing the employment: *ius variandi* and control power. 4. A new central position for indefinite contracts within the 'flexible' contract framework? 5. "In the spirit of flexibility": a solution for which problems?

SUMÁRIO: 1. O novo "contrato indefinido com proteção crescente" (*contratto di lavoro a tempo indeterminato a tutele crescenti*): uma fórmula cativante oculta regras pejorativas sobre demissão em contratos indefinidos; 2. Redução da proteção para demissão e efeitos sobre a estrutura do contrato de trabalho: o poder fortalecido do empregador (de retirada e disciplinar) e o resultante aperto de interesse dos funcionários; 3. Contratos indefinidos e os poderes fortalecidos do empregador na execução do emprego: *ius variandi* e poder de controle; 4. Uma nova posição central para contratos indefinidos dentro do quadro de contratos 'flexíveis'? 5. "No espírito da flexibilidade": uma solução para quais problemas?

1 THE NEW "INDEFINITE CONTRACT WITH INCREASING PROTECTION" (CONTRATTO DI LAVORO A TEMPO INDETERMINATO A TUTELE CRESCENTI): A CAPTIVATING FORMULA CONCEALS PEJORATIVE RULES ON DISMISSAL IN INDEFINITE CONTRACTS

Albeit being entitled "indefinite contract with increasing protection" ("*contratto di lavoro a tempo indeterminato a tutele crescenti*"), it is undisputed that Legislative Decree No. 23/2015 - implementing the act issued by the Government under Parliamentary delegation (*legge delega*) No. 183/2014 - does not foresee any new type of contract having special and 'increasing protection' at all. As regards any employee hired after its entering into force (7

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March 2015), it just limits itself to worsen the prior rules on dismissal of indefinite contracts under section 2094 of the Civil Code².

Legislative Decree No. 23/2015 does not affect the causes justifying dismissal, but changes the protection which the employee may claim in the event of unlawful dismissal. In short, the most important changes of such new regulations are the following.

Reinstatement protection is no longer a rule but an exception and, thus, compensatory protection becomes the general rule. Reinstatement protection may now only be appealed to (i) in case of nullity of the dismissal³; and (ii) as regards any dismissal on subjective grounds by undertakings⁴, in the event of 'lack of the notified material event'⁵.

There are new criteria to fix the amount of the compensation, which not only make the calculation rigid and automatic - thus evading the judicial discretionary power⁶ -, but also drastically reduce the figure. In the event of unjustified dismissal by medium and large sized employers, the compensation will be equal to 2 monthly salaries for each year of seniority of the employee, between a minimum of 4 and a maximum of 24 monthly salaries⁷. It will then be reduced to half in the event of flawed grounds or procedure⁸. In case of a smaller-sized employer, the amount of the compensation is cut by half in each of the cases considered and cannot exceed 6 monthly salaries⁹. Those moderate amounts are then bound to go down further if the parties agree to the conciliation under the Legislative Decree¹⁰. This possibility is widely boosted due to the fact that, in this case, the disbursements made to the employee are not taxable income¹¹.

In this new "indefinite contract with increasing protection" ("*contratto di lavoro a tempo indeterminato a tutele crescenti*"), the only thing that 'increases' – but not so much, to be honest – is the amount of the compensation now referred to the employee's seniority.

² Article 18 of the Workers' Statute; article 8 of Law No. 604/1966.

³ Article 2 of Legislative Decree No. 23/2015.

⁴ The dimensional requirements are still those under article 18, paragraphs 8 and 9, of the Workers' Statute.

⁵ Article 3, paragraph 2, of Legislative Decree No. 23/2015.

⁶ The compensation may no longer be weighed carefully by taking the specific situation into consideration: employment soundness and size of the undertaking, the employee's seniority, behaviour of the parties (cf. article 18, paragraphs 5, 6 and 7, of the Workers' Statute and article 8 of Law No. 604/1966).

⁷ Article 3, paragraph 1, of Legislative Decree No. 23/2015.

⁸ It means that the indemnity is fixed in 1 monthly salary for each year of service and between a minimum of 2 and a maximum of 12 monthly salaries. Article 4 of Legislative Decree No. 23/2015.

