
# CRISIS AND LABOUR MARKET IN SPAIN

**Borja Suárez Corujo**

Professor of Labour Law and Social Security Law (Autonomous University of Madrid, Spain)

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*"Une société salariale c'est surtout une société dans laquelle l'inmense majorité de la population accede à la citoyenneté sociales à partir, d'abord, de la consolidation du statut du travail"*

Robert Castel (1933-2013), *L'insécurité sociale*

The impact of the current economic crisis has had two main consequences on the Spanish labour market. The first one is the dramatic increase of the unemployment rate. The second one is the widespread idea that labour market regulation is the main cause of such a dramatic loss of jobs.

From this perspective, this paper examines the employment policies implemented in Spain since the onset of the crisis. For this purpose, it is divided into three parts which are preceded by some general remarks on the strong and weak points of the Spanish labour market in the previous years to the crisis as an attempt to explain how the unemployment rate has scaled up from 8% in 2007 to more than 27% (!) in 2013, and to point out what the consequences of the recent legal changes are.

## I. THE PREVIOUS YEARS TO THE OUTBURST OF THE CRISIS.

In a very short time, the Spanish economy went from intense growth and job creation to a sharp slowdown with a strong negative impact on business activity and employment. During the previous years to the outburst of the global crisis in 2008, Spain had one third of total job creation in the European Union. However, such a spectacular increase of employment had unstable foundations on which no one –neither the public administrations nor the economic actors– paid sufficient attention until it was too late. Among these precarious grounds, the most relevant one was, undoubtedly, that such high economic growth was fostered by an enormous housing bubble. The residential construction sector became strongly oversized intensifying the relevance of low human capital sectors that characterized the pattern of production of the Spanish economy.

Both factors contributed to exacerbate the macro-financial imbalances when the crisis hit Spain and particularly its labour market. But it is relevant to point out that there were already serious problems in this area. We might refer to, at least, four of them.

Firstly, Spain has historically had a very high unemployment rate; actually in 2007 it reached its lowest peak without descending beyond 8% (7.95 to be more precise), an anomaly that the Spanish public opinion –and the European

* Professor of Labour Law and Social Security Law (Autonomous University of Madrid, Spain).

authorities– mostly connected with the supposedly rigid regulation on the labour market, but probably more closely related to the type of industry and businesses characteristic of our economy.

In the same line, we must mention two additional contribution factors: one, that despite the fact that the employment rate had increased steadily since the 90s, it still remained low in comparative terms in 2007; and, the other, that the active labor market policies had never had the role it deserves in a dynamic legal employment frame.

Finally, the main problem of the Spanish labour market before the crisis was job instability due to a very high proportion of temporary work. In spite of a strict regulation, an abusive practice had and still continues to provoke a segmentation between temporary and permanent workers, becoming a key feature of our ill labour market[1]. Temporary work has indeed very negative effects in terms of job instability and low productivity. Although those are not exclusive problems to fix-term contracts, this type of workers are much more affected by them than workers with open-ended contracts.

The outburst of the 2008 crisis in Spain led to a quick and dramatic increase of unemployment. In less than five years it has increased almost 20 points (around 4 million unemployed persons) driving the Spanish society to the edge of social convulsion with 6.2 million unemployed workers and no perspective of job creation in the next two years. In relation to this it is worth making some remarks.

We must emphasize, above all, the singular close dependence of employment rate on economic growth in Spain. What we mean is that a decrease of the Spanish economy brings about a sharper drop of employment, whereas a GDP year-on-year growth of around 2 points is needed to create jobs. That explains that in 2012 while a year-on-year growth stood at -1.4%, employment decreased at a year-on-year rate of -4.7% (more than 800.000 jobs). And it makes the Spanish Government's recent macroeconomic forecast for the next four years more dramatic that include a GDP growth forecast of -1.3% in 2013 and a mere +0.5 and 0.9% in 2014 and 2015, respectively.

