

This is the peer reviewed version of the following article:

Experimentation and Social Dialogue in the Transformation of the Italian Employment Law: from the Legalisation of Temporary Work to a Statute of the New Form of Employment? / Biagi, Marco; Tiraboschi, Michele. - STAMPA. - 35:(1999), pp. 91-107.

Wolters Kluwer

Terms of use:

The terms and conditions for the reuse of this version of the manuscript are specified in the publishing policy. For all terms of use and more information see the publisher's website.

25/04/2024 11:16

(Article begins on next page)

Experimentation and Social Dialogue in the Transformation of the Italian Employment Law: from the Legalisation of Temporary Work to a *Statute of the New Form of Employment?*

1. The New Legal Framework

After a long period of relative stability – characterized by a progressive expansion of the legal statute on dependent work and by the consequent escape on the part of many from the regular framework of labour – Italian employment law has recently undergone a striking metamorphosis (see Biagi, 1998, *Id.*, 1997).

Act No. 196/1997 (the ‘Treu package’) has extended and strengthened the range of atypical forms of work: fixed-term contract, part-time work, temporary agency labour, apprenticeship, training contract and stages. Act No. 59/1997 (the ‘Bassanini Law’) and Decree No. 469/1997 have thoroughly redesigned the borders between the public and private areas in labour market management and employment services, eliminating the rigidity and inefficiency of the public monopoly on placement. Already firmly implemented (or at least on the way to being fully defined) are the measures to support research and technological innovation, financing of entrepreneurial development in depressed areas or in areas of urban degradation, the reorganization of incentives for hiring and geographical mobility, policies on the building of infrastructure through qualified public investment and the reorganization of the professional training system, in particular, that of continuing training as an instrument to increase employability and the quality of labour supply. New instrument of huge importance in the development of certain local context – such as the ‘area contacts’ (*contratti d’area*) and ‘territorial pacts’ (*patti territoriali*) – are ready for their definitive emergence, while it is only now that we are beginning to appreciate the enormous impact and the future possibilities for the development of an earlier reform: the privatization of public employment begun by Decree No. 29/1993 and implemented through the Decree No. 369/1997 and Decree No. 80/1998 (on all of this, see, in general, Treu, 1998).

These and still other interventions clearly indicate that labour law founded as a means of regulating one, unique model of dependent work (i.e., typical full-time contract for an indefinite period), now finds itself passed over not only by business – which has for a long time experimented (sometimes on the boundaries of legality) with new contractual methods of organising employment – but by the Italian legislator as well. Particularly expressive of this state of affairs is the case of temporary agency labour. Business has long sought ways to work more efficiently within and around (see Tiraboschi, 1994) the very rigid framework that bound this form of work until the recent legalization of articles 1-11 of Act No. 196/1997 (see Tiraboschi, 1997).

2. A Glance Forward

The reform process cannot stop here. We must admit that the transition from a monolithic and rigid labour law (*il diritto del lavoro*) to a more comprehensive and dynamic one declined in the plural (*il diritto dei lavori*), which will take into consideration the evolving society and economy, has only just begun.

Certain well-known and continually discussed phenomena – such as the globalization of market and technological innovation, coupled with the continuous growth of an ancient economic disease like black work and the proliferation of legal strategies designed to circumvent the rules of dependent work – have now gathered such undeniable momentum that we can now speak confidently of the necessity for a decisive updating of the Italian employment law. Paradoxically, the same statistical evidence about atypical and irregular work¹ shows that what we have is not a lack of work, but rather a lack of legal rules and contractual schemes able to interpret these forms and develop them in such a way as to stimulate their emergence from illegally and their equal division between all those involved in the labour market.

In particular, the conceptual opposition of contract *of* service and contract *for* services is becoming increasingly inadequate to the regulation of the evolution of the Italian labour market. The jobs of the future require simple and flexible rules capable of dealing with uncertainties during the process of legal qualification, which is a tradition source of contention.

A typical characteristic of the Italian labour market is that the compression of the numerous forms of work into the rigid scheme of contract of service and contract for services pushes all the atypical forms of work into a large grey area very close to illegality. This occurs even when these forms of work are necessary for the survival of the business or in the interest of the workers.

In order to progress beyond this problematic and fragmented framework, it is necessary to experiment with new ways of forming labour law, as in the recent circular No. 43/1998 from the Minister of labour, which recognized the legitimacy of contractual scheme such as *job sharing*. Until now this form of contract has never been experimented with, due to fears about possible controversies regarding the exact legal description of this form of working relationship. (However, on this point, we should remember that the flexible organization of part-time working hours is still forbidden by

¹ In this context it is enough to point out that the Italian Institute for statistics (ISTAT) has recently shown that in Italy there are around 5 million irregular workers engaged in the underground economy, black or grey. This corresponds to about 23 percent of the Italian workforce.

the Italian labour law.) This circular demonstrated that it is not necessary to wait and wait, because of Parliamentary 'working time', to regulate a new way of working. Instead, in some cases, an administrative intervention clarifying the boundaries and the fundamental rules of the contract is sufficient.

It should be pointed out that this does not mean the removal of the fundamental protection of labour law. But it does seem necessary to experiment with some doses of 'regular flexibility' (*flessibilità normata*) that, while contributing to the removal of some obstacles to the functioning of the market for regular work, are helping to create a favourable climate for the creation of new employment and the channelling of supply and demand, which today is dispersed and fragmented because of a lack of adequate information and instruments to evaluate the workforce (see Treu, 1997).

From this perspective, the recent legalization of temporary agency labour is extremely significant for the future development of Italian employment law. For this reason, it may be interesting to carry out a deeper and fuller evaluation of this particular form of atypical work, as it is particularly representative of the Italian labour climate.

