



# **(Few) Lights and (many) shadows on the new process procedure introduced by the reform of the labor market in Italy for the appeal of layoffs**

***Simone Caponetti***

PhD in Labor Law, Labor and Social Security

University of Rome "Tor Vergata"

**Abstract:** The paper analyses the procedural innovations introduced by the Law of 28<sup>th</sup> June 2012, n. 92 concerning the claim of layoffs. The author draws a descriptive overview of the new special ritual, accompanied by some critical reflections on the decision of the legislature that is at odds with the principles of simplification measures already introduced by Legislative Decree no. 150 of 2011. The view is even more complex and worrying if it is to be considered the point of view of the legal professionals, considered that the courts, having a lot of leeway on some points of the new rite, have created a real "jungle in the jurisprudence".

**Keywords:** The Italian Labor Trial; Rito Fornero; Claim of dismissal.

**Summary:** 1. Introduction 2. Problems concerning the type of ritual: similarities and differences with other procedures in force 3. The so-called "Rito Fornero" and the biphasic nature of the proceedings at first instance: the interlocutory 3.1 ... (continued) the stage of opposition in full knowledge .... 3.2 (continued) the complaint on appeal and the Supreme Court 4. Judicial practice, application problems, and "Guidelines" of the Courts: judicial conflicts and problems in the new proceedings' rite 5. Some concluding remarks.

## **1. Introduction**

The Law n. 92 of the 28<sup>th</sup> June 2012, otherwise known as "*Riforma Fornero*", contains detailed and complex provisions regarding the new legislation of the labor market in Italy which



is based on a perspective of growth, mediated by a solution arbitrated by all the political forces, affecting the "incoming" and "out coming" flexibility of workers. Because of its nature of compromise, the law had a parliamentary process rather smooth and quick, compressed by the need to present to the European partners, by the end of June 2012, a series of measures of inclusive and dynamic remodeling of the labor market which should be able to contribute to the creation of employment, both in quality and quantity, but also to the social and economic growth and to a permanent reduction in the unemployment rate.

From the very beginning, the labor law doctrine has not expressed itself in praise of it, rather contesting method and substance. In particular, some commentators have argued that the *corpus* of the Riforma Fornero «is full of apparent contradictions that inevitably lead the impossibility of achieving the predetermined structural purposes in it<sup>1</sup>.» It has been argued, in fact, that the innovative solutions proposed to renew the labor market, including those specifically related to flexibility in "out coming", are inspired to European models of management of the labor market which are not feasible in Italy, through the mechanism of the «irreversible fall of the real actual protection as the only exclusive sanction of the unfairness of the individual dismissal within the production unit or a company in excess of the limits provided for the employment as concerned by the article n. 18 of the Law 30<sup>th</sup> May 1970<sup>2</sup>». The issue of flexicurity is, now, often quoted in our country, with a particular focus - as much spasmodic as approximate - to the legendary reality of Northern Europe, exemplified in Denmark. But if the flexicurity has not been implemented in Italy before the financial crisis, with the favor of the economic, *a fortiori* it cannot be implemented now, since the total lack of the basis on which it should be built, that's to say, the freedom of employer to dismiss *versus* the guarantee of income and a new employment (with eventual prior training).

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<sup>1</sup> S. MAGRINI, "Quer pasticciaccio brutto dell'art. 18", in Arg. Dir. Lav., 2012 3, 535; M. FEZZI – F. SCARPELLI, "Guida alla Riforma Fornero", M. FEZZI – F. SCARPELLI (a cura di), "I quaderni di Wikilabour", Milano, July 2012. These authors express feelings of concern and dissatisfaction on the text of the law.

<sup>2</sup> F. CARINCI – M. MISCIONE, "Presentazione, in Commentario alla riforma Fornero", F. CARINCI – M. MISCIONE (a cura di), in Supplemento a Dir. Prat. Lav., 2012, 33, 7.



On these premises, one of the most important new features, expected from now long<sup>3</sup>, was about the moderation of real protection, which has been split in a series of penalties, divided between sanctions for reinstatement and sanctions for indemnification of various content, that can differ according to the violated rules and, in some cases, remitted at the discretion of the judge<sup>4</sup>. This feature was introduced in order to present to the European Union, the (exterior) image of a new regime for layoffs which should be inspired to a greater flexibility and certainty for the enterprise, in order to attract foreign investors as well.

As part of this important change lies a more specific one which is identified in paragraphs 47-69 to art. 1 of the Act n. 92 of 2012 concerning a new and articulated process *extra codicem*, and that could be defined as a "second level", which is in any case, not self-sufficient, in that, where the law has not dictated specific provisions it should be applied the rules of labor process, within the limits of their compatibility<sup>5</sup>.

## 2. Problems concerning the type of ritual: similarities and differences with other procedures in force

The doctrine of labor law has brought the new trial model within the category of special safeguards with non-trial detention<sup>6</sup>. In this sense, it has already been noted as the new

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<sup>3</sup> M. V. BALLESTRERO, *Declinazioni di Flexicurity. La riforma italiana e la deriva spagnola in Lav. dir., La riforma del lavoro del governo "tecnico"*, 2012, 3-4, 445, which states that the first European guidelines on which to orient the Labor market Reform were already present in the European strategy launched in Essen in 1997 and updated in the so called "Lisbon Strategy" firstly and then later also in the "Paper Europe 2020" of 3<sup>rd</sup> March 2010.

<sup>4</sup> In S. MAGRINI, *"Flessibilità in uscita e discrezionalità del giudice"*, report to the conference held at the Accademia dei Lincei on "The Reform of the Labour Market", Rome May 2<sup>nd</sup> - 3<sup>rd</sup>, 2013, typescript. The choice between reintegration sanctions and indemnity penalties would be remitted, in some of the most relevant hypothesis, to the (subjective) will of the judge.

<sup>5</sup> This is the case, for example, of the determination of the competent court: the story of 2012 says nothing about it, having considered the general standards applicable as in art. 413 code of Civil Procedure. To this end see, D. DE FEO, *"La prima fase del rito speciale in materia di licenziamenti"*, in Arg. Dir. Lav., 2013, 1, 101.

<sup>6</sup> See P. SORDI, *"L'ambito di applicazione del nuovo rito per l'impugnazione dei licenziamenti e disciplina della fase della tutela urgente"*, typescript, Relazione al Convegno di Roma del Consiglio Supremo della Magistratura on 30th October 2012. See also, although the list is not exhaustive: L. De ANGELIS, *"Art. 18 dello statuto dei lavoratori e processo: prime considerazioni"*, in I Working Paper del Centro Studi di diritto del lavoro Europeo "Massimo D'Antona" (WP C.S.D.L.E), n. 152, 2012; C. CONSOLO – D. RIZZARDO, *"Vere e presunte novità, sostanziali e processuali sui licenziamenti individuali"*, in Corr. Giur. 2012, 735; A. PALLADINI, *"Opposizioni e impugnazioni nel rito "Fornero"*, Typescript Report at the conference about "La riforma del mercato del lavoro", Milan, 17th



procedural rite presents common characteristics compared to other special procedures already existing in the sorting, without, however, making it possible to trace it within one or the other, because of the peculiar elements that make «difficult its systematical and unitary collocation<sup>7</sup>».

The main models of reference are represented, in particular, by:

- the process of repression of anti-union behavior in art. 28 of the Law of 20<sup>th</sup> May 1970 n. 300 (henceforth Statute of Labor, SoL);

- the application for interim measures of cognition governed by Articles 702 bis et seq. of the Code of Civil Procedure (henceforth Cod. Civ. Proc.); and

- the uniform application for interim relief referred to in Articles 669 bis et seq. of Cod. Civ. Proc.

But before we analyze the differences with these proceedings, it is appropriate to point out that the procedure in question seems to build on the previous work of a ministerial committee established by M.D. of November 8<sup>th</sup>, 2006 and presided over by magistrate Foglia<sup>8</sup>, who presented to the commission on 8<sup>th</sup> May 2007, an articulated proposal of reform of the whole labor process<sup>9</sup>. Like the draft proposed by Foglia, also the legislators in the year 2012

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october 2012; P. CURZIO, “*Il nuovo rito per i licenziamenti*”, in WP C.S.D.L.E “Massimo D’Antona”, n. 158, 2012, 18 and L. CAVALLARO, “*Il processo del lavoro al tempo dei <<tecnici>>*”, in Riv. Trim. Dir. Proc. Civ., 2013, 285.

<sup>7</sup> M. CONGEDUTI, “*Natura bisafica del primo grado di giudizio nel “rito Fornero”: poteri istruttori del giudice e obbligo di astensione*”, in Lav. Giur., 2013, 2, 158 e ss; G. BENASSI, “*La riforma del mercato del lavoro: modifiche processuali*”, in Lav. Giur., 2012, 8-9, 757; P. SORDI, “*L’ambito di applicazione del nuovo rito per l’impugnazione dei licenziamenti e disciplina della fase della tutela urgente*”, op. cit.