⁹ Article 9, paragraph 1, of Legislative Decree No. 23/2015

¹⁰ Indeed, in this case after having deducted the social security compensation as usual, the compensation is calculated as one monthly salary for each year of service of the employee between a minimum of 2 and a maximum of 18 monthly salaries (cf. article 6 of Legislative Decree No. 23/2015). The amounts are then cut by half for smaller sized employers (article 9, paragraph 1, of Legislative Decree No. 23/2015).

¹¹ Article 6 of Legislative Decree No. 23/2015.

Even if the limits (justification), obligations (grounds) and burdens (procedure) already foreseen in the past for dismissal remain unchanged, in the new system, the effectiveness is reduced in a considerable way: indeed, compensatory protection does not prevent the act of dismissal - even if vitiated - from leading to the termination of the contract upon a certain and, moreover, moderate financial burden weighing upon the employer.

Therefore, in the new context, the fact of choosing whether to expedite a dismissal in breach of the limits and rules set forth by law becomes a mere assessment of costs for the employer¹²

2 REDUCED PROTECTION FOR DISMISSAL AND EFFECTS ON THE EMPLOYMENT CONTRACT STRUCTURE: THE EMPLOYER'S STRENGTHENED POWER (OF WITHDRAWAL AND DISCIPLINARY) AND THE RESULTING EMPLOYEE INTEREST SQUEEZE

If things stand as above the result is that, in solving the conflict between the employer's interest to ensure its own organisation's operations based on the selected result¹³ and the employee's conflicting interests (in income continuity, in the realisation of his/her own professional and human personality through work), Legislative Decree No. 23/2015 significantly shifts the point of balance in favour of the former.

This is not done based on the causes justifying the dismissal. Indeed, not only does the principle of justification of the dismissal remain unchanged in light of its constitutional¹⁴, EU and international significance, but also those concepts of just cause and justified subjective and objective grounds for dismissal already identified by law beforehand.

Besides, it is not possible to change those concepts, without removing them, in order to shift the interest balance axis in favour of the employer. The just cause and the justified subjective and objective grounds for dismissal – as interpreted to date by the law in force – already fully recognise and protect the employer's interest in the organisation's operations (just cause and justified subjective grounds) and in changing the existing organisational structure in view of better achieving its own aims (justified objective grounds). Indeed, the employee may

¹² It is clear that this is how things stand, moreover, as regards workers with less seniority and, thus, with a very low cost of dismissal. But the employer could find it advantageous with the future in mind to take the risk to incur the immediate but, in any event, foreseeable disbursement resulting from a flawed dismissal also in respect of employees with greater seniority, should that cost (progressive and, in any event, subject to a maximum limit) be offset with the lower salary to be paid to newly hired employees to do the same job.

¹³ Regardless of whether it is productive (article 41 of the Constitution) or ideal (articles 2, 18, 19, 39 and 49 of the Constitution).

¹⁴ Cf. Constitutional Court 46/2000.

be lawfully dismissed either if he/she proves to be in considerable breach of contract (the 'considerable breach' requested by the concept of justified subjective grounds), such as to jeopardise the structure's normal operation, or if it results that his/her tasks may no longer be used in the new organisation freely chosen, as well as consistently and effectively accomplished by the employer.

Therefore, as regards the causes justifying dismissal, since 1966, our system has chosen to fully privilege the employer's interest in arranging the organisation (namely, by making the existing organisation work or by changing it) compared to the employee's interest in keeping his/her own job¹⁵.

Instead, the reform has had repercussions on the different types of protection applying upon an unjustified dismissal (besides being flawed lacking the respective grounds or upon a procedural flaw), by reducing them in a drastic way.

Thus, the employer has a wider scope to exercise the power of dismissal (and also the disciplinary power of which the dismissal for subjective grounds is the maximum expression), certainly, in breach of the principle of justification, but with the sole risk of paying a reduced compensation.