It is also important to note the strong impact that the housing bubble has had on the rise of unemployment. Almost three out of four jobs lost since 2008 belonged to the housing sector; but it is even more striking that the outburst of the bubble has not exhausted its negative effects: in 2012 one fifth part of the new unemployed was linked to the branch of construction. Moreover, the relevance of the job destruction in the housing sector is a key fact in order to explain why the crisis has hit so severely young workers under 30[2]

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[1] As a consequence of the crisis the temporary employment rate now stands at 22%, but it used to reach more than 30% in the late 90s. In the near future it is very probable that it will increase as soon as the creation of jobs starts again.

[2] The youth unemployment rate (57.2%) more than doubles the total unemployment rate (27,1%) in the first quarter of 2013. Additionally, 3 out of 4 jobs lost since the beginning of the crisis belonged to the group aged under 30.

Lastly, should we examine the impact of the economic crisis on the labour market in terms of the type of contract, we notice that job destruction did concentrate on temporary work during the first two years (2008 and 2009). But then, in 2010, there was a shift whereby permanent workers suffered the consequences of the crisis with the same intensity. That was followed by a clear priority of open-ended contracts as victims of a continual job loss in 2011, showing how unstable the position of permanent workers is. As far as 2012 is concerned, the result is more balanced: temporary and permanent workers have been affected in a similar way. Nevertheless, more than a change of trend, this intensification of temporary work destruction is presumably due to the ongoing labour adjustment in the public sector.

## II. EMPLOYMENT POLICIES AGAINST THE CRISIS: A PATH TO DEREGULATION.

### 1. Before 2012.

The first part of this analysis of the Spanish Government's response in the area of employment regulation covers the period between 2008 and 2009, a time when Zapatero's Socialist Party (*Partido Socialista Obrero Español, PSOE*) was ruling. Despite the quick labour market deterioration –1.9 million jobs were lost in that time–, there was not a specific reaction in this area. Quite the opposite, the government's attention was focused on economic recovery due to a (neo)Keynesian approach to the crisis and an accurate diagnosis whereby employment loss was mainly caused by the economic breakdown more than the Spanish labour regulation.

Nevertheless, two valuable events during this first stage are to be mentioned. On the one hand, dialogue between the social partners failed for the first time. As we will see, Zapatero's Administration tried hard to reach an agreement with trade unions and employers' organizations to implement together crisis-fighting measures. At that point, this compromise was unattainable for two main reasons: first, the limited political influence of the Ministry of Labour and Inmigration within the government and its lack of persuasive ability to bring about a settlement; and, second, the irresponsible behavior of the employers' organization CEOE (Confederación Española de Organizaciones Empresariales) whose president –currently in jail– showed very little interest in a modest but feasible agreement in July 2009.

On the other hand, this initial stage of the crisis in Spain was marked by the "discovery" of a new concept: internal (labor market) flexibility, an interesting –relatively unknown and hardly used– mechanism of maintaining employment and lowering adjustment costs in a context of economic contraction as an effective alternative to redundancies[3]. From that point onwards, "internal

[3] See *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Towards a job-rich recovery"*, 18.4.2012 [COM/2012/0173 final].

flexibility" became the main axe –or, at least, the most important motive alleged– of the labour market reforms.

2010 opens a second stage on the development of employment policies (2010-2011) characterized by the fact that national and supranational pressure on the urgence of a labour reform gained intensity and finally gave results.

To begin with that demand came from the European Union –in harmony with the International Monetary Fund–. Actually we might speak of a "diffuse" pressure: rather than a explicit mandate, some of the main guidelines for employment policies –enhance flexicurity, tackle labor market segmentation, raise the skill level of EU's workforce– adopted by the European Council[4] marked the path to identify as a priority for the Spanish labour market to introduce legal changes that led to a reduction of firing costs for open-ended contracts and to a resolute deregulation of collective bargaining.