3. Experimentation and Social Dialogue in the Legalisation in Italy of Temporary Agency Labour

It must immediately be pointed out that the recent legalization of temporary work through an agency cannot be interpreted simply as either a process of deregulation of the Italian labour market or as a new attitude of the Italian Government towards a drastic reduction in labour standards.

Taking into consideration the undoubted ineffectiveness of the official regulation of the public employment service and the conspicuous presence in the Italian labour market of a sprawling illegal network made up of private agencies and cooperatives of simple mediation, Act No. 196/1997 represents an attempt to re-regulate a sector that has remained for too long outside the rules (Tiraboschi, 1997). The introduction of temporary agency labour into our legal system represents, in other words, a great opportunity to clarify once and for all the boundaries between secret mediation in the hiring of labour (still illegal in respect of Article 1, Act No. 1369/1960) and the genuine mediation justified by recent movements in the labour market and in the way of working. The objective of the Italian Government is to reshape some of the guidelines of labour law in the face of the ever-increasing constraints of economic compatibility.

From this point of view it is relevant to underline the procedural technique adopted by the Italian legislator. The contents of Act No. 196/1997 reflect a previous agreement between the Government and the social parties (see the Employment Pact of 24 September 1996 and the previous Agreement of the Cost of Labour of 23 July 1993). The *legalisation* process follows a period of indispensable *social legitimisation*. In fact it has been demonstrated by comparative experience; only social legitimisation can grant a stable juridical framework and real possibilities for the future development in this area (Compare, for example, the French case with the German one).

Naturally, the will to capture social consensus has led to some (perhaps excessive) compromises and limitations. But it must be pointed out that this act is mainly experimental: after two years of enforcement, Article 11 provides for a confrontation between the Government and the social parties in order to introduce, if necessary, corrections and integrations.

In any case, the more contentious points are left to the process of collective bargaining, which will involve the social parties with the power to implement changes in the legal discipline. These important points include the delineation of cases in which it is possible to make use of a temporary worker, as well as the allowable ratio of temporary workers to the total number of workers of the user employee.

3.1. Agencies Authorised to Supply Temporary Labour Services

Article 2 of the Act lays down very strict regulations concerning those authorized to run a temporary agency. As in France, Germany and other European countries, the supply of labour cannot be provided freely by anyone who wishes to engage in this area. This is permitted only for 'agencies' specifically authorised by the Ministry of Labour. It is important to point out that the activity of supplying labour can be performed by a 'legal entity' and not by individuals. This legal entity must be a company registered in a special list created at the Ministry of labour.

The registration of these agencies is subjected to evidence that the applicant has met the specific requirements:

- the legal form must be that of an enterprise/undertaking. (the notion of enterprise/undertaking includes also co-operative societies, but in this last case there are further requirements which make it very difficult to use a co-operative for labour supply: see further).
- included in the name of the enterprise must be the words 'enterprise for the supply of temporary labour'.
- start-up capital of not less than 1 billion Italian lire and, for the first years of activity, a deposit guarantee of 700 million lire; from the third year, in place of the deposit, a bank or insurance guarantee for not less than 5 per cent of the previous year's turnover and the net of VAT – with a total guarantee amount of not less than 700 million Italian lire.
- presence of the registered office or branch within the territory of the Italian State.
- identification of the supply of temporary workers as the sole business – with the consideration that 'mixed' enterprises (performing both supply and placement of workers) are less easily controlled and more subject to abuse and potential fraud.
- availability of office and professional skills appropriate for the performance of the supplying labour.
- guarantee that the activity will occur over the entirety of the national territory or, at least, over not less than four Regions.

Special provision is also made concerning the personal qualification of directors, general managers and managers; most importantly, the absence of criminal convictions for the following: crimes against the patrimony, crimes against the public trust or against the public economy, the crime of association of a mafia-like character (under Article 416-bis of the Penal Code), unpremeditated crimes for which the law provides the penalty of imprisonment not less than three years at maximum, such as crimes or contraventions provided for in laws aimed at the prevention of accidents at work or, more generally, laws on labour or social security. Those in question must also not be under criminal investigation or indictment.

Authorisation to supply temporary labour may also be granted to workers' co-operative societies that, in addition to meeting the conditions required for the other companies, must have a least fifty members. In addition, it must employ non-partner employees for a number of days not exceeding one-third of the days of work performed by the co-operative as a whole. In this case, however, not the work-partners but *only* the workers employed by the co-operative can be supplied by the co-operative as temporary labour. This provision is highly controversial, since it seems to stand in opposition to the general principle governing workers' co-operatives, namely that priority and preference in job opportunities should be given to partners as opposed to non-partners.

Authorisation may also be issued to companies directly or indirectly controlled by the State, which have the aim of promoting and providing incentive for employment. So far (as of March 1998), 20 agencies more or less have been registered at the Ministry of Labour and are ready to operate.

3.2. The Contract for the Supply of Temporary Workers

The contract for the supply of temporary workers (*contratto di fornitura di lavoro temporaneo*) is a commercial contract through which an agency authorized by the Ministry of Labour supplies one or more workers employed by it, either for a specific task or for an indeterminate period of time, to be at the disposition of a firm or a public administration – which uses these workers 'to satisfy the need for temporary work' (Art. 1).

In the sense that it connects the three parties involved, this contract is the pivotal element on which the entire trilateral legal scheme rests. It connects the parties directly by identifying the legal relations between the agency and the user, and indirectly through the mandatory specification of the kind of work, the duration, the remuneration and so on. This explains why, although it is a normal commercial contract, the Italian legislation has put a great deal of emphasis on its regulation. From the rules which govern it, and especially from the delineation of the rights, powers, obligations and responsibility existing between the agency and the user, is derived the concrete and effective protection of the worker.