<sup>8</sup> Without claiming to be exhaustive, on the Commission's draft of Foglia see comments of L. De ANGELIS, “*Rilievi critici al progetto Foglia di riforma del processo del lavoro*”, in WP C. S. D. L. E. “Massimo D’Antona”, n. 59, 2007 and A. VALLEBONA, “*Parola d’ordine: salvare il processo del lavoro*”, in Mass. Giur. Lav., 2007, 1-2, 5.

<sup>9</sup> After the work of the Commission lead by Foglia, during the following Government, namely the fifteenth, the draft laws n. 106/XV/C (Cords and others); 595/XV/S (Ripamonti - Tibaldi), 1047/XV/S (Salvi, Treu and others), 1163/XV/S (Sacconi and others) were presented to the Parliament. All these bills were, properly, driven by the concern to ensure - without prejudice to the overall structure of the rite of the work and the regime of foreclosures that characterizes it - the speed and resolution of litigation regarding labor relations, according to a line followed for almost all regulatory actions in procedural matters. The procedures included therein would be applicable to the following disputes: layoffs, the legitimacy of the term applied to the contract, transfers pursuant to art. 2103 Civil Code and transfers pursuant art. 2112 Civil Code (while the Foglia’s project limited its applicability only to employment relationships subject to the rules provided for by art. 18 of Statute of Labor). They should have all precautionary nature and were designed as not subject to any preliminary conciliation procedure (then mandatory), and thought to be treated with priority over all other proceedings (except those related to precautions measures and to the repression of anti-union behavior as pursuant to art. 28 SoL.). For a full overview



apply a double-differentiation of procedural safeguard, separating the field of dispute regarding individual dismissals subjected to real protection from other issues pertaining to the employment tribunal, so attributing to these disputes a sort of "fast track", which, at least in the best of intentions, should result in a very short time for the resolution of disputes. It should be specified that, any way, there are significant differences between the so-called paper of "*Commissione Foglia*" and the law currently in force. The most important lies in the different sizes of the project of reform in 2007. The "*Commissione Foglia*" had, in fact, developed an overall project of reform, which covered also the security's and welfare's controversy. Instead, as already stated, the new rite merely introduces new procedural rules that are applicable only to disputes concerning dismissals within the provisions of art. 18 of SoL. Moreover, the Fornero's proposal, in opposition to the Foglia's draft, is not coordinated with the overall balance of the labor process, thus creating the opposite effect to that intended: the extension of procedural time and the delay for all other labor and welfare disputes<sup>10</sup>. Furthermore, the reform of 2012 has not provided anything concerning the application of coercive measures (in opposition to other projects or bills) in case of failure of the employer addressed to the reintegration of the sentence, thus leaving a serious and unreasonable gap in the existing legislature; the gap is even more serious because of the explicit exclusion of labor disputes from the general provisions contained in the art. 614 *bis* Cod. Civ. Proc. (About the implementation of the obligations "to do or not to do").

As far as the similarity to other existing procedures within the code of the Italian procedure, there is a clear affinity with the legal instrument provided for the suppression of anti-union conduct pursuant to art. 28 of SoL. The differences, however, are significant both in relation to the amplitude of the terms of handling and in regard to the formalities of the so called Fornero's procedure. Is not negligible the fact that while the opposition to the decree that closes the interlocutory proceedings pursuant to art. 28 SoL opens a process governed by the rules of labor procedures, the opposition against the decree issued according to what it's

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see D. DALFINO, "*Il nuovo procedimento in materia di impugnativa del licenziamento (nella l. 28 giugno 2012, n. 92)*", in *Giusto Proc.*, 2012, 3, 759, spec. 762.

<sup>10</sup> This opinion is shared by G. BENASSI, "*La riforma del mercato del lavoro: modifiche processuale*", in *Lav. Giur.*, 2012, 8-9, 749 et seq.



established by the Fornero's procedure is governed by a special ritual<sup>11</sup>. The same structure - defined by some as biphasic - of the judgment in first instance which connects the two special rites earlier compared, differs from the Fornero's procedure regarding the interlocutory proceedings of cognition referred to in Articles 702 *bis* et seq. Cod. Civ. Proc.: also in this case, however, the similarities are relevant and concern mainly the approximation of the proceeding in the first phase and the emanation, in a very short time, of a decisional measure assuming the aspect of an ordinance<sup>12</sup>.

A last model of reference taken into consideration by the legislature in 2012, is finally that of the uniform precautionary procedure laid down in Articles 669 *bis* et seq. Cod. Civ. Proc., especially as regards the demarcation of the investigatory powers of the court in the first phase and the discipline of the opposition<sup>13</sup>. Also in this case, it cannot be silenced a significant difference: the new proceeding introduced by Law no. 92 of 2012 ignores the existence of any *periculum in mora*, which remains alien to the new proceeding and therefore it should not be attached nor proved by the applicant.

### **3. The so-called "Rito Fornero" and the biphasic nature of the proceedings at first instance: the interlocutory**

The article n. 1, paragraph 47 of the Law no. 92 of 2012, has introduced a first brief phase for litigations that began after the entry into force of the law, i.e. from 18<sup>th</sup> July 2012. According to the paragraph in question - concerning the restrictions to which the object of the

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<sup>11</sup> The differences between proceedings under Article 28 of Statute of Labor and Fornero's ritual are in: A. PALLADINI, "Opposizioni e impugnazioni nel rito "Fornero"", Typewritten Report at the Conference "La riforma del mercato del lavoro", Milano, 17th October 2012; L. De ANGELIS, "Art. 18 dello statuto dei lavoratori e processo: prime considerazioni", in WP C.S.D.L.E "Massimo D'Antona", n. 152, 2012 and G. BENASSI, "La riforma del mercato del lavoro: modifiche processuali", in Lav. Giur., 2012, 8-9, 757.

<sup>12</sup> For further information on the interlocutory in art. 702 *bis* et seq. cod. civ. proc. please refer to M. CATALDI, "Il procedimento sommario di cognizione ex artt. 702 *bis* ss. c.p.c. e d.lgs. 1.9.2011, n. 150", Torino, 2013. About the exclusion from this type of proceeding about labor disputes, see D. DALFINO, "Sull'inapplicabilità del nuovo procedimento sommario di cognizione alle cause di lavoro", in Foro It., 2009, 5, 392 and G. TEGLIA, "Brevi note sul nuovo processo del licenziamento introdotto dalla riforma del mercato del lavoro", in Lav. Giur., 2012, 768.

<sup>13</sup> M. CONGEDUTI, "Natura bifasica del primo grado di giudizio nel "rito Fornero": poteri istruttori del giudice e obbligo di astensione", op. cit., 164.



application is limited to appeals of dismissals falling within the scope of Article n. 18 of SoL.<sup>14</sup> -, it is solely admitted that these cases can be dealt together with applications <based on identical constituting facts> - this hypothesis can be considered as purely theoretical<sup>15</sup> - and any eventual <situation related to the qualification of labor contract>, in other words the subordinated nature of the subject itself, this aspect being a prerequisite for the application of Article n. 18 of SoL.

The new rite has four "levels of protection": two steps at first instance, an appeal court and a judgment of legitimacy.

The first phase, characterized by brevity involves, as will be better explained in the continuation of this paper, the execution of inquisitor acts that are "indispensable" in view of

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<sup>14</sup> A part from the dimensional limit established in art. 18 Statute of Labor, which is repeated here for proper memory and is determined in more than fifteen employees in each production unit or more than sixty employees nationwide, the ritual also encompasses other circumstances not directly related to this limit. This is the case of discriminatory dismissals, layoffs determined by an illegal reason, and dismissals imposed in violation of the standards of protection, or the dismissal so-called <really ineffective> because missing of a written communication. This means that the ritual will apply in all these circumstances regardless of the number of employees occupying the enterprise or production unit. Having the "Riforma Fornero" then applied to collective redundancies for staff reduction as provided by Articles 18 Statute of Labor and 6 of Law no. 604 of 1966, also in this case we can refer to special ritual. *Contra*, A. CIRIELLO – M. LISI, "Disciplina processuale", in PELLACANI (a cura di), *Riforma del lavoro*, Milano, 2012, 284, according to which the Fornero's procedure would be inapplicable to collective redundancies, the latter having their source in a different law (Law no. 223 / 1991).