In Spain, Zapatero's Administration was increasingly pressed by a deteriorated economic and social context with a mounting unemployment rate –more than 20% near the middle of the year 2010–. Public opinion urgently demanded a political response with many eyes focused on labour market (de)regulation. Again the Spanish government bet on social dialogue to bring about that reform and it failed again. But this time there was an important difference. In May 2010, the Eurozone countries and the International Monetary Fund agreed on a bailout loan for Greece; that was the beginning of Europe's sovereign debt crisis that urgently forced Spain to implement austerity measures –the first ones approved just a few days after that– and to promote the so-called "structural reforms", labour market reform included in June 2010[5].

Before briefly analyzing the content of the new regulation –Royal Decree-law 10/2010–, we must point out that it is now clear that labour market reform had at that point turned out to be a lure that contributed to partially cover the dreadful state of the banking sector. In that sense, the initiative was a failure: it did not stop the loss of jobs, nor did it satisfy any of the interest of the different parties involved.

In fact, it is particularly relevant to notice how the frustrated search for the social legitimacy of these legal changes condemned the reform and showed the internal problems of the parties involved. As far as the employers' organization is concerned, it was again evident that they did not have much (any?) interest in reaching a compromise. Quite the opposite, trade unions probably went too far in concessions that harmed workers's interests impelled by the threat of financial collapse of the Spanish economy; once the reform was passed, they

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[4] See: *Council Decision of 21 October 2010, on guidelines for the employment policies of the Member States* (2010/707/EU).

[5] As S. DEAKIN points out "Labour law is at the core of arguments about how the European Union should respond to the sovereign debt crisis" ("The sovereign debt crisis and European Labour law", *Industrial Law Journal*, vol. 41, No. 3, September 2012, p. 251).

perhaps overreacted calling a general strike that took place –with no great success– in September 2010.

At the same time, the reform showed PSOE's (and government's) incoherences. There was a strong clash of two different (socialists?) points of view on labour market regulation: one closer to the interest of trade unions; the other much more receptive to the deregulating influence of the European Commission and what the public opinion referred to as "los mercados" (financial markets)[6].

The main features of that labour market reform focused on introducing more flexibility[7] (the motto would be "more flexibility, but not so much"). Three issues were then identified as the key points in order to achieve such goal, although one of them –collective bargaining– was postponed and would be regulated one year later.

The first axe corresponds to the "discovery" of internal flexibility, an expression that, surprisingly enough, had never been used before in the Spanish legal system. The inclusion of this new term is presented as a response to the dramatic job loss that the Spanish labour market had suffered since the onset of the crisis: it meant to slow down the excessive use of dismissal and temporary hiring as adjustment mechanisms by offering alternative instruments that focused on adapting labour conditions in order to guarantee the stability of the workforce in times of crisis. On the whole, the measures then introduced are not very ambitious; the seeked company-internal flexibility of labour conditions concentrates on reducing working time, improving the 2009 provision that allowed companies to temporarily decrease it –from a minimum of 10% reduction up to a maximum of 70%– while foreseeing employers' Social Security rebates and providing unemployment benefits for workers affected. But the most relevant aspect of this new regulation was that this sort of mechanisms could not be imposed unilaterally by the employer; its application should always be agreed with the workers, a key point that would be modified by the 2012 (Popular Party) reform.

The second main axe of the 2010 reform is the "peculiar" fight against dual (segmented) labour market. Unfortunately, it insists on a strategy that has historically failed: lowering the cost of open-ended contracts while doing very little against exorbitant temporary hiring. In particular, two actions are taken to reduce segmentation between permanent workers and temporary ones.

On the one hand, the law introduces timid restrictions on the use of fixed-term contracts standing out that the compensation for their expiry would be gradually

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[6] The debate on "single open-ended contract" –a new contract with severance payments increasing with seniority– is a very good example of such a conflict. See: RODRÍGUEZ PIÑERO Y BRAVO FERRER, M. "Sobre el contrato de trabajo "único", *Relaciones Laborales*, No.1, 2009, p. 111-124.

[7] See: WÖLFL, A. – MORA-SANGUINETTI, J. S. (2011), "Reforming the Labour Market in Spain", *OECD Economics Department Working Papers, No. 845*, OECD Publishing (http://dx.doi.org/10.1787/5kghtchh277h-en).

raised from 8 to 12 days' wage in 2015. Additionally a new provision establishes a three years maximum duration for the so called "contracts for well-defined tasks or projects" ("contrato de obra o servicio determinado"), one of the two types of fix-termed contracts most commonly used in Spain.