Indeed, according to the interpretation given by many parties, there would only be compensatory protection if the employer were to dismiss an employee for just cause or for justified subjective grounds, who then proves to be liable for a slight or very slight breach, instead – thus the so-called 'lack of the material event' (that is the total lack of any breach or non-chargeability of any such breach to the employee) which, in the event of disciplinary

¹⁵ Cf. L. Mengoni, *I poteri dell'imprenditore*, in *Diritto e valori*, Il Mulino Bologna, 1985, p. 394-396: 'Free from the public law complications typical of corporative law, the rules of the Civil Code, which define the employer's powers in its capacity as entrepreneur (head of the business), became an expression of the needs for technical and organisational functionality typical of any business doing operations in a modern technological society, just like it had been quickly developing in Italy during the years after the Second World War. [In the first twenty-year period following the entering into force of the Republican Constitution] Instead, the other aspect of the freedom of economic initiative, that is the entrepreneur's power over work organisation remains immune to any law and regulatory amendments (...). The rules of the Civil Code were only amended in one point. The fact of recognising a power of dismissal *ad nutum* to the employer, symmetric to the employee's power to resign (...) was a manifest contradiction in a code which assigns legal relevance to the instrumental link of the employment contract with the business interest. *Such significance means that, without prejudice to the entrepreneur's freedom to choose the aims of the productive organisation created by the entrepreneur, thus excluding any criticism on the technical aim of the organisation arranged by any such entrepreneur beforehand, the company's interest is subject to an objective assessment, made in connection with the company's objective structure and bound to provide a measure to control the grounds of certain measures of the employer towards its workers*, in order to ascertain whether they are functionally justified 'compared to the organisation's needs, in view of achieving *that technical result arranged beforehand*'. On the contrary, precisely the most serious instrument for the employee of the entrepreneur's organisational power, that is dismissal, was provided for under section 2118 of the Civil Code, as the content of a free power of withdrawal from the contract, in light of mere exchange contracts (for an unlimited duration), rather than being *instrumental* to the undertaking's needs and, therefore, subject to the limit of the technical discretionary power. *In this respect, Law No. 604 of 15 July 1966, takes on the meaning of a partial rationalisation of the Code by requiring that, should the conditions for terminating the contract for breach fail to arise, the dismissal is objectively justified by the undertaking's interest*' [italics are mine].

dismissal, would still lead to reinstatement¹⁶ –. This shall be the case of a dismissal for justified objective grounds of an employee following a reorganisation, maybe planned, but not effectively carried out by the employer.

It is clear that the employer's interest in arranging the organisation is thus strengthened. The act of dismissal (also in its disciplinary act form) may jeopardise the employee's position – by virtue of the termination effect which, in any event, follows the flawed act of dismissal – also upon a *merely declared* organisational change or upon a *slight* breach. The defaulting employee is thus even less protected than an ordinary debtor under any synallagmatic contract. In the latter case, there may only be termination, as is well known, upon a considerable breach in light of the counterparty's interest¹⁷

This strengthening – in law – of the power of dismissal (even in its disciplinary form) has clear repercussions – *de facto* – on the employee's overall position. Indeed, dismissal protection is the employment contract's crucial junction underpinning the effectiveness of the entire legal positions granted to the employee for the protection of his/her own interests.

There would thus be an overall weakening of the employee's position, in stating and claiming the rights granted in his/her favour throughout the performance of the employment contract.

Therefore, discriminatory dismissal and retaliatory dismissal become crucial: such types of dismissal have the duty to prevent executive and disciplinary power from exceeding the respective limits to the detriment of the typical positions of the employee in his/her dimension as a human being and as an individual placed in a social context.

3 INDEFINITE CONTRACTS AND THE EMPLOYER'S STRENGTHENED POWERS IN PERFORMING THE EMPLOYMENT: *IUS VARIANDI* AND CONTROL POWER

The other Legislative Decrees, passed meanwhile by implementing Act No. 183/2014 issued by the Government under Parliamentary delegation, concerning the applicable rules to all employment contracts, both existing and future, go in the same direction as Legislative Decree No. 23/2015, which entails – only for newly hired employees – clear flexibility of indefinite contracts during the phase of termination of the employment contract and, consequently, also during the performance of the employment.

¹⁶ Article 3, paragraph 2, of Legislative Decree No. 23/2015.

¹⁷ Section 1455 of the Civil Code.