<sup>15</sup> This opinion is shared by S. MAGRINI, "La risoluzione del rapporto di lavoro (Appunti per gli studenti del Dipartimento di Giurisprudenza della LUISS Guido Carli)", Free University Press, 2012 and A. VALLEBONA, "La Riforma del lavoro 2012", 2012, Torino, e-book which states that the phrase <based on constituting identical facts> refers to circumstances really hard to imagine, since, for example, the demand for compensation for not patrimonial damages caused by dismissals with real protection presupposes that such damages are constituting facts, not identical, but rather ulterior. While if the damages of any type arising from a further fact in relation to dismissal, as in the case of abusive dismissal, is the illicit itself to be not identical. After all, it would be inadmissible a forced interpretation that adds the word "even" after the words "founded", expanding, moreover and widely to all the applications also based on the qualification of the report (for example, on precedent salary differences). On this point it should be noted that there are markedly divergent opinions: on the one hand, there are those who will object to the phrase as a <blank mass>, being difficult to conceive an application paradigmatically different from those intended for special rite, really founded exclusively on identical constituting facts and that does not involve further segments respect to the main application (this is what the authors mentioned above intended, but also D. DALFINO, in "L'impugnativa del licenziamento secondo il c.d. "Rito Fornero": questioni interpretative", in *Foro It.*, 2013, 1, 6, which states that the wording of paragraph 47 of Article. 1 of Law no. 92 of 2012 is quite clear and decisive in limiting the subject of the application.). Another reading admits that the case can also be extended to additional facts: in this perspective, one may admit the special Fornero's proceeding, including, for example, the demand for compensation or payment of salary differences, or even of the indemnities, resulting from the difference in quality of the relationship. This reconstruction is made clearly by M. DE CRISTOFORO and G. GIOIA, "Il nuovo rito dei licenziamenti: l'anelito alla celerità per una tutela sostanziale dimidiata", in *Le Nuove Leggi Civ. Comm.*, 2013, 1, 3.



the immediate assessment of the *fumus boni iuris*, or appearance of a good right, but not already of the *periculum in mora*, or imminent and irreparable prejudice of the delay in the protection afforded, which is, in this case, presumed by law according to the nature of the cause<sup>16</sup>. This means that there will be a cognition characterized by the interlocutory nature of the trial, certainly a simplified cognition, but not a precautionary measure, because it lacks both the provisional and anticipatory measure, and because, as stated above, it is not generally required the *periculum in mora*.

From the set of rules that regulate this early stage, it seems to be intended to assess - in a not formalized proceeding, i.e. devoid of foreclosures and forfeitures<sup>17</sup> -, *sic et simpliciter*, the *fumus* of validity of the request that is, to allow an assessment of likelihood about the existence or not of dismissal's defects alleged by the complainant and not the full truth of the case.

Due these premises on the nature of the proceedings, from a pragmatic point of view, subject to the jurisdiction of the Court according to the jurisdiction of the work<sup>18</sup>, the special ritual begins with the filing of the appeal in the form required by art. n. 125 of the Code of Civil Procedure. Therefore, it must be indicated: 1) the judicial office, 2) the purpose, 3) the reason for the claim and 4) conclusions. The act, however, may be signed by the plaintiff or by his lawyer that, in the event, must provide his social security number, the e-mail address and fax number. Apparently, it is not considered necessary, according to article n. 414 of the Code of Civil Procedure, <the explanation of the facts and matters of law on which the request was made>, being sufficient a synthetic and overall exposure of the request and its reasons. Furthermore, because there is not an application of the requirements of art. 414 Cod. Civ. Proc.

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<sup>16</sup> D. DALFINO, "Il nuovo procedimento in materia di impugnativa del licenziamento" (in L. 28th June 2012), in *Giusto Proc. Civ.*, 2012, 3,759.

<sup>17</sup> In fact, a cautious interpretation of the rule leads to the conclusion that this new rite does not contain the strict foreclosures typical of the process of the work, except as regards the type of application (appeal of the individual dismissal covered under the scope of Article 18). About this see, G. TEGLIA, "Brevi note sul nuovo processo per i licenziamenti introdotto dalla riforma del mercato del lavoro", in *Lav. Giur.*, 8-9, 2012, 763, spec.767. The same conclusion is drawn also by I. PAGNI, "L'evoluzione del diritto processuale del lavoro tra esigenze di effettività e rapidità della tutela", in *Riv. Trim. Dir. Proc. Civ.*, 2013, 1, 75.

<sup>18</sup> Whose jurisdiction shall be determined by art. 413 CCP, for which the applicant will either sue in the courts of the judicial district where the employment relationship has arisen, or where the company was or its dependence, or where the production unit was at the moment in which the employee worked at the time of dismissal.





on the formulation of request and those of art. n. 416 Cod. Civ. Proc. on the appearance of the defendant in front of the Court, the parties are free to promote the preliminary motions throughout the proceedings.

The timing of this first phase shows the rationale behind the introduction of this new rite: the speed of the rite and at the same time its simplification. As to the first, it can be assumed that the entire procedure can be objectively marked by narrower timings than those set by the rite of the labor proceeding, which, in fact, are already reduced compared to the civil ceremony<sup>19</sup>. The second aspect - detectable especially in this first phase - is distinguished by the significant simplification of procedural rules<sup>20</sup>.

Following the submission of the application, the court must fix, by decree, the hearing of the parties not later than forty days from the filing of the appeal<sup>21</sup>. The appeal and the decree must be served on the defendant, like in the "ordinary" labor trial. The deadline for the notification cannot be less than twenty-five days before the hearing<sup>22</sup>, but the defendant can present five days prior to the hearing of discussion in court<sup>23</sup>. As for notifications, since the ordinary way is through the bailiff, the new rite provides for the possibility, in conjunction with the so-called telematic process, to be able to make use of certified electronic mail (from now on c.e.m.)<sup>24</sup>. Another peculiar fact and corollary of the new system, there is the rule, although

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<sup>19</sup> The first phase, in terms of procedural rules, it is functional ascertaining the legality or otherwise of the dismissal. Nevertheless, the second paragraph of paragraph 49 of the art. n.1 of Fornero's Act - contrary to what happens in the common procedure according to article. 420 Code of Civil Procedure - does not foresee the hearing of the Parties or either references to previous art. 417 Code of Civil Procedure, on the establishment and personal defense of the parties, with the aim of making more flexible the new procedure based mostly on the investigatory powers of the judge. See C. ROMEO, *"Le controversie nella legge Fornero tra specialità e ambito di competenza"*, il Lav. Giur., 2013, 3, 221, spec. 231.

<sup>20</sup> This is the case of the presentation of the application with the contents of art. 125 cod. Civ. Proc. and not with those of art. 414 cod. Civ. proc.

<sup>21</sup> In the "ordinary" rite of the labor trials, pursuant to art. 415, paragraph III, CCP., is sixty days.

<sup>22</sup> As provided for in art. 415, paragraph V, CCP., the term in the "ordinary" proceeding is thirty days.

<sup>23</sup> In this case, the legislature pursuant to art. 416 CCP, with reference to the "ordinary" ritual procedure, establishes a deadline of ten days before the hearing.

<sup>24</sup> The possibility to notify via certified e-mail must necessarily combine with the general arrangement provided for by art. 149 bis of the Civil Procedure Code, as introduced by art. 4 of Decree Law December 29<sup>th</sup>, 2009, n. 193, converted into Law n. 24 of 22<sup>nd</sup> February 2010, laying down rules for the digitization of justice, requiring, on the one hand the observance of the procedure described herein, including the obligation to digital signature, and, on the other hand, the certainty of the existence of a c.e.m. of the recipient resulting from the public lists. P. COSMAI, - *"L'impugnazione del licenziamento: limiti al sindacato giurisdizionale e specialità del rito. Primi spunti di*



organizational, that both parties must file the documentation, annexed to the Act of appearance in court, in duplicate, at the offices of Chancery<sup>25</sup>.

Once the proceeding is started, the court after hearing the parties, may proceed as better and fit as possible according to the acts, requested by the parties or disposed *ex officio* pursuant art. n. 421 Cod. Civ. Proc. and shall, in accordance with paragraph 49, by order immediately enforceable, the rejection or acceptance of the request, omitting any formality not essential to be heard. Modeled on art. n. 28 of SoL., the order of the judge shall not be suspended either revoked until the definition in the first degree of the eventual opposition. In the event that the judgment in ordinary cognition is not established, the procedural logic of the process - which involves the opposition clause <against the order of acceptance or refusal> within a mandatory period - suggests that the decision is formed judged, whether the order has accepted or rejected the instances of the complainant<sup>26</sup>. For this reason it is supposed that it should also be applied the general canon as in art. n. 112 in the Code of Civil Procedure, i.e. the obligation of the judge to express himself <on any question concerning the request and not beyond the limits of it>, while the judge should not express *ex officio* on <exceptions, that can be proposed only by parties>.