But, as I mentioned before, the attention is specifically focused on encouraging permanent contracts in two different ways. Firstly, the reform favours the use of the already existing permanent contract with reduced severance pay ("contrato de fomento de la contratación indefinida")[8] through an extension of the groups that can be hired. And, secondly, firing costs for open-ended contracts are indirectly reduced as a consequence of the new definition of the conditions for objective and collective dismissals, i.e. those that respond to "economic, technical, organizational or productive" reasons and that foresee a dismissal compensation of 20 days' wage per year of seniority up to a maximum of 12 months. In particular, the most significant change is that the employer no longer needs to provide an objective proof of a negative situation of the enterprise; projected losses or lasting income reduction might be sufficient to legitimate the redundancy decision as long as there would be some evidence those circumstances may affect the viability of the company or its ability to maintain the volume of employment.

Finally, the third axe of the labour market reform implemented by Zapatero's Administration had to do with collective bargaining. The partly new frame for it was introduced by the *Royal Decree-Law 7/2011, of June 10, on Urgent Measures to Reform Collective Bargaining*. The reason why this new regulation was passed almost a year later than the core of the reform lies in another frustrated attempt of a process of social dialogue that had been temporarily boosted by the "Social and Economic Agreement: for growth, employment and the guarantee of pensions" signed in February 2011 by the government and the most representative unions and employers' organizations.

The main purposes of this Decree-Law are, firstly, to enhance flexibility in the functioning of the collective bargaining system so that companies have a greater ability to adapt its production to changes in the economic environment, specially when things turn sour; and, secondly, to modernize collective bargaining system in order to promote employment and productivity once the economic recovery had taken place.

In regard to its content, reform focused on three aspects. On the one hand, it tries to tackle problems related to the traditional intermediate degree of centralization of collective bargaining in two ways: one, maintaining the features of a centralized bargaining; and, two, making that compatible with concrete steps towards a system where companies have the ability to opt out from sectoral level collective agreements. On the other hand, a great effort is made to improve the collective bargaining procedure and making it much more

[8] A type of permanent contract originally introduced in 1997 which entails a severance pay of 33 days' wages per year of seniority for unjustified dismissals up to a maximum of 24 months, instead of the 45 days' wages that corresponded to the ordinary type up to a maximum of 42 months.

dynamic; in particular, it is noteworthy the specific measures adopted to overcome the frequent negotiation block that usually harmed the interests of both parties coupled with fostering the solution through arbitration. Finally, we must mention a further step to enhance internal flexibility as it is now foreseen that the employer may impose an irregular distribution of working time –up to 5% of it– throughtout the year.

To conclude this part regarding the labour market reforms implemented by Zapatero's Administration during 2010 and 2011, we must underlined that the result was unsatisfying for all the parties concerned. There was a strong social contest led by the trade unions –we already mentioned that a general strike was held in September 2010–; Zapatero's popularity definitely sinked dragging the Socialist Party (PSOE); and even the employers' organizations –backed by the political right and the financial sector– opposed the legal changes introduced as they considered them insufficient to make labour market regulation really adaptable to the economic context. In the same line the European institutions insisted on taking further steps towards deregulation: in July 2011 the European Council passed new recommendations[9] demanding additional measures from the Spanish Government to proceed with the reform, first, to grant firms more flexibility to internally adapt working conditions to economic situation; and, second, to complete the legal changes regarding the collective bargaining system in order to correct the wage indexation system and to enhance the priority of firm-level conditions.

## 2. 2012: The labour "rupture".

The most significant part of this paper offers some critical thinking on the new policy stage opened in Spain after the elections held in November 2011, whereby the right-wing party (*PP, Partido Popular*) gained an overwhelming majority in Parliament. Ignoring an agreement reached by the social partners few days before[10], the new government approved in February 2012 a Decree-Law on urgent measures to reform the labour market (Royal Decree-Law 3/2012). This "extremely aggressive" reform[11] was fully backed by the European Commission and the European Central Bank, but found a strong opposition from trade unions and left-wing parties[12].

