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Continuity and discontinuity in the scope of social rights in the recent case law of the Court of Justice

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1. *The field of application of the Nice Charter: does the 2021 KO judgment reopens the question?*

Two relatively recent judgements of the Court of Justice allow dealing with the evergreen topic of social rights and especially their effectiveness, which depends first and foremost on the applicability of the sources that contain them. This is why, at the supranational level and not only, as will become evident shortly, the question of the scope of application of the Charter of Fundamental Rights is decisive.

In this regard, a judgment of the Court of Justice of 17 March 2021, *KO*, C-652/19, seems to undermine the certainties reached up to that point since, after recalling that "the provisions of the Charter apply, under Article 51(1) thereof, to the Member States only when they are implementing Union law. Article 6(1) TEU and Article 51(2) of the Charter make it clear that the Charter does not extend the field of application of Union law beyond the powers of the European Union and does not establish any new power or task for the European Union, or modify powers and tasks as defined in the Treaties. The Court is, therefore, called upon to interpret, in the light of the Charter, the law of the European Union within the limits of the pow-

ers conferred on it"[1]; it emphasises that for "it to be found that Directive 98/59 and, consequently, the Charter, are applicable to the main proceedings, that directive must impose a specific obligation in respect of the situation at issue in those proceedings, which has been implemented by the provisions of Italian law concerned"[2].

However, "such an obligation is not apparent from the provisions of Directive 98/59. The main objective of that directive is to make collective redundancies subject to prior consultation with the workers' representatives, and prior notification to the competent public authority"[3] and "Directive 98/59 provides for only a partial harmonisation of the rules for the protection of workers in the event of collective redundancies, that is to say, harmonisation of the procedure to be followed when such redundancies are to be made"[4] is ensured.

In particular, "the means of protection to be afforded to a worker who has been unlawfully dismissed as part of a collective redundancy, following a failure to comply with the criteria on the basis of which the employer is required to determine the workers to be dismissed, are manifestly unrelated to the notification and consultation obligations arising from Directive 98/59. Neither those means nor those selection criteria fall within the scope of that directive. Consequently, they remain within the Member States' competence"[5].

These affirmations of the Court of Justice contrast previous case law (from *Akeberg* to *Florescu* via *Poclava*) that had yet to go into detail and thus had left it to be understood that once an institution is regulated at the European level through a directive. This source has been transposed into national law, and the implementation of Union law allows the Charter of Fundamental Rights rules to enter the Member States' legal systems.

Apart from the change of orientation that is always possible, there is, however, an inconsistency in the reasoning of the most recent judgment of the Court of Luxembourg since the discourse should be differentiated according to whether one refers to Article 20 or Article 30 CFREU. While

[1] CJEU, C-652/19, par. 34.
[2] *KO*, par. 37.
[3] CJEU, C-652/19, par. 40.
[4] CJEU, *KO*, par. 41.
[5] CJEU, *KO*, par. 42.

the first rule states that 'all persons are equal before the law' and therefore effectively does not concern dismissals, Article 30, as is well known, refers precisely to this institution, stating that "every worker has the right to protection against unjustified dismissal, following Union law and national laws and practices". Therefore, implementing the directive on collective redundancies cannot permit the entry of Article 20 into domestic law. In contrast, the same cannot be said of Article 30, even if the effects of applying that provision to the present case would have been substantially irrelevant. Nevertheless, such an interpretation by the Court of Justice risks further weakening the Charter of Fundamental Rights and, thus, the application of social rights in domestic law.

2. Continued. *The possible interferences with the relevant Italian constitutional case law*

With the partial repealing of the Court of Justice will also have to reckon with the Italian Constitutional Court, which, as is known, regarding labour law, in Judgment 194 of 2018, had settled on the positions of the Court of Justice expressed up to that point.

The Constitution Court argued as follows about EU law profiles.

1) Under Article 51 CFREU, the Court of Justice of the European Union has consistently held that the provisions of the CFREU apply to the Member States when they act within the scope of Union law. And this is clear to the Constitutional Court, according to which 'for the Charter of Fundamental Rights of the European Union to be invoked in a case of constitutional legitimacy, the case subject to domestic legislation must be governed by European law – in so far as it is inherent in acts of the Union, in national acts and conduct which give effect to European Union law – and not by national rules alone which have no connection with that law' (judgment no. 80 of 2011). And in the present case, concerning the regulation of sanctions in the event of individual unlawful dismissals, there is no evidence to suggest that the censured regulation of Article 3(1) of Legislative Decree No 23 of 2015 was adopted in the implementation of the European Union law.

2) For the applicability of the CFREU, Article 3(1) of Legislative Decree No 23 of 2015 should fall within the scope of a rule of Union law other

than those of the Charter itself. However, the mere fact that Article 3(1) of Legislative Decree No 23 of 2015 falls within an area in which the Union has competence within the meaning of Article 153(2)(d) of the Treaty on the Functioning of the European Union cannot entail the applicability of the Charter given that, as regards the regulation of individual dismissals, the Union has not in practice exercised that competence. Moreover, it cannot be considered that the legislation censured was adopted in the implementation of Directive 98/59/EC (on collective redundancies) since, as is evident, Article 3(1) of Legislative Decree No 23 of 2015 regulates individual redundancies.

3) To argue the existence of a European case, the respondent argued that they would fall within the scope of the Union's employment policy and the measures adopted in response to the Council's recommendations. Those recommendations, provided for in Article 148(4) TFEU fall within the Council's discretion and have no binding force, so this is the implicit reasoning conducted by the Constitutional Court; they cannot be regarded as Union law.