The supply of temporary workers is still forbidden:

- for jobs of 'low professional content' – identified as such by the national collective agreement of the industry to which the client organization belongs, signed by the most 'comparatively representative' trade union organizations.
 - for the replacement of workers exercising the right to strike.
 - within production units in which during the previous twelve months there have been collective dismissals involving workers assigned to the tasks to which the temporary labour refers, save in the event the supply is to replace workers absent with the right to retain their job.
 - within the production units in which there has been a suspension of relationship or a reduction in hours with the right to 'wage integration' (a kind of unemployment pay) involving workers employed performing the tasks to which the supply of temporary services relates.
 - to client organization failing to demonstrate to the Provincial Labour Office that they have carried out the risk assessment required by Italian law.
-

- for process that require special medical surveillance and for particularly hazardous work indentified by the decree of the Ministry of Labour and Social Security issued within sixty days of the coming into force of the present Act.

Moreover, at the present time, in agriculture and building, temporary work supply contracts can only be introduced experimentally, and following an agreement on the areas and models of experimentation between the employers' organizations and the trade unions 'comparative representative' at the national level.

The law (Art. 1) provides that such a contract can be made:

1) '*in case of substitution for absent workers*'. In comparison to Act No. 230/1962 on fixed-term contracts, the possibility of using temporary agency labour to replace absent employees – even those who do not possess the right to retain their position – is certainly relevant. In fact, we must remind ourselves that under Act No. 230/1962 the use of temporary work in the form of a fixed-term contract was allowed only to substitute for workers with the right to maintain their position. Taking into consideration, however, the collective agreement legitimised by Act No. 56/1987, we find that the possibility exists of entering into fixed-term contracts even to substitute for those absent without the right to maintain their position. The type of contract chosen in this case by the user can depend solely on financial motivations. Here the business must strike a balance between the lesser cost of fixed-term contracts and the relevant advantage gained in quality of service and highly skilled and well-developed workers through agency employment.

2) '*in case of temporary need for worker qualification not covered by the firm's ordinary production organization*'. It is important to emphasise that these rules are still an exception to Act 1369 of 23 October 1960 outlawing mediation in the hiring of labour, a ban on labour-only subcontracting. Therefore, these cases must be interpreted in a restrictive sense. In particular, this second case does not seem to allow for the use of temporary agency labour in order to satisfy a boom in production that is not manageable using the ordinary production organisation. Put in other terms, the concept of 'need for qualifications not covered by the firm's ordinary production organization' must be interpreted in an objective sense, rather refining to the skills and specialization which are present in the firm. This interpretation conforms to the philosophy behind the Act: temporary labour than through an agency cannot always be used as an *alternative* to regular employment, but rather constitutes a *complementary* instrument. For those reasons, one cannot agree with scholars who consider that the new institution will, hypothetically, allow enterprises to under staff regular positions, filling the gaps with temporary employees. From a judicial point of view, the high cost of temporary agency labour renders this strategy of HRM irrational, not illegal.

3) '*in the cases provided for in the national collective agreement negotiated for the industry to which the client organization belongs, and signed by the most comparatively representative trade unions*'. Attention should be paid to the new formula 'comparatively representative union', which reflects the intensifying problems of a number of unions coexisting in the same industry, all claiming to represent employees. This formula should empower the Government and local authorities to select that union that, in the context of a specific sector/branch, are more representative than others, representing (not necessary organising) comparatively more workers than others. It seems very unlikely that this legal solution alone will be sufficient to solve the problem of union representation. One should add that it is necessary to develop appropriate legal

mechanisms to more adequately test, in effective terms, the power of trade union organizations to represent workers not officially affiliated with them.

A recent national, multi-industry agreement signed by Confindustria, Cgil, Cisl and Uil states that the temporary work supply contract, regulated by Act No. 196, 24 June 1997, may also be utilised – in addition to the case already included in Article 1, paragraph 2, letters b) and c) of the same act – to increase activity in the following cases:

- peaks of more intense activity, which cannot be handled with the usual production arrangements, and related to market demands coming from the acquisition of new orders, the launch of new products or on account of activities in other sectors.
- a need for the accomplishment of specific tasks, services or contracting and subcontracting, limited and temporary pre-determined which cannot be accomplished using the usual production arrangement alone.
- a need for the filling of particular orders that, because of the specific character of the product or the processing involved, required professional skills and specialization different from those normally used or that are, for whatever reason, in short supply on the local market.

Temporary workers hired for those cases agreed upon by the social parties and outlined in (2) on previous page, are not allowed to total more than an average of 8% of the 'standard' workers hired by the user enterprise. Otherwise, it is possible to sign contracts for temporary work with a maximum of five people, provided their number does not exceed the number of open-ended contracts already signed by the enterprise.

Skills of low professional content – for which, according to Article 1, paragraph 4, letter a) of Act No. 196/1997, it is forbidden to resort to temporary work – are those not included among the 'intermediate professional skills' decided upon on 31 January 1995 on the occasion of the national multi-industry agreement regarding working-training contracts and according to their specification laid down in the CCNL.

A contract for the supply of temporary workers must be in written form, the worker who provides his /her work of the client organization is deemed to have been employed by the latter under an open-ended employment contract. Any clause intended to limit, even indirectly, the right of the client organization to continue to employ the worker at the end of the contract for temporary work is null and void. Further, a copy of the contract for the supply of temporary workers must be sent within ten days of its signing by the supplying agency to the Provincial Labour Office responsible for the territory.

3.3. The Contract between the Worker and the Agency

The temporary agency labour contract is the contract by which the temporary employment agency employs the worker. The worker may be employed under a fixed-term contract, i.e., for a specified time corresponding to the duration of the work for the client organization. The worker may also, at the discretion of the temporary agency, be employed under an open-ended contract, i.e., for an indeterminate time.