First, it is worth considering here article 3 of Legislative Decree No. 81/2015 which, by reformulating the provisions under section 2103 of the Civil Code, significantly loosens the restrictions weighing upon the employer in exercising the *ius variandi*. Indeed, at present, the power to horizontally change the employee's tasks is no longer limited to the tasks equivalent to the last tasks 'effectively fulfilled', but may include all tasks of the 'level and statutory category classification of the last [tasks] effectively fulfilled'; whilst the power to deskill the employee is generally recognised within the statutory category 'in the event of any change to the company's organisational structure having repercussions on the employee's position', that is a general possibility to which the collective bargaining agreements of any level may add others. Therefore, the prohibition of any amendments is strongly softened which, provided that entered into in a protected manner, could lead to the assignment of tasks belonging to statutory categories or to lower classification levels and also, if necessary, to a salary reduction.

Article 23 of Legislative Decree No. 151/2015 goes in the same direction, which reformulates article 4 of the Workers' Statute. Indeed, the new provision also includes in the area of lawful exercise of the control power – regardless of any trade union or administrative filter – the case of remote control (not unintentional, but direct) over the fulfilment of the respective work, carried out through the 'instruments used by the employee to do his/her work and the instruments for recording accesses and attendance'.

The regulatory amendment as a whole therefore outlines an indefinite contract characterised by an expansion of the employer's powers – and, therefore, by the employer's authority recovery – and, consequently, inevitably by a squeeze (in law and then *de facto*) of the employee's position and interests.

The 'new' indefinite contract is – finally – a very flexible and versatile contract, both in the phase of termination of the employment contract and throughout the performance of the employment. Indeed, it is true that flexibility kept developing in the past for a long period of time 'on the fringes' of indefinite contracts, by multiplying and loosening the restrictions, as well as by lowering the protection of 'non-standard' employment contracts – first of all, fixed-term contracts –. It has now moved to the heart of standard employment agreements.

4 A NEW CENTRAL POSITION FOR INDEFINITE CONTRACTS WITHIN THE 'FLEXIBLE' CONTRACT FRAMEWORK?

We must still ask ourselves if the doses of flexibility injected into the body of indefinite contracts are capable of making the latter rise again to the contract mostly chosen by employers,

thus outclassing the other forms of 'flexible' work and settling that dualism which has been affecting our labour market for many years.

Notwithstanding the statement included under article 1 of Legislative Decree No. 81/2015 – pursuant to which 'indefinite contracts constitute the customary form of employment contract' –, it does not seem that things stand like this.

Indeed, throughout the reform, the plethora of types of non-standard employment contracts provided for by law¹⁸ has not been reduced at all and, moreover, the flexibility distinguishing them has not been reassessed but strengthened.

In particular, as regards fixed-term contracts – which constitute the most widespread 'flexible' contract and, therefore, the greatest 'competitor' of indefinite contracts –, Legislative Decree No. 81/2015 limits itself to reassert and, at the most, complete the framework outlined by Law by Decree No. 34/2014 (the so-called 'Poletti' Decree) which, as we may remember, had already led to the completion of the institution. As a matter of fact, on one hand, Legislative Decree No. 81/2015 confirms the final overcoming of the causality (and, thus, of the temporariness) of fixed-term contracts and, on the other hand, repropose two limits – one of temporary nature and one of quantitative nature – which, given the way in which they are structured, do not act as an effective barrier to the use of this type of contract: the wide temporary limit of 36 months as a whole – referred to the specific contract or to the series of contracts between the employer and the employee 'to fulfil tasks of equal level and statutory category'¹⁹ – is liable to considerable internal modulation as a result of the high number of extensions allowed (equal to 5²⁰). The quantitative limit fixed in a percentage of 20% of employees with indefinite contracts in force with the employer – however, subject to many objections – is assisted by an administrative sanction (thus reconfirming the provision under Law by Decree No. 34/2015) to be deemed, however, to be the only one, in accordance with the express exclusion in the event of breach of the transformation of the fixed-term contract into an indefinite contract²¹.