This is also valid beyond labour law. The Constitutional Court, in its judgment 149 of 2022, stated that there is no doubt that the European Union's secondary law governs the matter of copyright protection, in particular by Directive 2001/29/EC, and this implies that the domestic regulation falls within the scope of implementation of European Union law within the meaning of Article 51 CFREU, with the consequent obligation, on the part of the competent Italian administrative and judicial authorities, to respect the rights recognised by the Charter, including Article 50 CFREU, which sanctions at the EU level the right to *ne bis in idem*. As can be seen, also in this case, the Constitutional Court generically refers to the secondary source of the Union, from which derives the applicability of the principle contained in the Charter to the whole matter of copyright, even if the directive only protects certain aspects.

3. *The notion of the worker in anti-discrimination law: the "told" and "untold" of the 2023 JK judgment*

What has just been stated is countered by another ruling of the Court of Justice that does not concern the Charter of Fundamental Rights but re-

lates to a prominent social right, the right not to be discriminated against at work, stemming from Directive 2000/78. The reference is to the ruling of 12 January 2023, Case C 356/21, *J.K.*, according to which the scope of application of the Directive is rather broad since that source "Directive 2000/78 is not an act of EU secondary legislation such as those based, in particular, on Article 153(2) TFEU, which seek to protect only workers as the weaker party in an employment relationship, but seeks to eliminate, on grounds relating to social and public interest, all discriminatory obstacles to access to livelihoods and to the capacity to contribute to society through work, irrespective of the legal form in which it is provided"[6]. For these reasons, "although Directive 2000/78 is thus intended to cover a wide range of occupational activities, including those carried out by self-employed workers in order to earn their livelihood, it is nevertheless necessary to distinguish activities falling within the scope of that directive from those consisting of the mere provision of goods or services to one or more recipients and which do not fall within that scope"[7]. In the present case, the Court finds that it is not a supply of services but "the activity pursued by the applicant constitutes a genuine and effective occupational activity, pursued on a personal and regular basis for the same recipient, enabling the applicant to earn his livelihood, in whole or in part. Thus, "the question whether the conditions for access to such an activity fall within Article 3(1)(a) of Directive 2000/78 does not depend on the classification of that activity as 'employment' or 'self-employment', given that the scope of that provision and, accordingly, the scope of that directive must be construed broadly"[8]. In particular, "article 3(1)(c) of Directive 2000/78 refers to 'dismissal' only by way of example of 'employment and working conditions', and covers, among other things, the unilateral termination of any activity referred to in Article 3(1)(a) of that directive"[9] and, therefore, also of a self-employed activity. And this can be safely verified. "It should be noted, ..., that just as an employed worker may involuntarily lose his or her job following, for example, a 'dismissal', a person who has been self-employed may also find himself or herself obliged to stop working due to his or her contractual counterparty and thus be in a vulner-

[6] CJEU, C-356/21, par. 43.
[7] CJEU, *J.K.*, par. 44.
[8] CJEU, *J.K.*, par. 47.
[9] *J.K.*, par. 62.

able position comparable to that of an employed worker who has been dismissed"[10].

In short, the scope of the anti-discrimination protection guaranteed by Directive 2000/78, at least concerning conditions of employment and occupation, is extended by the Court of Justice also to forms of self-employment that are not merely the provision of services, and this is an undoubted advance in social rights.

However, even this ruling presents some obscure points that would have deserved a more in-depth study precisely concerning the Charter of Fundamental Rights rules, of which no mention is made. The reference is again to Article 30 and, above all, Article 21. The Court's choice not to refer to any of these provisions does not appear accidental.

Starting from the first, the Luxembourg judges, also in the light of the *KO* judgment, confirm that the scope of application of the rules of the Charter in domestic law is strictly linked to the institution to which the rule refers so that Article 30 can be applied only in the context of the implementation of directives concerning dismissals (moreover with all the limitations highlighted above).

It should not be forgotten, however, that Article 21 CFREU – according to which "any form of discrimination based, in particular, on sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation" is prohibited – was the subject of a judgment of the Court of Justice almost ten years ago, *Association de médiation sociale* of 2014. To be precise, the Court of Justice stated at the time that "the principle of non-discrimination ... enshrined in Article 21(1) of the Charter, is in itself sufficient to confer on individuals a right that can be invoked as such" provided, however, that the case to which this rule refers "falls within the field of application of the Charter".

So, one wonders why there is no reference to what has just been said in the 2023 judgment. The absence of even a mention of Article 21 conceals an attitude of caution on the Court of Justice concerned with addressing the personal scope of application of the Charter's rules in the field of labour law. In short, a connection between Article 21 and Directive 2000/78 in the present case would have risked opening a debate on applying the Charter

[10] *J.K.*, par. 63.

rule beyond employment. In contrast, in this way, the Court confines the question to the profile of working and employment conditions referred to in Directive 2000/78. In other words, the Luxembourg judges make it clear that the interpretation of the directive's scope concerning employment and work conditions is linked to the wording used in the 2000 directive while avoiding addressing whether that interpretation can be exported to Article 21 CFREU. It is clear, however, that the question of the personal scope of application of all Charter provisions, or at least of those for which it is not clear whether they apply only to employment, remains in the background and sooner or later will also have to be addressed by the Court of Justice.

Keywords

Social rights, Nice Charter, Scope, Court of Justice, Case law.