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[9] *Council Recommendation of 12 July 2011 on the National Reform Programme 2011 of Spain and delivering a Council opinion on the updated Stability Programme of Spain, 2011-2014* (2011/C 212/01).

[10] *2nd Agreement for Employment and Collective Bargaining* ("II Acuerdo para el empleo y la negociación colectiva 2012-2014"), signed on the 25th of January of 2012, by the most representative employer and trade union organisations [CEOE (Spanish Confederation of Employers' Organisations) and CEPYME (Spanish Confederation of Small and Medium-Sized Enterprises), and CCOO (Trade Union Confederation of Workers' Commissions) and UGT (General Workers' Confederation), respectively.

[11] Quoting the unfortunate expression of the Minister of Finance, Luis de Guindos.

[12] Actually, an action of unconstitutionality against Act 3/2012 (the law that replaced the Royal Decree-law 3/2012) was brought by PSOE and Izquierda Plural.

In this paper we argue that the magnitude of the legal changes introduced is such that we may speak of a new model of industrial relations, a model of "flexinsecurity". To support this, this last section outlines how the reform breaks the traditional –and inherent to Labour Law– balance between employers and employees, examining the following issues: the new forms of instability in hiring; how employers are allowed to impose internal flexibility on workers; the new collective bargaining system; and the easier and cheaper regime of dismissal.

But, previously, it is necessary to make a reference to the procedure followed to pass this new regulation. We have already discussed the –probably– sincere but useless efforts made by Zapatero's Administration to reach an agreement with the social partners. Paradoxally enough, although Rajoy's new government never expressed so enthusiast about it, this time the negotiation between trade unions and employers' organizations had given a result: the above mentioned Agreement for Employment and Collective Bargaining 2012-2014. Certainly it did not contained a comprehensive labour market reform, but it dealt with new ways of applying measures of internal flexibility in periods of crisis and, in that sense, it was a very good starting point to further negotiate.

But, unfortunately, Rajoy's government despised the opportunity of approving a labour market reform backed by the social partners, a support that would have meant so much social legitimacy as well as effectiveness. If that attitude was well-meaning, it lacked intelligence as it is the government the only one to be blamed for the negative results of a reform that has not lessened –let alone avoid– a deterioration of the labour market. On the contrary, it probably reflects that the conservative Popular Party government –in particular, its most neoliberal wing led by the Finance Minister– had a very clear idea of the type of labour market based on company flexibility they are decided to implement. From their point of view, this new model would first favour economic recovery and later on it would contribute as a key element to achieve growth in economic activity and job creation.

### *A. Basics of the labour "rupture".*

Regardless the reference to flexicurity that we come across in the preamble to the *Act 3/2012 on urgent measures to reform the labour market*, a careful analysis of its content shows that this is undoubtedly a legal initiative in favour of employers: this unprecedented reform increases employer flexibility while reducing worker security.

In fact, that lead us to a new idea of flexibility in the labour market that sacrifices employee security in a double sense: first, weakening worker position to negotiate the contractual terms on an individual basis, that is to say, softening the limits to contractual freedom that leave employees more exposed to market risks; and, second, devaluing the collective aspects of labour law, specifically the collective bargaining regulation. By the same token, the reform strengths employer's ability to act unilaterally within the scope of the employment relationship.

Accordingly, it is not exaggerated to state that the new legal frame causes a rupture of the characteristic balance of power between employers and employees that lies in the roots of Labour Law. That "traditional" –and imperfect– harmony is moved aside by a thorough reform that places unbalance, i.e. the prominence of employer, as a structural feature of the Spanish labour legislation. Hence, we must conclude that the 2012 labour maket reform establishes a new legal frame that not only refuses to adopt an integrated strategy to enhance simultaneously flexibility and security[13], but also puts an end of a balanced model of industrial relations replacing it by a model based on flexinsecurity. Next we explain why.