It should be said - concluding the analysis of this first phase - that the approximate nature of it does not mean, in itself, the use of emergency measures pursuant to art. 700 of the

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*riflessione, in Commentario alla riforma Fornero*", F. CARINCI – M. MISCIONE (a cura di), in Supplemento a Dir. Prat. Lav., 2012, 33, 22 – affirms that the latter hypothesis is very farfetched in the present case, having the recourse to be notified to a private party, not yet established through a prosecutor entered into the Register of Lawyers, and therefore obliged to have a c.e.m., matter of storage, control and update from the belonging *Consiglio dell'Ordine*.

<sup>25</sup> According to M. DE CRISTOFARO – G. GIOIA, in *"Il nuovo rito dei licenziamenti: l'anelito alla celerità per una tutela sostanziale dimidiata"*, in C. CESTER (a cura di), *"I licenziamenti dopo la legge n. 92 del 2012"*, Padova, 2013, 377, there is not a purpose of the legislation which provides for the filing of documents with the Registrar, if not in the circumstance merely to make it easier the receiving of documents by the defendant. Moreover, the above mentioned authors detect that the same provision does not allow to reconnect preclusive consequence, not even for the purpose of the interlocutory phase. P. COSMAI punctuates that, even if adhered to, such a prediction is unable to achieve its end in the case of *litisconsortile* process. See *"L'impugnazione del licenziamento: limiti al sindacato giurisdizionale e specialità del rito. Primi spunti di riflessione"*, as quoted above.

<sup>26</sup> A. VALLEBONA, *"La riforma del lavoro 2012"*, op. cit., 75, D. BORGHESI, *"I licenziamenti: tentativo di conciliazione e procedimento speciale, in Commentario alla riforma Fornero"*, F. CARINCI – M. MISCIONE (a cura di), in Supplemento a Dir. Prat. Lav., 2012, 33, 14.



Cod. Civ. Proc.<sup>27</sup>. The risk, in fact, that by the time required for the enactment of the measure, the right of the worker could suffer irreparable harm, continues to be very envisaged and this only will legitimize the use<sup>28</sup>.

### 3.1 ..... (continued) the stage of opposition in full knowledge

According to the provisions of paragraphs 51-57 of art. n. 1 of the Act reforming the labor market, it is possible to appeal against the order of acceptance or rejection, which was issued as a result of the interlocutory, thus opening a new trial phase characterized this time by a full knowledge. In this way, the losing party may appeal in opposition, within a period of thirty days from notification (or such communication, whichever is earlier) addressed to the tribunal that issued the opposite order<sup>29</sup>. It opens thus a real second phase of judgment in appeal with

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<sup>27</sup> About this see A. CIRIELLO – M. LISI, “*Disciplina processuale*”, in G. PELLACANI (a cura di), *Riforma del lavoro*, Milano, 2012, 281. In the jurisdictional practice see Tribunale di Bari’s order in October 17<sup>th</sup>, 2012, in *Foro it.*, 2013, 1, 673. The Court of Bari declared that the precautionary protection of urgency and the so called “rito Fornero” are not structurally incompatible. They believe instead that this incompatibility can be founded in the interpretative directives of the President of the employment section of the Court of Monza issued October 10, 2012. In addition, the Court of Bologna, by order of 25<sup>th</sup> October 2012, following to an action under Article. 700 of the CCP, fixed *ex officio* the hearing referred to in paragraph 48, Art. 1 of law no. 92 of 2012, with the consequent application of the relevant special ritual.

<sup>28</sup> The Court of Bari expressed an opposite point of view by order of the 17th October 2012, in <http://www.dplmodena.it/02-11-12TribBarLicL92-12.html>. According to this Judge the appeal pursuant to art. 700 of the CCP was dismissed because the introduction of the interlocutory while not excluding the abstract proposal of the application for interim measures, particularly for its quickness can consider the appeal as urgent only if there is a *periculum in mora*. This same opinion is expressed by D. DE FEO in “*La prima fase del rito speciale in materia di licenziamenti*”, in *Arg. Dir. Lav.*, 2013, 1, 106, according to whom, the issue of the relationship between the “Rito Fornero” and the urgent procedure pursuant to Art. 700 of the CCP, recalls the debate that followed the adoption of the law of 11<sup>th</sup> August 1973 no. 533, about the interference between the “new” labor process and procedures of urgency pursuant to art. 700 of the CCP. The result of a long debate was that the precautionary protection could also be operated to ensure the effects of a provisional decision concerning the litigation in work, while noting that the increased speed of the special ritual would have minimized the cases in which the time required to enforce the law in the ordinary way would cause imminent and irreparable harm. The problem is then that the practical reality was far from this.

<sup>29</sup> P. COSMAI, “*L’impugnazione del licenziamento: limiti al sindacato giurisdizionale e specialità del rito, primi spunti di riflessione*”. He states that the opposition in question is also crucial to the successful party, especially in the case of reinstated worker, since according Article n. 2909 of Civil Code, only judgments (i.e. the measure that defines the judgment) and not also the orders (like the one issued pursuant to paragraph 49 of the first phase) have ability to pass final, between the parties, and the heirs and their dependents. In this way, in case of transfer or inheritance from the employers' side, the assessment contained in the not-opposed pronouncement, becomes subject to contestation by the new owner. About this refer to Cass. June 26, 2001, n. 8765, in *Rep. Foro It.*, 2001, 5185, 41 and Cass. December 2nd, 1996, n. 10756, in *Rep. Foro it.*, 1996, 5340, 44. *Contra* G. BENASSI, “*La riforma*



respect to the previous *decisum*, but also characterized by a fuller and more in-depth cognition in view of the court, this time expressed by the legislator, according to the provision contained in the art. n. 414 Cod. Civ. Proc. for the formulation of the application.

This second phase is characterized by the possibility for the sued to introduce counterclaims, if these are based on constituting facts that are identical to those forming the basis of the main application, or simply briefings of defense pursuant to and in accordance with the foreclosures in art. 416 Cod. Civ. Proc.. It should be noted, nevertheless, with reference to this latter issue that if (any) counterclaims are different with respect to the relief (*petitum*) sought by the opposition proceedings, the court shall provide for the separation of judgments.

The methods, then, are those of adversarial institution proper to the trials' rite about job issues; the court shall determine by decree the hearing not later than sixty days after the filing of the opposition and assigns to the opposite party a term of up to ten days before the hearing. The appeal, together with the order setting the hearing, shall be notified by the opponent, even through c.e.m., to the opposed at least thirty days prior to the date of the constitution (paragraph 52). The constitution of the opposite occurs, as required by paragraph 53, in the same form and with the same forfeitures provided for by art. n. 416 Code of Civil Procedure. In the case of third party proceedings, the court attains to the following articles of the Code of Civil Procedure: ex art. n. 102, paragraph 2 (*litisconsorte* necessary), art. n. 106 (call of the third party that considers the process as common) and art. n. 107 (call of a third party to whom the court considers the process as common). The court shall determine within the next sixty days, a new hearing and has to be notified to the third party, by the parties<sup>30</sup>, the decree, the appeal and the briefing observing the terms referred to in paragraph 52. The setting up of

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*del mercato del lavoro: modifiche processuali*", in Lav. Giur., 2012, 8-9, 749. The author believes that if it is possible to adopt, in the silence of the law and in analogy to the proceedings for interim measures of cognition, the provision in art. 702 *quarter* CCP., the order, unless it is proposed the opposition, should produce the effects of art. 2909 of Civil Code., i.e. acquire force of *res judicata* between the parties, their heirs and assigns.

<sup>30</sup> The notification to the third party must be made exceptionally by the other parties instead of the office, as it is prescribed in general labor litigation pursuant art. 420, last paragraph, CCP. According to M. DE CRISTOFARO – G. GIOIA, "Il nuovo rito dei licenziamenti: l'anelito alla celerità per una tutela sostanziale dimidiata", in "I licenziamenti dopo la legge n. 92 del 2012", op. cit., 377, this entrusting of the duty of notification to the parties <causes high probability of prejudices that can be sometimes irreversible> being the parties always accustomed to the fact that it's up to the office to undertake all endo-trial notifications (that's to say during the trial proceeding).



the proceeding for the third party is modeled in almost the same way, as those of the defendant.

At a first reading, the opposition phase introduces a judgment measured in an almost comparable way to the ritual of trial for job's litigation pursuant to art. 409 Cod. Civ. proc., with which the legislature seems to remind the parties and the court about what are the trial terms according the code (largely superseded by the practice<sup>31</sup>). There seems to be no other purpose than the one just quoted, since the timing intervals are equal to the "ordinary" ritual<sup>32</sup>.

As in the interlocutory phase, the judge <having heard the parts and omitting any formality which is not essential to the counterclaim, proceeds properly to eligible and relevant acts as required by the parties or *ex officio*>, as in art. n. 421 cod. Civ. Proc.

