Studio Legale Picotti

Associazione tra professionisti costituita il 26.01.1987
www.studiopicotti.com e-mail: segreteria@studiopicotti.com

Prof. Avv. Lorenzo Picotti - picotti@studiopicotti.com
Ordinario di Diritto penale e diritto penale dell'informatica nell'Università degli Studi di Verona – Patrocinante in Cassazione

Avv. Gabriella de Strobel – destrobel@studiopicotti.com
Avv. Simonetta del Medico - del medico@studiopicotti.com
Avv. Tommaso Galvanini- galvanini@studiopicotti.com
Avv. Greta Sona-sona@studiopicotti.com
Dott. Veronica Rossi – rossi@studiopicotti.com
Dott. Carlo Sorio – sorio@studiopicoti.com
Dott. Felice Rubino – rubino@studiopicotti.com

Consulenza:
Prof. Daniele de Strobel
Già Docente di Tecnica delle Assicurazioni all'Università di Parma

Verona,24 January 2011

Attn.
JACKIE MORIN
Head of Unit
Social protection and Integration
Employment and Social Affairs
European Commission
Rue Joseph II/1000 Bruxelles
e-mail:

Jackie.morin@ec.europea.eu

Re.: <u>Foreign mother-tongue lettori // Italian Republic - art. 26 LAW n. 240 30 December 2010, ("Gelmini Reform")</u>

Dear Mr Morin,

Following the preceding opinion, dated 7 December 2010, sent to you on instruction from Mr David Petrie – President of the Association of Foreign Lecturers in Italy (A.L.L.S.I.) – I would like to integrate my previous considerations in the light of the successive law proposed by the Italian Government and approved by the Parliament, as referred to above. For your information and better understanding, I hereby cite the norm in question contained in art. 26, entitled "Discipline for foreign cultural exchange lecturers", clause 3, Law n. 240 passed on 30 December 2010 (known as the Gelmini Italian University Reform).

This clause, inserted following an amendment proposed during the final Parliamentary discussion of the reform, purports to be a mere "authentic interpretation" but in fact is neither coherent with the title of the Article – as it does not apply to the foreign cultural exchange lecturers who are regulated by clauses 1 and 2 – nor is it merely "interpretive" as it modifies

the current legislative framework governing the lettori radically and is pejorative in its effects, without finding any remedy to the discrimination suffered by lettori in administrative practice.

Indeed, clause 3 establishes as follows:

> *Article 1, clause 1, of the decree law 14 January 2004, n. 2, converted with amendments, into law n. 63, 5 March 2004, is interpreted in the sense that in execution of the decision of the European Court of Justice 26 June 2001 in Case C-212/99,* ***salaries corresponding to*** *those of* ***tenured part-time researchers*** *in proportion to the annual hourly workload actually undertaken, must be attributed to the* ***collaborators & language experts*** *employed by the* ***affected universities*** *as foreign mother-tongue lettori,* ***with effect from*** *the first day of employment as foreign mother-tongue lettori under article 28 of the decree of the President of the Republic 11 July 1980, n. 382* ***up to*** *the date of the start of the* ***new employment relationship*** *as collaborators & language experts under article 4 of the decree law n. 120, 21 April 1995, converted with modifications into law n. 236, 21 June 1995.* ***Starting from this last date****, in order to safeguard the rights deriving from the* ***preceding employment relationship****, the collaborators & language experts have the right to maintain, as an individual salary, the amount corresponding to the difference between the last salary paid as foreign mother-tongue lettori, calculated according to the criteria stipulated in the cited decree law n. 2 of 2004 converted with modifications into law n. 63 of 2004 and, where this is lower,* ***the overall salary due to them according to the provisions of the collective contractual*** *arrangement* ***applicable under*** *decree law n. 120, 21 April 1995, converted with modifications into law* ***n. 236, 21 June 1995****. From the date this present law comes into force, all* ***pending court cases*** *relating to these matters are forthwith* ***extinguished****. [own bolding]*

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Several points are in clear and explicit contrast with European Union Law and the principles expressed by the European Court of Justice since 1989 in at least 6 decisions concerning the rights of lettori employed by Italian Universities under the terms of art. 28

DPR n. 382 of 1980 (4 were interpretive and 2 rulings found Italy to be in breach of community law).

Consequently the new law perpetuates and aggravates further the violations carried out by the Italian State, explicitly demonstrating both its **will to discriminate** in terms of employment conditions and salary and to **evade** the application of the decisions of the Court of Justice, in particular the rulings of 26 June 2001, 18 July 2006 and 15 May 2008 (the latter two rulings completely ignored by the clause in question).

The following main aspects should be considered by the European Commission.