¹⁸ Within the scope of employment contracts, the only type to be abrogated is the job sharing contract which, however, has remained almost unused in practice (cf. articles 41-45 of Legislative Decree No. 276/2003, abrogated by article 55, paragraph 1, letter d), of Legislative Decree No. 81/2015). As regards self-employment, instead, project based work is abrogated (articles 61-69 *bis*, of Legislative Decree No. 276/2003, abrogated by article 52 of Legislative Decree No. 81/2015). Joint ventures where the contribution of the member of the joint venture consists in his/her work (section 2549 of the Civil Code, as amended by article 53 of Legislative Decree No. 81/2015) are also abrogated.

¹⁹ Article 19 of Legislative Decree No. 81/2015.

²⁰ Cf. article 21 of Legislative Decree No. 81/2015, which reconfirms the provisions under Law by Decree No. 34/2015.

²¹ Article 23 of Legislative Decree No. 81/2015.

Any interest of the employee hired in breach of the quantitative limit to challenge the lawfulness of the contract is thus softened, since it would not obtain any benefit therefrom and, if anything, it would lead to risk the renewal or extension.

Therefore, in the system outlined by the Jobs Act, indefinite contracts and fixed-term contracts are put at the same level: the choice between one or the other is not subject to effective limits; both are widely flexible, both throughout the performance of the employment contract and in the phase of terminating the employment contract.

The employer shall then opt for an indefinite contract or for a fixed-term contract based on a mere assessment of costs.

And in so far as costs are concerned, it is clear that there is still a difference between the two types of contract even if, at present, it is rather slight²²: any employer choosing the so-called indefinite contracts with 'increasing protection' must record in the financial statements the compensation it would be forced to pay were the judge to deem the dismissal unjustified; a cost which, instead, totally lacks in fixed-term contracts.

This is the reason why, through the '2015 Stability Law'²³, indefinite contracts have been boosted financially with contributory reliefs²⁴. Indeed, at present, the financial incentive tips the scales of the advantages – as regards costs, but not rules²⁵ – in favour of indefinite contracts.

Having stated the above, we must now ask ourselves whether indefinite contracts are bound to reoccupy ground compared to the different types of self-employment – project based work, freelance work coordinated by an employer, freelance professionals (VAT holders) –.

In this respect, Legislative Decree No. 81/2015 introduces the so-called work 'heter-organised' by the principal 'namely, exclusively personal and ongoing work, whereby the principal organises all performance related aspects, also including working hours and workplace' and foresees the application of the rules typical of employment²⁶. Nonetheless, at the same time, as regards self-employment, the freelance work coordinated by an employer under section 409, No. 3, of the Code of Civil Procedure, still exists, however abrogating, at

²² Moreover, as regards newly hired employees, in light of the fact that – as already stated – the compensation is calculated based on seniority.

²³ Law No. 190/2014.

²⁴ As regards any new hiring with an indefinite contract throughout year 2015, article 1, paragraph 118, of Law No. 190/2014 exempts the employer from paying the contributions for a maximum period of 36 months, save for the Inail (Industrial Injury Compensation Board) contributions and save for agricultural work, apprenticeship contracts and housework, for a maximum annual amount equal to Euro 8,060.00 for each worker. Furthermore, article 1, paragraph 20 *et seq.*, of Law No. 190/2014 has foreseen the full deductibility of the cost of indefinite term staff from the IRAP (Regional Business Tax) taxable base.

²⁵ The dismissal in contracts with 'increasing protection', even if unjustified, interrupts the employment contract.

²⁶ Article 2 of Legislative Decree No. 81/2015.

the same time, project based work and the related protection rules, thus leading to a clear employee protection regression²⁷.

There are no doubts as to the fact that the legislator aims at widening the scope of application of the protection typical of employment, or better still and more precisely, at amending employment contracts by expanding the latter²⁸. The new type of 'heter-organised' work has precisely this aim.

However, it is not clear whether the operation may be successful and, therefore, how much employment contracts – and the related protection – are bound to expand. It depends a lot on the meaning that interpreters will assign to the word 'heter-organisation' distinguishing the new type introduced by article 2 of Legislative Decree No. 81/2015²⁹.