It is thus easy to identify that the difference between the two phases of the ritual lies in the type of instruction: while in the first phase, because of its interlocutory nature and brevity, must be performed only the acts exclusively for the necessary investigations, in the second phase, with opposition in full knowledge, only relevant and eligible investigations must be made. The investigations of the latter will therefore be performed within a wider range because the selective criterion passes from indispensability to eligibility and relevance<sup>33</sup>. In this sense, the second phase can be rightly considered as a phase of extension and completion of the acquisition and formation of the proof which is not completely released from the first, but rather related to it. After the examination of the case, it is possible to proceed directly to the discussion or the judge can defer the discussion, giving the parties, if appropriate, an expiring date to deposit or submit defensive notes up to ten days before the hearing.

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<sup>31</sup> About this see E. BARRACO, "*Il rito speciale per le cause di licenziamento: il legislatore complica anche il profilo processuale*", in *Mass. Giur. Lav.*, 2012, 11, 894.

<sup>32</sup> E. BARRACO, "*Il rito speciale per le cause di licenziamento: il legislatore complica anche il profilo processuale*", He states that these schedules operate a change *in melius* for the parties in the proceedings, given that the "ordinary" labor trial provides for a shorter time to prepare the defense, as pursuant to art. 415, paragraph 5, CCP, which provides that from the date of notification and the hearing to discuss there must be a period not less than thirty days, thus leaving the defendant only twenty days, instead of thirty days, in order to prepare its defenses.

<sup>33</sup> P. CURZIO, "*Il nuovo rito per i licenziamenti*", in *WP C.S.D.L.E. "Massimo D'Antona"*, n. 158, 2012, 1, spec. pag. 25.



Appeal proceedings culminates in the issuance of a judgment, or by a decree which must contain the information required by art. n. 132 Code of Civil Procedure (Content of the judgment) and art. 118 in implementation of the cod. Civ. proc (The motivation of the judgment).

Also on this point, the legislature of 2012 dictates a peculiar rule: <the judgment, with the full explanation of reasons must be filed in the Chancery within ten days from the hearing of the discussion>. This formula is essentially different from the “ordinary” ritual of labor’s trial, as in this case <the judge – at the end of the discussion - formulates the judgment by reading the device and the exposure of the reasons of the decision, *de facto* and in law. The fact remains that, in cases of particular complexity of the dispute, the judge sets in the device a limited time which shall not exceed sixty days, for the filing of the judgment> (Article 429, paragraph 1, Code of Civil Procedure).

### 3.2 .... (continue) the complaint on appeal and the Supreme Court

Paragraphs 59 and 60 govern, however, the trial phase of the proceedings of complaint, essentially modeled on that of the proceedings at first instance (phase to full knowledge). It is a real second degree of judgment concerning the control of the decision at first instance, through a unique juridical instrument that is called generically “complaint”<sup>34</sup>, which in reality is nothing more than an appeal and as such should be formulated<sup>35</sup>. The meager legislative provision on

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<sup>34</sup> See G. BENASSI, “*La riforma del mercato del lavoro: modifiche processuali*”, in *Lav. Giur.*, 2012, 8-9, 757. Benassi states that the legislature has probably been influenced by the mechanism of appeals as outlined by the “Commissione Foglia”, according to which the order issued by the single judge at the end of trial actions was to appeal against the Board, in which the judge who issued the claimed judgment could not be part of. About the identities and differences of this special rite with that provided by the “Commissione Foglia” see the paragraph 2.

<sup>35</sup> S. MAGRINI, “*La risoluzione del rapporto di lavoro (Appunti per gli studenti del Dipartimento di Giurisprudenza della LUISS Guido Carli)*”, Free University Press, 2012: the author believes that to use the word “complaint” to indicate the appeal «makes the legislature smarter». C. CONSOLO – D. RIZZARDO, “*Vere e presunte novità, sostanziali e processuali, sui licenziamenti individuali*”, in *Corr. Giur.*, 2012, 6, 736: for these authors it’s just a mere and apparent «word game for needs of tribute to the semantic speed». M. DE CRISTOFORO – G. GIOIA, “*Il nuovo rito dei licenziamenti: l’anelito alla celerità per una tutela sostanziale dimidiata*”, *op. cit.*, 377: these authors have defined this terminology as “inexplicable”. hanno definito <inspiegabile> l’operazione terminologica del legislatore del 2012. On the relationship between complaint and appeal, see N. RASCIO, “*Note sull’impiego del reclamo (in luogo dell’appello) come mezzo per impugnare le sentenze con devoluzione automatica piena*”, in *Riv. Dir. Proc.*, 2008, 955.



the proposal of the request imposes the inescapable need to supplement the rules by taking the Code as model, or art. 434 cod. Civ. Proc., with its reference to Article 414 cod. Civ. Proc. and the new requirements of content and form introduced by the so called Development Decree (D.L. 22th June 2012, n. 83, converted into Law the 7<sup>th</sup> August 2012, n. 134<sup>36</sup>). Thus, it will be necessary also for the claim, the oblige to state, under penalty of inadmissibility, the parts of the order that you intend to appeal and the changes that are required with respect to the ruling made by the court of first instance as well as the circumstances giving rise to the violation of the law and their relevance to the contested decision. The application of Art. n. 434 Cod. Civ. Proc., has as a consequence the subjugation of the litigation of the layoffs to the new "filtering" rules on appeal pursuant to art. 348 *bis*. Cod. Civ. Proc. (Inadmissibility of the appeal).

Nothing is said about the accidental appeal, which of course will be proposed at the time of the response of Appeal: in this case, however, the absence of any reference to the oblige of notification according to art. 436 Cod. Civ. Proc. (in the same period prescribed for filing the statement of defense) should lead to the exclusion of the conceivability of such an additional burden, since this one is not related to the conduct of the hearing<sup>37</sup>.

During this stage it is not allowed, as indeed also in the "ordinary" Labor trials, to introduce new evidence or documents unless the Board decides that these are essential to the decision or the part proves that it was not possible to put forward those documents during the first instance for reasons not attributable to him/her<sup>38</sup>, with implicit reference to art. 345 Cod. Civ. Proc.

As previously mentioned, the timing for notice-appearance-constitution of the case are the same as for the proceedings at first instance, referred to in paragraphs 51, 52 and 53 art. 1

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<sup>36</sup> See L. VIOLA, *"L'appello motivato della legge 134/2012"*, in Civ. Proc. Rev, 2013, 1, 87 and R. CAPONI, *"La riforma dell'appello dopo la svolta delle commissioni parlamentari,"* in Judicium.it, 2012.

<sup>37</sup> See M. DE CRISTOFARO – G. GIOIA, *"Il nuovo rito dei licenziamenti: l'anelito alla celerità per una tutela sostanziale dimidiata"*, in *"I licenziamenti dopo la legge n. 92 del 2012"*, C. CESTER (a cura di), Padova, 2013, 377.

<sup>38</sup> This is set also by the art. 345 Code of Civil Procedure which regulates precisely the appeal in a civil ceremony. According to P. COSMAI, in *"L'impugnazione del licenziamento: limiti al sindacato giurisdizionale e specialità del rito, primi spunti di riflessione"*, op. cit., 29, such a remedy against the first-instance judgment can be defined as original, as lexically improper, usually used for the opposition to the ordinances. Moreover, according to the same author, the complaint should not be brought to the Court of Appeal, but at the same Court in a panel, as it normally happens in the case of actions of species.



of Law no. 92/2012. Actually, this is nothing new since it was already in the "ordinary" rite for labor trials, operating in the second degree identical foreclosures and similar powers of the Board. After hearing the arguments, the same Court of Appeal may suspend the sentence claimed only if there are serious reasons<sup>39</sup>. This is certainly not a novelty of little relevance as to the judgments containing orders for reinstatement, the effectiveness of which was not considered in the "ordinary" process of labor, likely to be suspended by the Court of Appeal through the infringement as in art. 431 Code of Civil Procedure.

This third phase ends with a judgment, complete with reasons, that must be filed in the Chancery within ten days from the hearing of discussion. According to paragraphs 61-63 of art. 1, the final judgment that defines the complaint is ordinarily to be appealed to the Supreme Court, according to precisely the rules of the appeals to the Supreme Court<sup>40</sup>. Only two specificities must be punctuated for the degree of legitimacy. The first is the one that provides the oblige for the Supreme Court to set a hearing within six months from the filing of the appeal (paragraph 63, Art. 1 of law no. 92 of 2012): this precept is inspired by the need to accelerate the procedure, but which are still unrealistic, considering the time and the number of litigation in the courts. Secondly, it is confirmed that the inhibitory enforceability of the judgment of the second degree, according to the general principle of art. 373 Cod. Civ. Proc., has to be requested to the Court of Appeal, where however, the reference to paragraph 60 also appears to rely on the criterion laid down therein about the "serious reasons", certainly more subdued compared to the more restrictive requirement of serious and irreparable damage that is quoted in Article 373 Cod. Civ. Proc. and that both in the civil and labor litigation, is the "ordinary" condition for the inhibition of the judgments under appeal in Supreme Court.