### *B. Easier hiring through instability.*

The 2012 reform claims to fight against the segmentation in the labour market between employees on temporary contracts –the so-called *outsiders*– and those workers on open-ended contracts –*insiders*–. In a certain way, it does; but it pays too high a price for that as it introduces instability in the regulation of permanent contracts and it also makes more precarious other types of hiring regulation.

As far as the first issue is concerned, a new open-ended contract for employers –entrepreneurs– with fewer than 50 employees is created (*contrato indefinido de apoyo a los emprendedores*). Leaving aside the incentives established to recruit young workers in particular[14], its major characteristic is a probationary period of one year –instead of the usual three or six months contemplated by the law–; a provision that might be declared unconstitutional[15] as it allows the employer to dismiss workers without paying any severance pay during that period presumably violating the requirement of protection against unjustified dismissal[16] which, according to the Constitutional Court, ultimately stems from the recognition of the right of work under Section 35 of the Spanish Constitution.

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[13] See: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 27 June 2007, entitled *'Towards Common Principles of Flexicurity: More and better jobs through flexibility and security'* [COM(2007) 359 final]. Also: SCIARRA, S. (2008) "Is flexicurity a European policy?", Unità di Ricerca sulla Governance Europea (URGE), Working Paper No. 4.

[14] First, employers are entitled to receive fiscal benefits: a 3.000 euro reduction in the tax bill when hiring the first employee if he/she is under 30 years old; and a fiscal deduction equal to 50% of the unemployment benefit if the person recruited is unemployed. Second, employers are also entitled to Social Security rebates targeted at young (under 30) and old (over 45) unemployed. Moreover, the new contract is made compatible with perceiving 25% of the unemployment benefit.

[15] This is one of grounds that sustains the already mentioned action of unconstitutionality against Act 3/2012.

[16] On this principle from a European perspective, see: VAN VOSS, G.H. – TER HAR, B. "Common Ground in European Dismissal Law", *European Labour Law Journal*, Volume 3 (2012), No. 3, p. 221.

Despite an apparently engaging regulation from the company's perspective, it should be noted that the number of contracts of this type signed is low so far. Among other factors, the most determining one might be the "culture of temporality" whereby companies use systematically fix-termed contracts simulating a temporary reason that does not exist. So once again we must come to the conclusion that the strategy addressed to lower the costs of open-ended contracts[17] is useless, because companies will insist on temporary hiring. The only effective way of correcting this would be to limit the scope for the use of fixed-term contracts; not surprisingly what the 2012 reform does is just the opposite.

Generally speaking, the legal changes introduced in regard to different contractual types different to the standard permanent (and full-time) one are minor. But that itself must be criticized since it substantially keeps up the legal conditions that trigger an abusive use of non standard hiring, i.e. temporary contracts.

We must concede that the provision whereby the extension of temporary contracts for more than two years is forbidden once again –it was suspended for two years in 2011, a decision difficult to justify–. But, as a matter of fact, this measure is more symbolic than effective given the fact that in practice it is easy to avoid these restrictions. Moreover, the new regulation on the "apprenticeship contract" (*contrato para la formación y el aprendizaje*) brings some changes to enhance flexibility –rising to 30 years old the age ceiling to be eligible for this contract until the unemployment rate falls bellow 15%, or devaluing the content of training– that overall tips the balance in favour of employers.

Finally, attention must also be drawn to part-time contracts that now foresees, in addition to the traditional "complementary hours" (*horas complementarias* –regular overtime–), the ordinary employees' overtime (*horas extraordinarias*), weakening the position of workers; in short, once again more flexibility in favour of employers.

### *C. More intense internal flexibility through company imposition.*

Historically one major weakness of the Spanish labour relations model lies in the limited development of instruments of internal flexibility within companies offered by the labour legislation. As we have already seen, that began to change in 2010. From that point onwards, internal flexibility becomes a key element to face two main challenges: one of them is to improve competitiveness of firms; the other one is to use internal flexibility, i.e. the ability to adapt working conditions, as an alternative to job destruction[18]. But the 2012 reform goes

[17] As we will see, the severance pay for unjustified dismissal is also reduced from 45 days' wages per year of seniority to 33 days.

