SUMMARY

2014/18 Discrimination on grounds of personal belief includes trade union membership and activities of employees on behalf of the union (IT)

<p>When the car manufacturer Fiat brought back the production of PANDA cars from Poland to Italy beginning in 2010, it terminated the national collective agreements to which it was a party and entered into a new, company-level collective agreement for one of its factories. There were certain key differences between the new agreement and the old, and the largest trade union, FIOM-Cgil (‘FIOM’), vigorously opposed the changes and refused to sign up to the agreement. Fiat had had approximately 4,000 members laid off (but still counted as part of the workforce), but now brought 1,893 of them back to work on the production of PANDA cars. However, not one was a member of FIOM. FIOM and 19 activist-employees brought an action against Fiat and the court ruled that Fiat had discriminated against FIOM members on grounds of their personal beliefs.</p>

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the agreement. Fiat had had approximately 4,000 members laid off (but still counted as part of the workforce), but now brought 1,893 of them back to work on the production of PANDA cars. However, not one was a member of FIOM. FIOM and 19 activist-employees brought an action against Fiat and the court ruled that Fiat had discriminated against FIOM members on grounds of their personal beliefs.

Facts

Fabbrica Italiana Pomigliano ('FIP'), a Fiat-controlled company, decided in 2010 to bring the production of PANDA cars back from Poland to Italy, and restructure the Pomigliano premises to operate a new production process. At same time it decided to leave the metallurgical employers' association so that it was no longer bound by the national collective agreements signed by that association. It then unilaterally terminated all existing lower level collective agreements; introduced a new production method to trade unions and proposed a new company-level collective agreement linked to that production method.

As the new collective agreement would increase mandatory overtime from 40 to 120 hours annually, per employee (with possible peaks of up to 200 hours); exclude sick pay in some cases on a discretionary basis; and might result in some workers not having work breaks for lunch or dinner as these would be left to the end of the shift, FIOM, the largest trade union at Pomigliano and in the metallurgical sector as a whole refused to sign the agreement. By contrast, four other unions went ahead and signed.

The new agreement was voted in by 62.2% of the employees. However, this did not satisfy Fiat, as it had been looking for a larger majority to justify bring PANDA production back to Italy. It would also, as part of the process, need to recall a large number of laid off employees back to work under the law on layoffs, 'CIGS'.[1]

Before, during and after the employees' vote, FIOM had lost a number of its members. This may have been because FIP said it would have pursued the development plan further if the trade unions had fully supported it. In January 2011, FIOM had roughly 900 members amongst the 4367 Pomigliano employees but was still the main trade union at FIP. The following year, Fiat re-hired roughly 50% of the original 4367 Pomigliano employees and had called 1893 employees back to work from CIGS suspension. As such, they were entitled to full salary.

However, not one of the 1893 employees was a FIOM member or representative, whereas Fiat had rehired 11 representatives of other trade unions, particularly the large unions, FIM and UILM, but also the minor independent associations FISMIC and UGL. All of these had signed the controversial company-level collective agreement and supported the new production system.

FIOM brought urgent proceedings against Fiat based on Legislative Decree 150 of 2011 (as amended by legislative decree 216 of 2003) on behalf of 19 employees and on behalf of the collective interests of any other FIOM employee who might have been discriminated against by FIP's behaviour.

Notably, the trade unions did not bring their action on the basis of section 28 of law no. 300 of 1970 (the so-called 'Workers' Statute'). This law serves to protect workers from discrimination and, in particular, discrimination by means of 'anti-trade union behaviour' defined as "any behavior which restricts the freedom of trade unions activity and the exercise of the right to strike" and so could have been used in this case. However, in the event, the Court of Appeal found Legislative Decree 150 of 2011 to have been a suitable vehicle for a case involving discrimination during re-hiring as a result of trade union affiliation, as described below.

Judgment

During the proceedings, FIP raised a number of technical and procedural objections relating to the specific laws invoked and to the type of proceedings brought – all of which the court rejected.

On the substantive issue, the court found that 'personal beliefs' includes being a member or representative of a trade union at company level and that personal beliefs are protected under both EU and Italian anti-discrimination law. FIOM hired a professor of statistics as an expert witness in the proceedings and in his view the chances were lower than one in a million that no FIOM member should have been included among the laid-off employees who were recalled back to work with full salary entitlement.

FIP's defence was that the selection had not been made by FIP themselves but by external companies and by 'team leaders'. The team leaders were the first to be rehired and they were then entitled to pick their teams by identifying the employees they deemed "necessary" in the new premises.

The court judge decided that since personal belief included trade union activity and that there was evidence of discrimination, FIP should:

hire the 19 FIOM members that had personally claimed against FIP within 40 days of the decision;
hire at least 2.87% of the FIOM members, equal to 145 workers within a further 180 days.