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<sup>39</sup> It's clear the similarity with the ordinary appeal of judgments, with a petition for suspension, abandoning that of the complaint under Article 669 *terdecies* CCP, despite the formal definition used by the legislature, where the assumptions of suspension are marginal and exceptional features as already highlighted. On this point, it must be specified also that the appeal subject to the reasons outlined in Article. 433, comma 2, cod. proc. civ. disappears.

<sup>40</sup> Any phase of legitimacy must be promoted - now also for the reasons set out in the new art. 30, paragraph 1, of Law no. 183 of 2010, under penalty of forfeiture - within sixty days from the notification of the judgment, or of the notification, whichever is earlier, or pursuant to art. 327 CCP.





#### 4. Judicial practice, application problems, and "Guidelines" of the Courts: judicial conflicts and problems in the new proceedings' rite

Barely a year after the entry into force of the new rite, there have been clarifying interventions and interpretations of the Reform expressed by the courts about the scope and operation of the new trial procedure. As already foreseen by the doctrine, following the enactment of the "Riforma Fornero", the nodal points that have then generated conflicts are essentially three:

- the compulsory or optional nature of the new rite;
- the wrong choice of the rite and a possible conversion "in progress" of itself; and finally
- the problem related to the court called upon to decide during the phase of opposition, and specifically whether it can be identified in the same individual of the interlocutory.

As regards the first problem about the obligatory nature of the "new" rite, the doubts raised by the Labor Process doctrine have been expressed in the practice through different and contradictory interpretations of the Courts.

Indeed, in general, it's not the text of subsection 48 (the use of the present tense leaves no doubt <the request... proposes>), although clear, that may be noted as not mandatory, but rather it's the underlying rationale (*ratio*) and the function of the rite (the acceleration of judicial protection in view of the formation of a stable decision) that seem to argue in favor of not allowing the employee (or the employer, where it is apparent the interest of the latter to seek the assessment of legitimacy of the dismissal<sup>41</sup>), to opt for the rite in full knowledge ex art. 414 et seq Cod. Civ. Proc.<sup>42</sup>. This consideration is proved by a judgment of the Court of Monza

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<sup>41</sup> About the problem of interest on the part of the employer to choose to use the "Rito Fornero", see A. PICCININI, "Richiesta di accertamento della legittimità del licenziamento ex rito Fornero da parte del datore di lavoro", in Lav. Giur., 203, 4, 376. See also the order of the Court of Genoa on January 9, 2013 and the order in Reggio Calabria, 6 February 2013, both in Lav. Giur., 2013, 4, 367.

<sup>42</sup> See the doctrinal opinion espressa by A. BOLLANI, "Il rito speciale in tema di licenziamento, in La nuova riforma del lavoro, M. MAGNANI – M. TIRABOSCHI (a cura di), Milano, 2012; F. P. LUISO, "La disciplina processuale speciale della legge n. 92/2012 nell'ambito del processo civile: modelli di riferimento e inquadramento sistematico", Report during a Conference at CSM 5966, "La riforma del mercato del lavoro nella legge 28 giugno 2012, n. 92", Roma 29-31 ottobre 2012, typescript; M. DE LUCA, "Procedimento specifico per i licenziamenti nella recente riforma del



on 22<sup>nd</sup> October 2012<sup>43</sup> and the Court of Rome, by order of 28<sup>th</sup> November 2012<sup>44</sup>, and in policy and organizational documents of the Courts of Rieti<sup>45</sup> and Venice<sup>46</sup>, which consider in fact that the rite in question is not optional but mandatory; on the contrary, a different opinion is expressed by the Labor Section of the Court of Florence, which has released on 17<sup>th</sup> October 2012<sup>47</sup>, a document, approved unanimously by the judges of labor, that with an unusual (in practice) praiseworthy way, has set out the interpretative <options that all the judges of the labor will use within the Court of Firenze>. The first step of the document states the right of the plaintiff to choose whether to challenge the dismissal with the new rite or with an ordinary appeal under Art. 414 Cod. Civ. Proc., if deemed more suitable to the client's. The Florentine judges move their conviction by the premise that it would be illogical to constrain the party to propose more causes, thus multiplying the trials. It is then called in support of the voluntary nature of the rite the jurisprudence of the Supreme Court, albeit with reference to another procedure, which could accept the ordinary appeal because of the charge of anti-union as stated in art. 28 of Sol<sup>48</sup>.

Another matter concerning the one just summarized is related to the mistake in choosing the proceeding. The law makes no provision in this regard, revealing, even in this case, the guidelines of the law. The Court of Naples, by order dated October 26<sup>th</sup>, 2012 and the Court of Lecce, by order of 21<sup>st</sup> November 2012<sup>49</sup>, appear to suggest that the judge - when found that

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*mercato del lavoro (legge n. 92 del 2012): note minime*", in Foro It., 2012, 5, 345, 2; L. De ANGELIS, "Art. 18 dello statuto dei lavoratori e processo: prime considerazioni", in I Working Paper at "Centro Studi di diritto del lavoro Europeo "Massimo D'Antona" (WP C.S.D.L.E)", n. 152, 2012 and P. CURZIO, "Il nuovo rito per i licenziamenti", in I Working Paper del Centro Studi di diritto del lavoro Europeo (WP C.S.D.L.E) "Massimo D'Antona", 2012, n. 158, 18. *Contra*, C. CONSOLO – D. RIZZARDI, "Vere e presunte novità, sostanziali e processuali sui licenziamenti individuali", in Corr. Giur. 2012, 735.

<sup>43</sup> The order can be read on the website: [http://www.bollettinoadapt.it/site/home/bollettino-adapt/speciale/13-febbraio-2013-n-8.html?int=node/newsletter&ext=template/template\\_newsletter](http://www.bollettinoadapt.it/site/home/bollettino-adapt/speciale/13-febbraio-2013-n-8.html?int=node/newsletter&ext=template/template_newsletter).

<sup>44</sup> In Riv. Ita. Dir. Lav., 2012, 2, 1115.

<sup>45</sup> In [http://www.tribunale.rieti.giustizia.it/doc/modulistica/Prime\\_indicazioni\\_applicative\\_Rito\\_Fornero.pdf](http://www.tribunale.rieti.giustizia.it/doc/modulistica/Prime_indicazioni_applicative_Rito_Fornero.pdf), which paragraph 2 states that <the new rite is mandatory and not optional>.

<sup>46</sup> Published in Riv. Ita. Dir. Lav., 2012, 2, 1115.

<sup>47</sup> The document can be read in Riv. Ita. Dir. Lav., 2012, II, 1110.

<sup>48</sup> See Cass. 26<sup>th</sup> January 1982, n. 515, in Foro It., 1982, 1, 1048 ; Cass. 8<sup>th</sup> September 1995, n. 9503, in Mass. Giur. Lav., with notes by CECHELLA; Cass. 3rd May 2003, n. 6723, in Riv. Crit. Dir. Lav., 2003, 622.

<sup>49</sup> Both published in Mass. Jur. Lav., 2013, 1-2, 81, with note by A. VALLEBONA, "Domanda estranea al nuovo rito speciale per i licenziamenti: mutamento di rito e non improponibilità".



in the ordinary forms of art. 414 cod. Civ. Proc., a dismissal is challenged falling in art. 18 SoL. - shall, *ex officio*, govern the dispute according to the forms of special provision<sup>50</sup>. It seems that this guide line has been adopted by most of the Italian courts. With one exception, in this case resulting from a policy document issued by the Court of Monza on 30<sup>th</sup> October 2012<sup>51</sup>. According to this judicial office in fact <the claim under Article 414 cod. Civ. Proc., about a dismissal with real protection, proposed after July 18<sup>th</sup>, 2012, is inadmissible>.

The error can also occur in the opposite manner, i.e. in the presentation *ex* article n. 1, paragraph 48 of the Law n. 92 of 2012 of an application containing questions that are outside the area of the particular proceeding. On this specific aspect the Court of Milan, by order of 15<sup>th</sup> October 2012<sup>52</sup>, stated that the claim is unthinkable because - and this is what interests us - in the interlocutory phase is not provided the possibility of obtaining a conversion of the proceeding. There is, also in this case, some jurisprudence opinions (endorsed by almost all of the doctrine<sup>53</sup>) that interpret the norm in a different way, that's to say in favor of the possibility of conversion of the rite, even *ex officio*. This is the case with the guidelines of the Venice Court of 12<sup>th</sup> December 2012<sup>54</sup> where it is appropriately specified that - having realized the existence of the dimensional requirement for the application of Article 18 of Labor Statute -, it is possible to separate at the first hearing the summed up applications, changing the procedure and the date of hearing pursuant to art. 414 cod. Civ. Proc., continuing the special rite for the applications referred to in the new rite. The judge excludes the declaration of inadmissibility (that would terminate the process with pronouncement in ritual) being the vice corrected with the change of the same and re-establishing the "ordinary" labor trial *ex* art. 414 cod. Civ. Proc.. This solution, in my opinion, is to be preferred for two reasons: the first is that it is a way to

<sup>50</sup> About this issue see, A. VALLEBONA, "Domanda rientrante nel nuovo rito speciale per i licenziamenti proposta col rito del lavoro ordinario: trattazione con rito speciale", in *Mass. Giur. Lav.*, 2013, 1-2, 86.