Once employed, the temporary worker is required to carry out his/her activities in the interest and under the direction and control of the client organization. It is worth noting that the exercise of disciplinary power still belongs to the agency, on the assumption that the employment relationship is established between the agency and worker. Nevertheless, Act 196/1997 provides that the client/ user company shall report to the agency for possible disciplinary action any possible violation of work duties (as identified by

the client) by the worker. Commentators have emphasised that this solution seems rather complicated, although it is a consequence of the 'triangular' arrangement characteristic of temporary agency labour.

In the case of employment for an indeterminate period, the worker remains at the disposal of the agency even during periods in which he/she is not working for a client organization. In this case, the contract between the employee and the agency shall make provision for a guaranteed income for periods in which no work is performed ('availability bonus').

As far as the application of statutory and collectively agreed-upon employment protection standards is concerned, the temporary agency workers are not considered part of the workforce of the client/user firm. This rule does not refer to health and safety provisions.

The temporary employment contract must be in written form, and a copy must be given to the worker within five days of the beginning of activity within the client organization. In the absence of a written contract or indication of the beginning and end of the work at the client organization, the contract for temporary employment is converted into a contract binding the agency for an open-ended period. However, the expressed period of the initial assignment may be extended, with the consent of the worker and in writing, and for the duration provided for in the national collective agreements covering the category.

If the work continues beyond the specified time, the worker is after that time, deemed to have been employed on an open-ended basis by the client organization. Thus, if the temporary work continues beyond the term initially set or is subsequently extended; the worker has the right to an increase of 20% in daily pay for each day of the continuation of the relationship, until the tenth day following. This increase is chargeable to the agency if the continuation of work has been agreed upon.

Temporary workers must be employed under the same pay, conditions and other terms to which employees at the same level of the client organization are entitled. A principle of parity between permanent and temporary workers is established in the legislation of many European countries. However, the collective agreements of the industry to which the client organization belongs can identify – in relation to the results achieved in implementing programs agreed upon by the parties or linked with the economic results of the organization – modalities and criteria for the determination and payment of wage and salaries.

4. The Legal Status of Temporary Workers

The great difficulties in providing effective protection of the individual and collective rights of the groups involved in the supply of temporary work have all along drastically slowed the process of legislation. Undoubtedly these difficulties stem from, more than merely the temporary and intermittent nature of the labour, the structural and programmatic separation between the (holder of the) *contract* and (the real user in) the *working relationship*. In fact, for the temporary worker, an employment contract involving even two potential employers (the agency and the client employer), can result in a contract with 'no stated, effective employer' (Siau, 1996, p. 16) or, at any rate, no visible control over the power and responsibilities connected to the use of a hetero-direct workforce.

A particular illustrative example can be taken from the British experience. The deep uncertainties shown by the judiciary in regard to the legal qualification of the contract between the intermittent worker and the temporary agency, together with the difficulty of integrating the requirement of continuing seniority required by the British legislation, have, for the majority of this kind of worker, made the regulations arranged by labour law to protect dependent employment relationships in essence irrelevant. The danger is not wholly theoretical that, in this as in other similar cases, the worker could be demoted 'from subject of rights to transitory object' (Ghezzi, 1995, p. 229).

In order to confront the danger of masking the true relationships of production and consequently, the true bearer(s) of responsibility for workers' rights, the legislature has introduced a series of stricture that are intended to guarantee, although only in an indirect way, the right of temporary workers: rigorous selection of subjects qualified for the supply of temporary work (Art. 2); delimitation of legitimate cases for resources to supply of temporary work and further reference to the provisions of Act No. 1369/1960, which still represent the general rule with respect to the legal qualification of the interposing phenomena (Arts. 1 and 10); clear and unequivocal outlining of the responsibilities and obligations of the dispatcher and dispatched worker with respect to the protection of the health and safety of temporary workers (Art. 6.1), social security benefits and contributions and welfare services (Art. 9, 1), damages caused to third parties by temporary workers during working hours (Art. 6, 7), accident and professional disease insurance (Art. 9, 2), etc.

At this point it is necessary to add that to these 'indirect' guarantees – normally used to safeguard steady work and full-time employment – Act No. 196/1997 adds some important provisions for the 'direct' protection of individual and collective temporary worker's rights. These provisions can be constructed as a movement towards a fully-fledged 'statute' concerning temporary workers. Because the employee must in actuality (though not legally) interact with two employers, an abstract assimilation of the temporary worker's rights with those of all workers already heard, whether with standard or atypical contracts, is hardly effective. What is instead required is a precise individualism (if possible, through a collective agreement for temporary agency employees: cfr. Art. 11, 5) of the active and passive legal positions of the worker, both within the supplier agency and user enterprise.

From this point of view, a fundamental parameter with respect to the goal of adjusting the general regulations to the peculiarities of this case must surely be the application of the principle of equal treatment, or non-discrimination, between permanent workers of the user enterprise and temporary workers.

If, with respect to the relationship between the temporary agency and the user enterprise, the principle of equal treatment enables us to reduce or even exclude the speculative character of the legal nature of that relationship (Art. 3, Act No.1365/1960), it seems in fact to guarantee, on the level of the single worker's legal position, a good social integration of the worker into the user enterprise. Concerning collective relationships, the principle of equal treatment allows the coincidence of the intermittent workforce's interest with the permanent personnel, either of the temporary agency or the user enterprise. This side steps the dangerous phenomena of both *social dumping* and a direct opposition of interests between the different groups of workers in a given labour context.