Only provided that 'heter-organisation' ever takes on a precise and definite meaning³⁰, enabling the latter to clearly distinguish it from 'organisation' (*coordinamento*) typical of the freelance work organised by an employer³¹, and a wider meaning than that usually assigned to the 'heter-organisation' distinguishing section 2094 of the Civil Code, the new 'heter-organised employment' may effectively widen its own scope of application. Instead, should a confusing situation arise, it is very likely that employers will prevail freelance work organised by an employer under section 409, paragraph 3, of the Code of Civil Procedure – not only including fixed-term contracts, but also indefinite contracts –, maybe incurring the risk of a contract redefinition. Indeed, freelance work organised by an employer, as self-employed work, is excluded from the typical protection of employment contracts³² (it is sufficient to think of the protection in the event of illness; of the rules on working hours; or of the maximum time limit,

²⁷ Article 52 of Legislative Decree No. 81/2015.

²⁸ This author agrees with the idea that article 2 of Legislative Decree No. 81/2015 changes the concept of employment under section 2094 of the Civil Code, by identifying the so-called 'heter-organised work', bound to embrace employment contracts. In this sense, T. Treu, *In tema di Jobs Act: il riordino dei tipi contrattuali*, in GDLRI, 2915, p. 163.

²⁹ However, the issue is made difficult by the fact of foreseeing many cases excluded from the scope of application of the rule, a possibility in which, however, the 'heter-organisation' condition could incur in practice (cf. article 2, paragraph 2, of Legislative Decree No. 81/2015).

³⁰ However, P. Ichino writes, *Sulla questione del lavoro non subordinato, ma sostanzialmente dipendente nel diritto europeo e in quello degli Stati membri*, in RIDL, 2015, II, p. 577, that 'the heter-organisation element seems to lack an appreciable distinctive value'.

³¹ According to O. Razzolini, *La nuova disciplina delle collaborazioni organizzate dal committente. Prime considerazioni.*, in WP Massimo D'Antona 266/2015, p. 10 *et seq.*, the 'heter-organisation' takes the shape of a unilateral power that the principal exercises throughout the performance of the contract, whilst 'organisation' (*coordinamento*) needs be understood as an activity carried out upon the mutual agreement of the parties, either by virtue of the agreement reached in drawing up the agreement, or by virtue of a future negotiation.

³² Only in some cases has the legislator expressly extended some of the protection typical of employment contracts to freelance work organised by an employer. For instance, the employment procedure (section 409, paragraph 3, of the Code of Civil Procedure); the waiver and settlement regime (section 2113 of the Civil Code); the employment receivables revaluation regime (section 429, paragraph 3, of the Code of Civil Procedure); the rules on strike of essential public services (Law No. 146/1990); social security protection.

or of the extension and renewal regime typical of indefinite and fixed-term contracts) and, thus, cheaper.

In any event, indefinite contracts and fixed-term contracts are by now equivalent in practice. And, therefore, it is not obvious that the new 'heter-organised employment' contracts – even if strictly interpreted – produce the effect of putting the indefinite contract with 'increasing protection' at the centre of the system'. Indeed, the employer could find it more advantageous to draw up a fixed-term contract inferring 'heter-organised' work.

The legislator is well aware of this and once again acts to boost – at least in this first phase – hiring with an indefinite contract of workers already parties to self-employment contracts (regardless of whether they are project based, freelance work organised by an employer in which ongoing and organised work is inferred, or self-employed contracts *tout court* drawn up with VAT holders), by providing in this respect for two types of benefits for the employer. The first is of financial nature: indeed, the drawing up of an indefinite contract involves the lapse of all administrative, contributory and tax unlawful acts related to the wrong definition of the previous self-employment contract. Instead, the second is of regulatory nature and concerns the past legal relationship between the parties: the conclusion of the indefinite contract is conditional upon an act of conciliation – to take place in a protected venue –, which needs to foresee the employee's waiver 'of all possible claims concerning the past employment contract'³³. Hence, significant benefits – which are however added to the financial incentives already foreseen in general by the '2015 Stability Rule', as mentioned above – if we consider that the only *quid pro quo* would be the employer's obligation not to dismiss the employee during the twelve months following the hiring, unless if for cause.

Also from the latter standpoint, then, it is clear that the massive doses of flexibility generally introduced into the system do not ensure at all in themselves – and regardless of any incentives and benefits – that the indefinite contract may constitute, with the future in mind, 'the customary form of employment contract'.