<sup>51</sup> The text can be read in *Riv. Ita. Dir. Lav.*, 2012, 2, 1113.

<sup>52</sup> As far as we know, it's not yet published, but this judgment was taken as example by A. BOTTINI, "Il nuovo processo per l'impugnazione dei licenziamenti: obbligatorietà e selezione all'ingresso", in *Riv. It. Dir. Lav.*, 2012, 2, 1104, spec. 1106.

<sup>53</sup> Without claiming to be exhaustive, please refer to the following list: A. VALLEBONA, "Nuovo rito per i licenziamenti: obbligatorietà e applicazione di ufficio", in *Mass. Giur. Lav.*, 2013, 1-2, 85 and S. MAGRINI, "Flessibilità in uscita e discrezionalità del giudice", Report at the Conference at Accademia dei Lincei about "La Riforma del Mercato del lavoro", Roma 2-3 may 2013, typescript.

<sup>54</sup> It is possible to read the guidelines of the Court of Venice in *Riv. Ita. Dir. Lav.*, 2012, 2, 1115.



prevent the forfeiture proceedings pursuant to art. n. 32 of law no. 183 of 2010; the second is strictly connected to the first one so that, in order to avoid such forfeiture, the lawyers would be forced (if only for the mere sake) to multiply the complaints, with deleterious effect on the courtrooms, because of the loads of work on judges and for the same *ratio* of special ritual<sup>55</sup>.

An additional and important issue that has brought many problems in the courtrooms is related to the figure of the judge competent to hear the case in full knowledge and, specifically, whether it may be the same person of the interlocutory. This problem is particularly stressed in the Courts of smaller size in which a single judge, expert in labor issues, operates. Starting from the premise that in this circumstance the law did not comment about it, the operational model was left to the discretion of the judges. There is no denying that the grounds of the conflict arises from internal organization of the Court: the smaller it is, the lower it's the number of judging personnel and, of course, also the number of cases in the register; therefore the Court of reference will identify two judges<sup>56</sup>; while conversely, the problem does not arise, or arises minimally, because in the case of large courts, both judges and controversies have high numbers<sup>57</sup>.

## 5. Some concluding remarks

Wanting to draw conclusions on the so called "Rito Fornero", it has to be remarked firstly that it is appreciable, even if in principle, the considerable effort that the legislature

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<sup>55</sup> This solution would be in line with what was stated by the Constitutional Court on 12<sup>th</sup> March 2007, n. 77, in Foro It., 2007 1, 1009, which imposed the *traslatio iudicii* even between different jurisdictions, so that it would be inconceivable to remove a judgment or an application for which it is competent the same court.

<sup>56</sup> This is the case of the Court of Rieti and Monza mentioned above. They do not feel to exclude a priori the possibility that the phase of opposition in full cognition has to be decided by the same judge who was involved in the first phase. On this point, in fact, in the Court of Rieti has determined that *<the judge of urgent step is not incompatible with that of opposition when it comes to decide>*. On the same wave length also, the Court of Piacenza on 12<sup>th</sup> November 2012, in Lav. Giur., 2013, 2, 158.

<sup>57</sup> For example, the Courts of Florence on 17<sup>th</sup> October 2012 and in Venice on 12<sup>th</sup> December 2012 already mentioned, agree to exclude that the opposition is being decided by the same judge who has taken steps in the interlocutory. In this sense, the Court of Bologna on 27<sup>th</sup> November 2012, in [www.dplmodena.it](http://www.dplmodena.it), has pronounced an opinion about the appeal against a judge of the employment section under the ground that, since he had participated and emitted an order during the first phase of the trial, was not entitled to judge the next phase of opposition, otherwise he would have violated the Article. 51 CCP.



sought to accomplish, offering an alternative procedural and faster channel for disputes within the scope of the actual protection.

It does not seem, however, that the first impression can be considered entirely positive, indeed more shadows than lights emerge. Shadows are exacerbated by Tribunals enunciations which are often at opposite sides and have produced a real "jungle in the jurisprudence."

Furthermore, the doubling of the processes in the first instance and the lack of foreclosures in the interlocutory, have already resulted in an insecure time dilation assumed for the conclusion of trials and an increase in the rate of variance of judicial decisions. A dilation that is added to that which arises from substantial problems relating to rewriting the art. n. 18 of Labor Statute, that in the near future will enforce the doubts on the merit and the ritual itself<sup>58</sup>.

In this sense, we should ask ourselves two questions: the first one is about whether it was necessary to introduce this new rite, considering the fact, which lays in the negative sense, that few month before the "*Riforma Fornero*", a new legislative instrument, the Legislative Decree no. 150<sup>59</sup> of September 1<sup>st</sup>, 2011, was launched and it aimed at the reduction and simplification of civil proceedings of cognition. Moreover, it fits into a frame that is not that of ordinary civil proceedings, but that of Labor trial, already considered a special and "fast" ritual, compared to ordinary civil proceedings.

The second question is about whether the growing jurisprudential uncertainty is beneficial or not for the acclaimed << prospect of growth >> to which it was entitled the whole Law n. 92 of 2012.

In a mere indicative way, in order not to frustrate the efforts of the legislature of 2012 and to make less heavy the four sets of proceedings<sup>60</sup>, this new procedure should be perhaps

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<sup>58</sup> See A. SALETTI – B. SASSANI, "*Commentario alla riforma del codice di procedura civile (legge 18 giugno 2009, n. 69)*", Torino, 2009.

<sup>59</sup> For a deeper reading see A. SALETTI – B. SASSANI, "*Commentario alla riforma del codice di procedura civile (legge 18 giugno 2009, n. 69)*", Torino, 2009.

<sup>60</sup> A. MARESCA, "*Il nuovo regime sanzionatorio del licenziamento illegittimo: le modifiche all'art. 18 statuto dei lavoratori*", in Riv. Ita. Dir. Lav., 2012, 420, spec. pag. 457. The author underlines that the load due to the four



accompanied by the reorganization of judicial offices – which is the result of mere political purposes for some commentators of the doctrine<sup>61</sup> -, such as the increase in the number of judges, or that of human capital in support of the court, as happened in 1973 in the aftermath of reform that involved the Labor procedures. Failing that, it can't be denied that the introduction of a new rite was the easiest and less expensive answer in order to meet immediately the expectations of the audience, especially foreign<sup>62</sup>, but at the same time the tool that will block the courtrooms, slowing other disputes.

#### BIBLIOGRAPHY:

BALLESTRERO, M. V., *Declinazioni di Flexicurity. La riforma italiana e la deriva spagnola in Lav. dir., La riforma del lavoro del governo "tecnico"*, 2012, 3-4, 445;

BARRACO, E., *"Il rito speciale per le cause di licenziamento: il legislatore complica anche il profilo processuale"*, in *Mass. Giur. Lav.*, 2012, 11, 894;

BENASSI, G., *"La riforma del mercato del lavoro: modifiche processuale"*, in *Lav. Giur.*, 2012, 8-9, 749;

BOLLANI, A., *"Il rito speciale in tema di licenziamento"*, in *La nuova riforma del lavoro*, M. MAGNANI – M. TIRABOSCHI (a cura di), Milano, 2012;

BORGHESI, D., *"I licenziamenti: tentativo di conciliazione e procedimento speciale, in Commentario alla riforma Fornero"*, F. CARINCI – M. MISCIONE (a cura di), in *Supplemento a Dir. Prat. Lav.*, 2012, 33, 14;

BOTTINI, A., *"Il nuovo processo per l'impugnazione dei licenziamenti: obbligatorietà e selezione all'ingresso"*, in *Riv. It. Dir. Lav.*, 2012, 2, 1104;

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levels of courts is further burdened by the preventive procedure aimed at reconciliation in the case of dismissal for justified and objective reason.

<sup>61</sup> R. CAPONI, *"La corsia preferenziale per alcune controversie di lavoro rallenta le altre in assenza delle adeguate risorse"*, in *Guida al dir.*, 2012, 18, 9.

<sup>62</sup> *Ibidem.* R. CAPONI as above.