For these reasons, in spite of the rubric of Article 4 (which simply refers to the retributive treatment of the temporary workers), it seems reasonable to assume that by 'equal

treatment' is meant not only the economic variety, but the normative as well. On this issue the social parties have expressed themselves in the Agreements of 1993 and 1996, both of which provide for – as is made evident by the accompanying report of Bill No. 1918/1996 – 'conditions of full parity with the employees of the user company'. Article 4, paragraph 2 states that the worker temporarily assigned to a user enterprise must be 'given *treatment* not inferior to that which the employees at the same level of the user enterprise are entitled to receive' (emphasis added), without any exclusive referral to remuneration, while Article 1, paragraph 5, c) Article 3, paragraph 3, f) point out that, in both user contract and the agency contract, the place, the working hours 'and the economic and normative treatment' of the workers shall be equal.

This regulation could, on a practical level, give rise to several problems, above all with reference to non-homogeneous level of working arrangements between the supplier and the user. Even more relevant is the problem of the comparison between the jobs performed by the temporary worker and the way in which wage levels are determined within the user enterprise. Such a comparison would not always be possible, when one considers that one of the cases of legitimate resort to temporary workers is one involving the temporary needs for skill not provided for the normal arrangements.

In the case of an open-ended contract, the temporary agency must provide for monthly 'availability' compensation divisible into hourly portions, payable by the supplier enterprise during the periods in which the worker is waiting for the assignment (Art. 4, 3). The aforesaid compensation must conform with the level laid down in the collective agreement and, furthermore, not be inferior to the minimum fixed by Decree of the Ministry of Labour and Social Security; in the case of part-time work, the level is reduced proportionally. It is important to note that the availability compensation is described as a type of minimal remuneration due to the worker being hired with an open-ended contract. If, as is the case with short period of assignment, the remuneration received for the work effectively carried out in the user enterprise does not reach the indemnity level, the supplier enterprise is in fact obliged to augment the remuneration until it equals the level of availability compensation.

Within the structure of the act, it is of particular importance to consider the provision of Article 3, paragraph 4 – according to which the worker '*has the right to supply his labour for the whole period of assignment*, except in the case of not advancing beyond the trial period or the unexpected occurrence of a just cause of not withdrawal from the contract' (emphasis ended). In fact, in one way, the right to supply labour for the entire period of the assignment represents a protection against possible discriminatory practices. It is, however, easy to imagine how, with its practical application, the effectiveness of this provision will be greatly weakened by the reciprocal relationships of power and economic convenience between worker and agency on one side, and those between the agency and the user enterprise on the other side. The fear of missing future possibilities for work will push the agency as much as the worker not to insist upon such demands. In another way, this provision allows one to sustain that proof as to a just cause for withdrawal should be evaluated in the light of that withdrawal's accruing only to the interests of the user enterprise, rather than that of the supplier or worker.

For these reasons, it does not seem correct to state that Article 3, paragraph 4 regulates only the just withdrawal from the contract for fixed-term temporary work, with open-ended contracts being referred to the general legislation on dismissals. The just cause for withdrawal dealt with Article 3, paragraph 4 must in fact be referred to dysfunctions affecting the contract for the supply of temporary work and therefore, primarily, to the

relationship between the supplier and the user enterprise. If not, it could be paradoxically maintained that the temporary worker employed with an open-ended contract is entitled to complete his assignment even in the pre-sense of the justified reason (subjective or objective) for dismissal, given that, in these cases, a just cause for withdrawal from the employment contract might be lacking. Similarly, the temporary worker even if hired with an open-ended contract, should then be allowed to withdraw freely from the employment relationship by giving his/her resignation during the trial period, even though he/she has received available compensation during the waiting period before assignment.

The application of a cause for legitimate cancellation of a contract for the supply of temporary work will obviously also have an effect on the temporary work contract. The failure of the broader connection, upon which temporary agency labour is based, will directly imply the cancellation of the fixed-term temporary work contract, which is used specifically on the basis of beneficial length of labour period. There will, however, exist greater problems with determining the future of an open-ended temporary work contract – and, unfortunately, in this case complex logical and systematic confusion exist concerning the possible application of the general legislation of Act No. 604/1966 and its pursuant changes and riders to the temporary work contract.

This issue undoubtedly deserves an attentive analysis (with reference also to the problems connected with the exertion of disciplinary power). Although such an analysis cannot be carried out within these preliminary reflections on Article 1-11 of Art No. 196/1997, it could be supposed, from now on wards, that the general legislation concerning dismissal is also structurally unrelated to the open-ended temporary work contract. Firstly, because it deals with a form of negotiation not pertaining to Article 2094 of the Civil Code and, secondly, because the withdrawal preceded by a warning seems hardly compatible with the assignment period of the worker.

The question deserves, as we have already said, more attentive consideration also because the position, mentioned above in purely problematic terms, seems at the moment to be a minority opinion. However, with respect to the open-ended temporary work contract, only two cases for cancellation seem plausible, both referring to a just cause for withdrawal from the employment contract: on the one hand, the interruption of the assignment with the user company on account of a just withdrawal from the supply contract that also affects (although not automatically, as in the fixed-term employment contract) the temporary contract, and the groundless refusal of the worker to accept the execution of an assignment, on the other hand. If these considerations are indeed well founded, one could consequently conclude that there exists no other possibility, aside from dismissal or resignation for a just cause, for the just withdrawal from the temporary work contract. However, it is not clear what legal interests a temporary agency would have in paying a fixed-term worker availability compensation should be the latter, having accepted an assignment, then be free to determine, through giving simple notice, the cessation of the obligation.

From this point of view, particular importance will be attached to the collective agreement for employees of the temporary agency (cfr. Art. paragraph 5). This agreement will regulate the procedure of withdrawal with notice (during periods before assignment) for the worker hired under an open-ended contract and outline the just reasons, regardless of the type of contract, for withdrawal during the temporary worker's periods of assignments. In fact, this seems to be the only possible way – at least if we are concerned with not excluding completely the temporary agencies' interests (already reasonably

limited) – to draw up open-ended temporary work employment contract. Thinking differently, the exclusion of the general legislation on dismissals will flow *de facto* from the economic choices made by the supplier enterprises; that is they will most likely limit themselves to fixed-term contracts with temporary workers, thus excluding the possibility that these workers can benefit from a minimum income between assignments. (This is now the case in Germany, where – in the absence of the obligation to hire temporary workers with an open-ended contract – current practice shows a net predominance of unstable and temporary contractual relations.)