1. In **the first place,** art. 26 is in open and explicit **contrast with the principles of community law** expressed by the European Court of Justice (namely 30 May 1989 and 2 August 1993, cases known as Allué I and II; 26 June 2001 and 18 July 2006, that found Italy to be in breach of community law; and 15 May 2008, Delay), because it establishes a consequence that must be absolutely avoided after the recognition that the annual limit to employment contracts under art. 28 DPR 382 of 1980 is illegitimate: namely **the splitting into two parts** of the employment relationship of all University lettori, previously employed under the terms of the cited norm, now abrogated, as an effect of the general and common provisions established for all national workers in articles 1 and 2 of Law n. 230, 30 April 1962 (which regulated the conversion of fixed term contracts into open-ended contracts at the time of the Court of Justice decisions in 1993 and 2001) and by Legislative Decree n. 368 of 2001 that has substituted it, which is that once the fixed term limits established in employment contracts have been determined to be null, the said employment contracts are "converted" into a **single** open-ended contract *ab origine*, that is to say valid from the date of first recruitment until its definitive and final cessation, with every favourable consequence regarding salary increments, seniority and career progression, as well as the payment of pension contributions.

In particular, the decision of the EC Court of Justice on 26 June 2001, determining the application of arts. 1 and 2 L. 230/1962 to the employment relationships *de quibus*, expressly determined in paragraph 21: "…*when a worker .... is entitled, under Law No 230, to have his fixed-term employment contract converted into one of indeterminate duration, all his acquired*

rights are guaranteed from the date of his original recruitment. That guarantee has consequences not only with regard to increases in salary, but also with regard to seniority and to payment, by the employer, of social security contributions." In paragraph 30 the Court determined, furthermore, that if national workers were entitled to this treatment, then the lettori employed under art.28 "*must also be entitled to similar reinstatement with effect from the date of their original recruitment*".

In the most recent decision of 15 May 2008, Delay, C-276/2007, the European Court has even more explicitly determined: "*the application of Law 230/62 to national workers presupposes the* ***continuation of the employment relationships*** *between the employer and the workers"* (par.24): consequently in the case in question Ms Delay obtained the reconstruction of seniority as a **single** employment relationship, in terms of salary increments and social security contributions, from the date of her first recruitment until the present, with the right to maintain employment as a *lettrice*, as established by the Appeal Court in Florence in ruling n. 54 on 14 January 2011.

Indeed, art.1 of Decree Law n. 2 of 2004, converted in Law 63 of 2004 is expressed in this sense, and has been duly interpreted and applied by all the domestic case law, in particular the Cassation Court (following the numerous law suits brought by lettori consequent to the fact that the Italian Universities not mentioned explicitly in the cited law – except the six universities considered by the now closed infringement proceedings - did not spontaneously apply the terms of the law in their administrative practice), resulting in the reconstruction of the employment and career of the lettori as **one single** relationship, with reference to the objective "minimum" parameter corresponding to another category of teaching staff in the Italian universities with "similar" functions, identified as "tenured part-time researchers".

Only in these terms did the Court of Justice determine that the new legal framework in 2004 was an adequate basis for the "reconstruction of the seniority" of the lettori.

On the other hand, the new norms in 2010 under discussion here establish that this parameter is applicable only for the "**preceding relationship**", namely from their recruitment

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until the stipulation of new contracts as CELs, a figure introduced by law 236 of 1995, a law which itself was condemned on several points by the Court of Justice in the judgements of 2001, 2006 and 2008, precisely because it was deemed **insufficient** insofar as it did not eliminate all the unfavourable effects of the abrogated regulation of the fixed term contracts, guaranteeing a salary and social security conditions "as though" the discrimination had never existed.

However, with clear discriminatory intent, and limiting acquired rights, the law under examination **blocks** the right to seniority to 1994 or 1995, according to the cited parameter, then explicitly declaring a successive "**new relationship**", regulated by the legislation of 1993-1995 and the successive collective contractual arrangements, both national and local, that the Court of Justice had already determined to be inadequate to guarantee the rights of the lettori and former lettori employed previously (cf. in particular judgements 2006 and 2008).

Furthermore, the consolidated jurisprudence of the Italian Cassation Court has clarified that this norm can regulate only recruitment after 1st January 1994, whilst it cannot be applied to the lettori and former lettori employed under art. 28 DPR 382 of 1980, who have the right to the more favourable treatment recognised by L. 63 of 2004: the norm in art. 4, L. n. 236/95 *"that regulates the new professional figure of foreign mother-tongue linguistic collaborator .... **is inapplicable to employment relationships of foreign language lettori contracted on the basis of the preceding legislation**"* (…). Indeed "…***there is no transformation of the relationship*** *already in force with the lettori* [ex art. 28 cit.] *with the stipulation of new contracts according to the provisions of L. 236/95*" (e.g. Cassation rulings: Cass., 22.02.2007, n. 4147; Cass., 11.11.2003, n. 16959; Cass. 16.08.2004, n. 15931; Cass., 10.05.2005, n. 9737).