CAPONI, R., *“La riforma dell’appello dopo la svolta delle commissioni parlamentari,”* in *Judicium.it*, 2012;

CAPONI, R., *“La corsia preferenziale per alcune controversie di lavoro rallenta le altre in assenza delle adeguate risorse”*, in *Guida al dir.*, 2012, 18, 9;

CARINCI F. –MISCIONE M., *“Presentazione, in Commentario alla riforma Fornero”*, F. CARINCI – M. MISCIONE (a cura di), in *Supplemento a Dir. Prat. Lav.*, 2012, 33, 7;

CATALDI, M., *“Il procedimento sommario di cognizione ex artt. 702 bis ss. c.p.c. e d.lgs. 1.9.2011, n. 150”*, Torino, 2013;

CAVALLARO, L., *“ Il processo del lavoro al tempo dei <<tecnicici>>”*, in *Riv. Trim. Dir. Proc. Civ.*, 2013, 285;

CIRIELLO A. – LISI M., *“Disciplina processuale”*, in G. PELLACANI (a cura di), *Riforma del lavoro*, Milano, 2012, 281;

CONGEDUTI, M., *“Natura bisafica del primo grado di giudizio nel “rito Fornero”: poteri istruttori del giudice e obbligo di astensione”*, in *Lav. Giur.*, 2013, 2, 158;

CONSOLO C. –RIZZARDO D., *“Vere e presunte novità, sostanziali e processuali sui licenziamenti individuali”*, in *Corr. Giur.* 2012, 735;

CONSOLO C. –RIZZARDO D., *“Vere e presunte novità, sostanziali e processuali, sui licenziamenti individuali”*, in *Corr. Giur.*, 2012, 6, 736;

COSMAI, P., *“L’impugnazione del licenziamento: limiti al sindacato giurisdizionale e specialità del rito. Primi spunti di riflessione, in Commentario alla riforma Fornero”*, F. CARINCI – M. MISCIONE (a cura di), in *Supplemento a Dir. Prat. Lav.*, 2012, 33, 22;

CURZIO, P. *“Il nuovo rito per i licenziamenti”*, in *WP C.S.D.L.E “Massimo D’Antona”*, n. 158, 2012, 18;

D. DALFINO, *“L’impugnativa del licenziamento secondo il c.d. “Rito Fornero”: questioni interpretative”*, in *Foro It.*, 2013, 1, 6;



DALFINO, D., *“Sull’inapplicabilità del nuovo procedimento sommario di cognizione alle cause di lavoro”*, in Foro It., 2009, 5, 392;

DALFINO, D., *“Il nuovo procedimento in materia di impugnativa del licenziamento”* (in L. 28th June 2012), in Giusto Proc. Civ., 2012, 3,759;

De ANGELIS, L., *“Rilievi critici al progetto Foglia di riforma del processo del lavoro”*, in WP C. S. D. L. E. “Massimo D’Antona”, n. 59, 2007;

De ANGELIS, L., *“Art. 18 dello statuto dei lavoratori e processo: prime considerazioni”*, in I Working Paper del Centro Studi di diritto del lavoro Europeo “Massimo D’Antona” (WP C.S.D.L.E), n. 152, 2012;

DE CRISTOFORO M. - GIOIA G., *“Il nuovo rito dei licenziamenti: l’anelito alla celerità per una tutela sostanziale dimidiata”*, in Le Nuove Leggi Civ. Comm., 2013, 1, 3 ed in C. CESTER (a cura di), *“I licenziamenti dopo la legge n. 92 del 2012”*, Padova, 2013, 377;

DE FEO, D., *“La prima fase del rito speciale in materia di licenziamenti”*, in Arg. Dir. Lav., 2013, 1, 101;

DE LUCA, M., *“Procedimento specifico per i licenziamenti nella recente riforma del mercato del lavoro (legge n. 92 del 2012): note minime”*, in Foro It., 2012, 5, 345, 2;

FEZZI M.– SCARPELLI F., *“Guida alla Riforma Fornero”*, M. FEZZI – F. SCARPELLI (a cura di), *“I quaderni di Wikilabour”*, Milano, July 2012;

G. BENASSI, *“La riforma del mercato del lavoro: modifiche processuali”*, in Lav. Giur., 2012, 8-9, 757;

LUISO, F. P., *“La disciplina processuale speciale della legge n. 92/2012 nell’ambito del processo civile: modelli di riferimento e inquadramento sistematico”*, Repor during a Conference at CSM 5966, *“La riforma del mercato del lavoro nella legge 28 giugno 2012, n. 92”*, Roma 29-31 ottobre 2012, typescript;





MAGRINI, S., *“Flessibilità in uscita e discrezionalità del giudice”*, report to the conference held at the Accademia dei Lincei on "The Reform of the Labour Market", Rome May 2<sup>nd</sup> - 3<sup>rd</sup>, 2013, typescript;

MAGRINI, S., *“Quer pasticciaccio brutto dell’art. 18”*, in Arg. Dir. Lav., 2012 3, 535;

MAGRINI, S., *“La risoluzione del rapporto di lavoro (Appunti per gli studenti del Dipartimento di Giurisprudenza della LUISS Guido Carli)”*, Free University Press, 2012;

MARESCA, A., *“Il nuovo regime sanzionatorio del licenziamento illegittimo: le modifiche all’art. 18 statuto dei lavoratori”*, in Riv. Ita. Dir. Lav., 2012, 420;

PAGNI, I., *“L’evoluzione del diritto processuale del lavoro tra esigenze di effettività e rapidità della tutela”*, in Riv. Trim. Dir. Proc. Civ., 2013, 1, 75;

PALLADINI, A., *“Opposizioni e impugnazioni nel rito “Fornero””*, Typewritten Report at the Conference *“La riforma del mercato del lavoro”*, Milano, 17th october 2012;

PICCININI, A., *“Richiesta di accertamento della legittimità del licenziamento ex rito Fornero da parte del datore di lavoro”*, in Lav. Giur., 203, 4, 376;

RASCIO, N., *“Note sull’impiego del reclamo (in luogo dell’appello) come mezzo per impugnare le sentenze con devoluzione automatica piena”*, in Riv. Dir. Proc., 2008, 955;

ROMEO, C., *“Le controversie nella legge Fornero tra specialità e ambito di competenza”*, il Lav. Giur., 2013, 3, 221;

SALETTI A. –SASSANI B., *“Commentario alla riforma del codice di procedura civile (legge 18 giugno 2009, n. 69)”*, Torino, 2009;

SORDI, P., *“L’ambito di applicazione del nuovo rito per l’impugnazione dei licenziamenti e disciplina della fase della tutela urgente”*, typescript, Relazione al Convegno di Roma del Consiglio Supremo della Magistratura on 30th October 2012;

TEGLIA, G., *“Brevi note sul nuovo processo per i licenziamenti introdotto dalla riforma del mercato del lavoro”*, in Lav. Giur., 8-9, 2012, 763;



VALLEBONA, A., *“Domanda rientrante nel nuovo rito speciale per i licenziamenti proposta col rito del lavoro ordinario: trattazione con rito speciale”*, in *Mass. Giur. Lav.*, 2013, 1-2, 86;

VALLEBONA, A., *“Parola d’ordine: salvare il processo del lavoro”*, in *Mass. Giur. Lav.*, 2007, 1-2, 5;

VALLEBONA, A., *“La Riforma del lavoro 2012”*, 2012, Torino, e-book;

VALLEBONA, A., *“Nuovo rito per i licenziamenti: obligatorietà e applicazione di ufficio”*, in *Mass. Giur. Lav.*, 2013, 1-2, 85;

VIOLA, L., *“L’appello motivato della legge 134/2012”*, in *Civ. Proc. Rev.*, 2013, 1, 87;

#### JURISPRUDENCE:

Cass. 26<sup>th</sup> January 1982, n. 515, in *Foro It.*, 1982, 1, 1048;

Cass. 3rd May 2003, n. 6723, in *Riv. Crit. Dir. Lav.*, 2003, 622;

Cass. 8<sup>th</sup> September 1995, n. 9503, in *Mass. Giur. Lav.*, with notes by CECHELLA;

Cass. December 2nd, 1996, n. 10756, in *Rep. Foro it.*, 1996, 5340, 44;

Cass. June 26, 2001, n. 8765, in *Rep. Foro It.*, 2001, 5185, 41;

Court of Bologna on 27<sup>th</sup> November 2012, in [www.dplmodena.it](http://www.dplmodena.it);

Court of Genoa on January 9, 2013, in *Lav. Giur.*, 2013, 4, 367;

Court of Reggio Calabria, 6 February 2013, in *Lav. Giur.*, 2013, 4, 367;

Court of Piacenza on 12<sup>th</sup> November 2012, in *Lav. Giur.*, 2013, 2, 158;

Court of Bari on October 17<sup>th</sup>, 2012, in *Foro it.*, 2013, 1, 673;

Constitutional Court on 12<sup>th</sup> March 2007, n. 77, in *Foro It.*, 2007 1, 1009;