The case then went to the Court of Appeal in Rome and it upheld the lower court's ruling that

the concept of personal belief includes trade union membership and activity, and confirmed that discrimination had taken place.

The Court of Appeal also rejected further objections by FIP, such as that it had not been directly responsible for selecting employees for rehiring. In the Court's view, FIP was clearly complying with Fiat's obligations in relation to the (re)hirings. It also noted that FIP had failed to provide evidence to counter FIOM's expert witness in relation to the likelihood that any new workforce of the required size would not include FIOM members.

FIP also tried to argue that not hiring FIOM members should be an option available to it. The Court of Appeal was unconvinced. It particularly noted that a former FIOM member (who may have left FIOM as a result of pressure from Fiat) had been rehired despite belonging to a group carrying out an activity that was yet to be transferred - whereas none of the current FIOM members had been recalled. The Court said that FIP had supplied no evidence as to why this was not discriminatory.

The Court of Appeal confirmed both the order to rehire the 19 immediately and the order to conduct the future rehiring's it was required to undertake in a way that respected the ratio between FIOM and non-FIOM members. As before, this was set at 2.87% of the total number of employees.

Commentary

This decision has been widely reported in the national and international press, as it touches on how far the freedom to conduct business in the way a company wishes can fairly be taken.

On the one hand, when investing in a country, it may be in the company's interests only to invest in certain projects if they are sufficiently supported by the trade unions – and no judge can require a company to develop business in Italy if it does not wish to.

However, the question was, did this freedom (and, more generally, the freedom of private economic private initiative protected by section 41 of the Italian Constitution) include the right for the employer to decide, not only the terms and conditions of work in the company, but also which employees (with reference to their trade union membership) should be hired, in circumstances where the company was aiming to operate a new production process under new working rules - and those rules were not accepted by the largest trade union? More specifically, when deciding who should come back from CIGS, was it discriminatory to leave out employees who were company-level representatives of FIOM, for example? The representatives in question had already been appointed beforehand and retained their role as representatives, despite being suspended in CIGS. The case clarified that not allowing them

back to work was discriminatory, as it was based on FIOM's opposition to the collective bargaining agreement proposed and supported by Fiat.

The idea that certain employees could be prevented from working at a particular employer is also contrary to the Italian Constitutional principles relating to trade union activity and the seeking of new membership. Trade union activity is protected by Italian law in all workplaces, whether or not trade unions are present, and is only restricted to the extent that it must not prevent normal production activity. Union activity and the seeking of new members are protected both at individual and collective level: this means that individuals are fully entitled to conduct union-related activities in the workplace, whether or not they are members of a specific trade union. And crucially, neither the trade union nor the employer is entitled to select employees based on their trade union affiliation (or lack of it).

In my view, the exclusion FIOM employees from the new plant, is reminiscent of the 'closed shop'. This arrangement existed in the US, the UK and Canada and gave unions – or sometimes a specific trade union – the right to veto the presence of specific non-unionised employees in a particular company or in a specific workplace. In other words, only members of certain trade unions could work there, or sometimes, workers had to join a particular trade union in order to be allowed to work there. This arrangement was often based on an agreement signed between the employer and that union. The UK abandoned closed shop agreements after joining the EU, this practice being contrary to European principles, as the civil law jurisdictions (as opposed to the common law ones) regarded such arrangements as unconstitutional. It is not known, but is possible that some kind of unofficial arrangement had been reached with the remaining four unions – those that did sign up to the new collective bargaining agreement. It is certainly noteworthy that none of them protested against the discrimination suffered by FIOM.

Footnote

1 'Cassa integrazione guadagni straordinaria', or 'CIGS' is an Italian law that enables companies to retain employees as part of the workforce, whilst they are not working. Whilst on CIGS, employees are entitled to a kind of unemployment benefit from the state, capped at € 1,000 per month and are prevented from working for other employers, since their employment agreement remains in force. Theoretically, CIGS should only be used in cases of restructuring where there is a reasonable chance that the employee will return to work. However, in practice, CIGS has been requested by and granted to the largest industrial groups by successive Italian Governments, with the aim of avoiding or mitigating the social problems that would be caused by large numbers of workers being made redundant at same time. Specific measures have meant that this tool can be used over a period of years, and this has served to protect the manufacturing sector - once the biggest sector of industry in Italy – for a long time. By contrast, the services sector, for example, has benefitted from it to a much lesser extent and for shorter periods.

Subject: Other forms of discrimination, trade union activity

Parties: FIP s.p.a., - v - FIM-CGIL nazionale, obo 19 employees (from first instance) + 3 additional employees

Court: Corte di Appelo di Roma (Rome Court of Appeal)

Date: 19 October 2012

Case Numbers: 5080 and 5204/2012

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