Even if clause 3 of art. 26 law 240 of 2010 declares – in a very confused provision – the "conservation" of the eventual acquired "difference of treatment", in the foreseen passage to a "new" relationship as a CEL, this eventual difference, (which is very slight or in some cases even negative because it only concerns the early and smaller number of years of service),

would then be *frozen* until wholly *absorbed* by the different and **inferior** treatment established **exclusively** for the foreign mother-tongue lettori and the CELs: that is to say, categories of workers that are *both* identified on the basis of foreign nationality, without any link to the salary progressions and seniority of national workers that carry out *similar* teaching functions in the Italian universities.

Therefore, it is evident that art. 26 under consideration, that claims to give validity to the later CEL contracts, is in contrast with the European rulings of 2001, 2006 and 2008 (cf. in particular paragraphs 21, 22, 25, 28, 29, 30 and 31 of ECJ Judgement 26.6.2001; paragraph 1 of ECJ Judgement 18.7.2006; paragraphs 22 and 23 of ECJ Judgement 15.5.2008), contradicting the general rule of the "conversion" of the first contract of employment under art. 28 DPR 382 of 1980 into a single open-ended employment relationship.

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2. In the second place, the new norm does **not** state that the salary conditions of tenured part-time researchers are only the guaranteed minimum parameter for all lettori recruited under art. 28 DPR 382/1980, and that more favourable terms already acquired must be maintained, whether acquired through contracts, on the basis of preceding judiciary decisions or anyway due on the basis of determinations on the "***adequacy"*** of the salary established by contract or anyway received, according to the provisions of art. 36 of the Italian Constitution.

The new legislation, in restricting the parameter for the determination of the salary of former lettori solely to tenured part-time researchers, has reduced the salary that they may receive, in explicit contrast to the *ratio decidendi* of L. 63/2004, that is to eliminate all discrimination between national and foreign workers, as determined also by the successive **ECJ Judgement of 18 July 2006** - case C-119/04. In paragraph 38, indeed, in interpreting the phrase in art. 1 of L. 63/2004 ("*save more favourable terms")*, the Court explicitly affirmed: "*...it would appear that the application of those criteria **does not**, in certain cases, preclude the career of a former assistant from being reconstructed on **more advantageous terms.**"*

An identical interpretation has been given by the Italian Cassation Court, which stated: "*The foreign mother-tongue University lettori, where they have become linguistic collaborators and experts, have the right at the very least to the economic terms corresponding to a tenured part-time researcher, to be applied from their first recruitment, but more favourable terms are maintained ... Maintaining eventual more favourable terms – envisaged specifically by the very jus supeveniens – art. 1 of Decree Law 14. January 2004 n. 2...- . is however consistent with the case law of this Court, whereby* ***the judge is assigned … the duty of determining the sufficiency and adequacy*** *of salary* ***(according to the provisions of art. 36 of the Italian Constitution) – even if this is limited only to the part exceeding the guaranteed minimum****, (even allowing, within the provision, the contrast between community law and domestic law, complained of in the case taken to the Court of Justice on 4 March 2004, to be resolved through interpretation…"* (cfr. Cass. 21856/2004, and Cass. n.17759/05; Cass. n. 4147/07).

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3. **Thirdly,** the clause under examination does **not** state clearly that the provisions in law 63/2004 must be applied to all lettori in service in all Italian universities and not only the six universities named in art. 1 of law 63/2004, although the Cassation Court, applying general principles concerning the relations between domestic law and community law, has clarified that "*any limitation of the field of application of the new legislation to the Universities specifically named* ***cannot have any effect on the validity of the specific source of community law that must be attributed to the judgements of the Court of Justice of the European Community*** *and in particular the cited judgement of 26 June 2006, that the legislation itself intends to apply"*, with the consequence that "*it must be recognised for* ***all those belonging to the category*** *... insofar as employed by* ***universities other*** *than those contemplated."* (cf. Cass. n. 21856/04 e n. 5909/05; Cass. 4147/07; Cass. 2112/07).

However, as it is merely an interpretation of the case law, it is not binding for Cassation itself, nor is it binding for judicial determinations, and even less so for university administrative practice; consequently, legislation is needed to exclude the evident

discrimination among lettori employed by different Italian universities: this necessary specification has not been made in art. 26 which, in a rather cryptic expression: "…*employed by the* ***affected*** *universities …"*, in no way clarifies whether the provisions apply to all universities or only those "affected" in the sense of those six named in L. 63/2004, to which the clause specifically refers.