Article 5 of Act No. 196/199, on the professional training of temporary workers, is aimed at weakening, if not entirely excluding, the undeniable risks involved in the ‘precariousness’ inherent in temporary work. This article should be put alongside both the 1996 labour Agreement and the general perspective on the reorganisation of professional training outlined in Article 17 of Act No. 196/1997. Article 5 sets up a fund aimed at financing temporary worker’s professional training and supported by the supplier enterprises with contributions equal to 5% of the remuneration paid to these workers. This fund will, moreover, have the option to assign resources – should they be stipulated in collective agreements applying to the supplier enterprises – to support workers’ income ‘during periods of works shortage’ (Article 5, paragraph 4). The activation of this provision is dependent upon the issuing of a decree promulgation within sixty days of the date on which the law will come into force. At the present time, it can only be assumed that training will take place during the periods between assignments (see Vittore, Landi, 1997).

With specific regard to professional training as an ‘antidote’ to precariousness in employment relationships, one must straight away reaffirm the presence of the confusions, mentioned above, relating to the exclusion from the purview of the act in question those skills of low professional content. It is surely paradoxical that those workers with high professional skills – already excluded from the ordinary labour market and therefore relegated to the hidden one – will not be able to benefit from the professional training initiatives that can supposedly contribute to an elevation out of their precarious state (Veneziani, 1993, Treu, 1995).

Furthermore, the training provision also raises uncertainties from the point of view of the user enterprise, since put in the general context of Article 1-11 of Act No. 196/1997; it does not seem to provide any guarantee of competitive advantage based on the ‘quality’ of human resources. In fact, temporary worker training, as it is presently organized, presents itself as a purely coercive measure that does not nourish a corresponding interest of the temporary agency for the professional elevation and specialization of its own employees. Also, we should not forget all those clauses intended to limit the ability of the user enterprise to hire the worker at the end of the contracts for the supply of temporary labour (Act. 1, paragraph 6 and Art. 3, paragraph 6). Even if this provision is justified with respect to temporary work employment contracts of limited duration, it seems unreasonable if applied to temporary work employment contracts for an indeterminate time. Paradoxically, a provision supposedly in favour of temporary workers ends up working against them, since it discourages the constitution of stable relations between user company and workers.

Comparative examples are highly instructive in this case. The legislation of both the Spanish and the Japanese is indifferent toward whether supplier enterprises enter into fixed-term or open-ended employment relationships with their own temporary workers. In practice, while the Spanish temporary agencies immediately moved towards fixed-

term contracts, Japanese agencies, because they place more stress on training and investment in human resources, do not hesitate to hire the large majority of temporary workers for an indeterminate time (more than 80%) (cfr. Tiraboschi, 1995). It is easy to foresee that, since provisions to sustain employment for an indeterminate time are missing, Italian agencies will orient themselves, as the Spanish, towards the fixed-term contracts.

Should this prove to be the case, it will then be particularly difficult to assign the role of a link between assignments to the temporary worker's professional training and the lack of judicial stability in the labour relationship with the temporary agency will probably make the process of training a workforce causal and irregular by nature, both complex and fragmentary.

Lastly, we see that an analysis of the temporary workers' union rights reveals a notable distinction between the relationship of the worker with temporary agency and that with user enterprise.

With reference to the forms of representation of temporary workers with in the temporary agency, there are few regulations which define an *ad hoc* rule or provide for an adaptation of the general rules with respect to the relevant peculiarities of this case. This has the result – largely taken for granted – of making the temporary worker's primary channel of representation completely abstract and secondary. The wording adopted by the Italian legislature concerning this point is quite reductive: '... union rights shall be applied to the user enterprises' employees as stated in Act No. 300, 20 May 1970 and the modifications pursuant thereon' (Art. 7 paragraph 1). Not only is there no co-ordination between the forms of representation of the temporary agency's permanent workers and the temporary workers (for example, the use of a mechanism of polls division with respect to the creation of an RSA) and, within this last category, between workers hired with a fixed-term contact and workers hired with an open-ended contact. There are, in addition, not even minimal directives on the manner in which a workforce that is, by definition, temporary and fluctuating should be calculated. The fact is that in the Italian regulations there exists no consideration of the way to bring about a concrete enjoyment union rights (both active and passive) within the different forms of labour and the phenomenon, typical of manpower supply, of the fragmentation and dispersal of the enterprise collective. The risk is that the important principle affirmed in Article 7, paragraph 1 will remain a dead letter.

Of course, the problem of counting the temporary agency's employees emerges in reference to the field of enforcement of the Workers' Statute. Taking into consideration the formulation of Act No. 196/1997, it seems beyond dispute that the requisites of Article 35 of the Statute can be applied to the temporary agency's employees as well.

Regarding the union rights of temporary workers assigned to a user enterprise, Article 7, paragraph 3 of Act No. 196/1997 does not hesitate to affirm that 'the temporary worker, for the entire length of his/her contract, has the right from the user enterprise to exercise the rights to freedom and to union activity, and even to participate in the assemblies of the user enterprises' employees'. If, however, one attempts a co-ordination of the formal provision of the act within a union practices, it becomes apparent that in this case as well as the acknowledgment of some of the rights of the temporary worker runs the risk of being merely theoretical.