5 "IN THE SPIRIT OF FLEXIBILITY": A SOLUTION FOR WHICH PROBLEMS?

Finally, we need to ask ourselves for the problems that the new legal framework briefly described may solve.

³³ Article 54 of Legislative Decree No. 81/2015.

The problems afflicting the Italian labour market are clear and obvious to all: the high unemployment rate³⁴ and the low employment rate³⁵; the marked dualism between protected employees, hired with an indefinite contract, and under protected workers – mainly young people–, confined in 'flexible' types of work³⁶; the low productivity of labour³⁷.

It is obvious that a labour market reform cannot in itself increase employment and reduce unemployment: their trend depends on the increase in the demand for goods – of which the labour requirements by companies are a dependent variable –, but certainly not on the amendments to the rules on employment³⁸.

But this reform cannot even – in itself – settle the labour market dualism, by putting the indefinite contract at the centre of the system again.

As regards employment contracts, the loosening of restrictions and rules, precisely since made open-ended, does not remove the competitive advantage of fixed-term contracts, as such avoiding the rules on dismissal.

And any such situation could also arise in the alternative between 'heter-organised employment' contract and freelance work organised by an employer. Freelance work organised by an employer – already in itself advantageous since avoiding the protective rules typical of employment contracts (rules on illness, working hours, etc.) – could lead in fact to a valid functional substitute for employment contracts, should it be admitted by interpretation that there is some form of *unilateral power* of organisation by the principal (which is difficult to distinguish in practice by the employer's 'heter-organised' power typical of the new 'heter-organised employment').

Therefore, it is not the new rules – which inject doses of general flexibility into the system – but, if anything, the fact of providing for financial incentives in favour of indefinite contracts which may lead to settle the dualism afflicting our labour market. Therefore, it shall be necessary to maintain such incentives throughout time in order not to jeopardise the respective aim. However, without failing to mention that the overcoming of the labour market segmentation, if any, shall in any event take place 'on a fall', since the employment contract with 'increasing protection', as already stated, is certainly an indefinite contract, but is assisted by rules which are much softer than in the past as regards dismissal protection.

³⁴ Equal to 12.1% in the second half of 2015 and to 11.9% as at August 2015. The youth unemployment rate during the same period is equal to 41.1% and in the regions of Southern Italy to 57.4% (source: *Istat*, that is the Italian National Statistical Institute).

³⁵ Equal to 56.3% in the second half of 2015 (source: *Istat*).

³⁶ The rate of new fixed-term contracts in 2014 was equal to 68% (source: MINISTERO DEL LAVORO E DELLE POLITICHE SOCIALI, *Rapporto annuale sulle comunicazioni obbligatorie 2015*).

³⁷ In 2014 labour productivity, calculated as the added value for each worked hour, fell by 0.7%.

³⁸ As regards these problems 'the labour market has an essentially passive role'.

There still remains the issue of the increase in labour productivity.

Also from this standpoint, it does not seem that the reform is going in the right direction. Indeed, the new rules make reference to a model based on an exasperated competition between insiders and outsiders, where the increase in the employed worker's commitment arises out of the fear to be dismissed (cheaply) and replaced with another more efficient, willing and (since newly hired) cheaper unemployed worker. It would have been better, instead – for the specific workers and for the system – to strengthen the mutual link between the employer and the employee, foreseeing a contractual model in which, after an initial probation period, the protection against a flawed dismissal was really bound to grow³⁹, thus facilitating the mutual trust between the parties and, therefore, favouring greater commitment on the employee's side in view of the employer's targets but, at the same time, also the employer's involvement for the purposes of the employee's professional growth.

Were the new regulatory model 'in the spirit of flexibility' provided to us by the reform, thus, to very likely produce an increase in labour productivity, it will do so not for the increased value of the contribution of workers of greater professional competence, but rather as a result of the salary reduction.

³⁹ Cf. the proposal of the so-called “*contratto ad affidamento crescente*” of B. Caruso, *Nel cantiere del contratto di inserimento: il contratto ad “affidamento crescente*”, 12 May 2014, in www.nelmerito.it; Id., *Il contratto a tutele crescenti tra politica e diritto. Variazioni sul tema*, in WP Massimo D’Antona, 265/2015, p. 21.