This is not merely a theoretical detail but a concrete consideration, because the new legislation **has not provided** for the necessary **funds** for the universities other than the six mentioned in the 2004 law, as if it were a question of mere "interpretation": therefore it is by no means guaranteed that the other universities will/can proceed to reconstruct the seniority of the lettori and pay the difference in salary between what they received and what they are entitled to, at the very least on the basis of the indicated minimum terms, and that new claims before domestic courts will be necessary, as has happened in the past and continues to happen.

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4. **Fourthly,** the situation of lettori who have **never signed** a **contract as CELs** has not even been considered and is still unresolved, as is that of those unilaterally assigned to the category of CELs by some universities without their consent (e.g. University of Bologna, University of Verona, University of Salerno). Nor are there any provisions for **those who have obtained** court rulings **declaring their new CEL contracts to be null, thereby determining their right to maintain their status as lettori** (cf. ex multis the case of Ms Delay cited above; the rulings of: Tribunal of Padova 688/2005, Appeal Court of Venice, 641/2008; Appeal Court of Venice, 21.12.2010; Appeal Court of Milan 195/2008; etc.), precisely because their first recruitment, contracted under art. 28 DPR 382/1980, should be "converted" into a single open-ended employment relationship, according to the provisions of law 230/1962.

These employment relationships cannot therefore be regulated by legislation for CELS as the workers in question have never signed CEL contracts or anyway their contracts as CELs have been declared null *ex tunc*, and so they are to be considered *tamquam non esset*. Hence, it is clear that the domestic legislator cannot violate the acquired rights from these relationships

as lettori and must, on the contrary, guarantee their full respect also in terms of salary conditions, seniority and social security contributions.

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5. The final sentence contained in clause 3 of art. 26 law 240 of 2010 is of an unprecedented seriousness, as it **extinguishes** peremptorily and arbitrarily **"all pending court cases"**. This provision, which anyway does not indicate the presuppositions for extinguishing court cases or which legal claims are referred to (of the many that could be claimed in a law suit, even if not strictly financial) is in open and direct contrast with article 3 (principle of equality and the duty of the Republic of Italy to remove the obstacles to its implementation), article 24 (the inviolable right to defence), and article 111 (the right to a fair trial) of the Italian Constitution and article 47 of the Charter of Fundamental Rights of the European Union and article 6 in Section 1 of the European Convention on Human Rights, that establishes: "***In the determination of his civil rights and obligations*** *or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."*

The Nice Charter became legally binding under the Treaty of Lisbon, while art.6 of the Treaty accedes to the European Convention on Human Rights with the direct effect that *"Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, shall constitute general principles of the Union's law.*

It follows that the provision in the final sentence of article 26 clause 3 of law 240 of 2010 constitutes a **direct violation of community law by the Italian State** and that the provision should not be applied by domestic courts as it is in contrast with the principles of the Union originating from the Nice Charter and the European Convention on Human Rights.

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In **conclusion**, it should be noted that the President of the Italian Republic, Giorgio Napolitano, in promulgating Law 240 of 2010, formally identified several critical elements in the formulation of some articles, among which is the clause in question. In particular, the President of the Republic, specified that article 26 should be formulated *"in unequivocal terms*

that correspond to the consolidated case law of the Constitutional Court" (surely intending, more accurately, a reference to the principles expressed by the Cassation Court in conformity with the judgements of the European Court of Justice).

Despite such an authoritative communication, that has confirmed the evident illegitimacy of the law in question, and asked for a timely reformulation, it is impossible to understand how further implementation decrees could resolve the grave violation of community law as explained above, which affect the category of foreign lettori and former foreign lettori in Italy.

Consequently, I believe that all the conditions now exist in order to proceed in a timely fashion in accordance with the provisions and the effects of article 258 and in particular article 260 TFEU (formerly articles 226 and 228 EC Treaty), namely sending a "reasoned opinion" that would constitute a formal notice to Italy, and the successive formal referral to the Court of Justice in order to impose an appropriate penalty sanction on the Italian State, a sanction that was avoided in 2006 only because it appeared that the State had ended the discrimination in course by decree law n. 2 of 2004 converted into law n. 63 of 2004.

However, not only has this discrimination not ceased in administrative practice by the Italian universities, as widely documented, resulting in even more law suits than before, but today it can be stated that the Italian state's express will **not** to end the discrimination has been set forth in legislation, through an "authentic interpretation" of that provision which places it in direct and diametric contrast with European and domestic case law, while no necessary funds have been allocated by the State, in the context of the well-known financial constraints of the individual universities.

I remain at your disposal for any further clarifications and trust that there will be a timely continuation of the necessary procedures.

Yours sincerely,

Professor Lorenzo Picotti