In attempting a solution to this problem we can take our bearings from a comparative evaluation of the general provisions concerning temporary workers' rights included in the national multi-industry Agreement of 20 December 1993 – an agreement concern-

ing the creation of unitary union structures- from which it is possible to infer that only rarely does a temporary worker satisfy the requirements necessary to remain in the enterprise. With particular reference to the delicate theme of the right to stand as a candidate, we find that the industry-level collective bargaining taking place after the Agreement, even though the exact formulation sometimes differ, has effectuated the provisions of the latter. In C.c. No. 1, in fact, the eligibility of workers with a fixed-term contract, or rather of those with a *non-open-ended* contract, is provided for and, therefore, also that of temporary worker, at least theoretically. But this is dependent on the condition that the worker's contract is, on the date of the elections, still valid for a period not less than six months. The right to stand as candidate is therefore not applicable to those workers hired with a contract of less than six months. In addition, there is no provision made for the disparity between the temporary nature and the uncertainty of the labour relationship and the three-year office of the RSU member. Thus, at the end of the non-open-ended contract, the mandate expires automatically. However, even if one were to assert that these rules are not applicable *by analogy* to the temporary labour force, it is at any rate that Italian union procedures have shown complete indifference towards the mechanisms of representation of the labour force present inside a company on a merely temporary basis (cfr. Tiraboschi M., 1996). It is thus apparent that that these restrictions will lead to the exclusion for the temporary worker of both the right to vote and the right to stand as a candidate, on the presupposition that he/she has no real contractual ties with the user enterprise.

And yet, despite some obvious difficulties, it does not seem that the status of a temporary worker is radically incompatible with the right to vote. On a systematic level, it must at least be recognized that the temporary worker has the right to participate in the elections of the representative for worker safety, according to Article 18 of Legislative Decree No. 626/1994, which states that 'the representative for safety is elected directly by the workers and chosen from *among them*'.

However, it must be emphasized that union rights, according to Article 7 of Act No. 196/1997, seem to take on a significant degree of efficacy only when referred to the collective interests of the stable labour force of the use of enterprise. In fact, Article 7, paragraph 4 instructs the user enterprise to communicate, before the initiation of the supply contract, to the unitary union structure, or to plant-level union structure (and, in the absence of such, to the territorial trade association connected to the most representative national confederation) the numbers of and reasons for resource to temporary workers and continue to provide this information, along with a description of the contacts and workers involved.

As we have already seen at a previous session (Tiraboschi M., 1996), in order to resolve the delicate problems of the representation of the collective interests of the temporary workforce, notwithstanding that this leads to tension and antagonism with the steady one, it is no longer possible to set aside this problem of 'participation'. In fact, in the face of the 'evolution that (...) the labour factor is undergoing, on the level of contents and the way of execution (and also of the same contractual typologies that can be used)', one cannot but agree with one who presses for a corresponding process of change and adaptation within union activity, in the exercising of its protective function for workers' interests (...) and the opening towards participation models' (on this points see Carabelli, 1996). With this reference to temporary labour through an agency, the search for adequate channels of communication between the individual and the collective level cannot be limited to traditional outlines of the exercise of union rights or

workers access to the functions of representation inside the company. We must go far beyond in our search for and experimentation with new forms of representation consonant with emergence of these, so to speak, 'disorganised' interests.

5. Conclusions

Undoubtedly, the technique adopted by Act No. 196/1997 for the regulation of temporary agency labour represents a substantial starting point for more complete reform in Italian labour law and good start toward providing clear regulation on atypical work in general.

Given the specific legal and cultural context of Italy, a simple deregulation is not feasible. On the contrary, it seems necessary to experiment with, as we have said, doses of 'regulated flexibility', contributing to the creation of a climate favouring additional employment and the recovery of the broad areas of black work. The government is indeed committed, as has been formally affirmed in the agreements with the social parties, to loosening some of Italian labour law's real rigidities, but without destructing the market of steady and full-time labour. Within this broad context, characterized by particular bonds of economic and social compatibility, the inevitable problem of the redefinition of the boundaries between independent and dependent work cannot be simplistically – and unrealistically – approached through an intervention directed towards burdening penalising atypical work, co-ordinated activities and the new forms of work organization. A legislative intervention in the form of the codification of a new bargaining scheme (co-ordinated work) does not promise to be helpful either. The market requires flexibility, simple rules, and certainty of the law: a new definition introducing a contractual *terbium* genus could only decrease the litigation, uncertainties of description and the escape into the black economy.

More convincing and realistic is the idea of a *Statute of the new forms of employment* that would approach in a pragmatic manner the problem of the new forms of employment more from the side of protection (and of their re-modulation as regards *all* employment relationships), than from that of formal definitions and concepts. The idea that should be developed implies the abandonment of the never-ending attempt to define and classify a contractual reality that changes rapidly and constantly and in its place, the creation of an essential (and appropriately limited) core of imperative rules and principles – mainly those referred to in the Constitution common to all bargaining relationships concerning labour.

In brief, the Statute should operate on two separate levels constructed to support each other. On one side we could conceive of a voluntary mean, stimulating certification in the administrative setting, of the legal qualification assigned by the parties to a specific labour relationship. On the other hand, in order to render such a mean effective, it will be necessary to move towards the removal of some of the causes that combine to add to the litigation concerning employment relationships and raise levels of *physiological* flight into the black and the atypical labour markets. (Of course, a very different thing is the *pathological* flight, which, in addition to eroding labour guarantees, is also an element of distortion in the arena of competition and must be done away with.) This could be accomplished by outlining a new way of reducing the differences between independent and dependent employment relationships. In this perspective, a *Statute on the forms of employment* could make it possible to modulate and heighten (by type) the

protections germane to every kind of agreement, setting up a concentric pattern of categories along a continuum of modalities in the execution of labour, moving from the minimum and imperative protections enforceable in all employment relationships, to the grantees belonging only to dependent work (protection against dismissal).

The issue of employment relationship certification, as an answer to the excess of court cases on the subject of contract classification, will not necessarily mean a marked increase in conflicts, on the condition, obviously, that the bargaining programme agreed upon *ex ante* by the parties is kept during the term of adjustment. In order to foster the process of certification, it would be also useful to distinguish between an area of an absolutely binding nature or public order (in other words, an area related to the worker's fundamental rights), which would not be at the parties disposal (under penalty of relationship reclassification in judicial session) and an area of relative changeability, negotiated by the collective partners during collective bargaining and/or by the individual partners as the employment relationship is established. In this last case, however, this could take place *only* in front of the administrative body qualified for such certification (wages above the minimum sufficiency threshold, management of career paths, length of notice, relationship stability, and allowance in case of relationship suspension, working times, etc.).

Undoubtedly more critical is the element concerning the remodulation of protection, on which not only can adequate political and social consent hardly be realized, but, surprisingly, concerning which taboos and ideological disagreements re-emerge. Nevertheless, it is clear that the regulation of atypical work requires the revision (at least in part) of the traditional dependent work protections as well, and we must also proceed toward a corresponding normative realignment of social security benefit, which will entail the outlining of a core of social security common to all independent and dependent workers. This would in turn entail provisions for basic social-insurance tax revenue for all employment relationships, contributing toward making the problem of the qualification of the various types of social security less drastic. The mere regulation of atypical work without a corresponding redefinition of the dependent work statute is, as a matter of fact, incapable of anything but a contribution to making labour management rules more burdensome and presumably stimulating further flight into the hidden economy or even an increase in labour outsourcing and enterprise reallocation.

It is clear that a serious reform bill cannot avoid this issue. In light of a normative and social framework that already provides for ample forms of evasion of the employment stability rule, it is quite frankly puzzling to witness the rigidly ideological requirements trumpeted by some political and trade union groups concerning the question of dismissals. In addition to the black and grey labour markets, there is nobody who can deny that nowadays entrance into the dependent labour market, take place, for the most part, through the legitimate expedients of forms temporary work, fictitious training contracts (apprenticeship, work-training contract) and independent and co-ordinated work contracts. Regarding all of these, the rules concerning dismissals are not enforced. Why should we accept this hypocrisy, unless it is to handle with kid gloves the politically charged issue of firings, instead of working seriously towards a real solution aimed at the effective reinitiating of the open-ended labour contracts and youth employment? What we are lacking here is certainly no ideas: except for the prohibition against discriminatory dismissals (e.g., for illness or maternity), the enforcement of the narrow limitations on individual discharges could be jettisoned (without impairing the protections of an adult labour force firmly inserted in a business context) for the following: a)

those working their first job (and under 32 years of age) with an open-ended dependent employment contract; b) for all new hires, during their first two years of work, in the provinces in which the average yearly rate of unemployment for the year before hiring, according to the enlarge ISTAT definition, is at least 3% lower than the national average; c) for those workers who have seniority of less than two years with the same employer.

We repeat again that the deficit is not in good idea, but in the ability (the courage?) to abandon old schemes hardened paradigms that no longer correspond to the reality on which we would like to improve (on this point see Blanpain, 1998).

References

- Biagi M. (1998), *A love-hate relationship: Regulating non-standard work in Italy*, in *The Role of Private Agencies*, Leuven, 1-2 April 1998
- Biagi M. (1997), *Mercati e rapporti di lavoro*, Giuffrè, Milano
- Blanpain R. (1998), *Il diritto del lavoro nel XXI secolo: l'era dei lavoratori del 'portafoglio' creativo*, in *Diritto delle Relazioni Industriali*, No. 3
- Carabelli U. (1996), *Le RSA dopo il referendum, tra vincoli comunitari e prospettive di partecipazione*, in *Diritto delle Relazioni Industriali*, No. 1
- Ghezzi G. (1995), *Proposte per un Testo Unico in tema di mercato del lavoro*, in *Lavoro nella Giurisprudenza*, p. 221 e ss.
- Siau B. (1996), *Le travail temporaire en droit comparé Européen et international*, LGDJ, Paris
- Tiraboschi M. (1997), *La legalizzazione del lavoro intermittente tramite agenzia. Prime riflessioni sulle legge n. 196/1997*, in *Diritto delle Relazioni Industriali*, No. 3
- Tiraboschi M. (1996), *Lavoro atipico e rappresentanza degli interessi*, in Biagi M., Suwa Y. (eds.), *Il diritto dei disoccupati*, Studi in onore di Koichiro Yamaguchi, Giuffrè, Milano
- Tiraboschi M. (1995), *Evoluzione storica e attuale disciplina giuridica delle agenzie di lavoro temporaneo in Giappone: un inventario critico e alcuni elementi di riflessione per il caso italiano*, in *Diritto delle Relazioni Industriali*, No. 1
- Tiraboschi M. (1994), *Temporary Work and Employment agency in Italy*, Università di Modena, Collana del Dipartimento di Economia Aziendale, No. 26
- Treu T. (1998), *Italy*, in R. Blanpain, *International Encyclopaedia of labour law and Industrial Relations*, Kluwer, Deventer, vol. 7.
- Treu T. (1997), *Politiche del lavoro e strumenti di promozione dell'occupazione: il caso italiano in una prospettiva europea*, in M. Biagi (ed.), *Mercati e rapporti di lavoro*, Giuffrè, Milano
- Treu T. (1995), *Le politiche del lavoro del Governo italiano*, in *Diritto delle Relazioni Industriali*, No. 2
- Veneziani B. (1993), *La flessibilità del lavoro e i suoi antidoti*, in *Giornale di Diritto del lavoro e delle Relazioni Industriali*, p. 235 e ss.,
- Vittore A., Landi F. (1997), *Lavoro temporaneo e formazione*, in Biagi (ed.), *Mercati e rapporti di lavoro*, Giuffrè, Milano,
-