[18] Cf. MERCADER UGUINA, J.R. "Care crosses the river: the 2012 Spanish labor reform", *Spanish Labour Law and Employment Relations Journal* (April-November 2012), vol. 1, No. 1-2, p. 12.

clearly beyond the conception that was settling in the Spanish legislation as it turns the pursued flexibility into a contractual deregulation that allows the use of internal flexibility as a regular tool of business management[19].

The most relevant novelties in this area have to do with those mechanisms used by employers to adapt working conditions to company needs. Surely there are different adjustment tools. We may draw the line to separate temporary instruments from permanent (indefinite) ones in order to concentrate on the latter, because it is here where the important legal changes are introduced (on the contrary, regulation on suspension and temporary reduction of working hours suffers only minor changes).

A reference must be made to the extension of the competence for irregular distribution of working hours that is raised from 5 to 10% of the annual working time. That is to say that the employer is entitled to demand availability for work –with no other requirement than a notification with a minimum five-day prior notice– for a total of around 160 hours per year.
But regarding internal flexibility the most significant legal changes affect what is known as substantial modifications of working conditions (salary, working time, and work organization and performance measurement, among others[20]) when they are not regulated by a collective bargaining agreement (that case is examined bellow) under article 41 Workers' Statute.

As we pointed out, the reform takes a resolute step towards deregulation. Such a remark is based on, firstly, the very loose definition of the reasons that justify modifications of working conditions. Apart from the reference to their "economic, technical, organizational or productive" dimension, the new provision does not specify what is meant by those terms, eludes the requirement of reasonableness and proportionality, and demands nothing but a vague connection to the "competitiveness, productivity, or technical or work organization at the company". And, secondly, deregulation is also the result of the strengthening of employer's power, because it is now attributed to employers the ability to act unilaterally forcing or imposing changes on working conditions to their employees even when there is no agreement between the parties.

In a nutshell, the reform introduces a new concept of internal flexibility. It leaves behind a model where the adjustment of working conditions was based on the agreement of employer and employees ("negotiated internal flexibility") to enshrine a new one characterized by the reinforced supremacy of the former ("imposed internal flexibility"). It is evident that this new pattern goes far in terms of flexibility; actually it goes too far because it harms worker's position and interests breaking the balance between employee protection and economic efficiency in favour of the latter.

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[19] MERCADER UGUINA, J.R. "Care crosses…", *op. cit.*, p. 13.

[20] Geographical mobility is subject to its own regulation (article 40 Workers' Statute), but it follows a very similar regulatory pattern.

Besides it is important to take into account that this new model of (company) flexibility, rather than facilitating negotiated solutions, favours unilateral –often arbitrary– decisions of the employer affect core aspects of the employment relationship as salary, working time or other important working conditions.

But there is still a more powerful critic to the new regulation: it comes with a major legal changes that makes firing much easier and cheaper. From the perspective of internal flexibility that could mean that either companies are not so interested in adapting working conditions, even if they can impose it in a unilateral manner, or they make use of it to impose a hardening of those working conditions, i.e. salaries and working time***: thus more than a guarantee for job protection (let alone an instrument to favour employability) it becomes an instrument set in the hands of employers to empty the typical function of Labour Law: promoting equality between employer and employee[21]. A step backwards.

### D. *A new (and devalued) collective bargaining system.*

Spanish public opinion has paid little attention to the reform of collective bargaining system. However, this is probably one the major changes introduced as it concerns the "backbone" of labour relations[22] and key factor to our production system.

The renewal of the structure of collective bargaining is consistent with the whole reform: it is based on a strong bet on business flexibility to adapt working conditions to the fluctuating market conditions. But again it should be criticized that the new Law seems to forget what the main characteristic of our companies is: its small size[23]. For that reason, the path followed to give priority to firm level collective agreements is apparently contradictory given the fact that the smaller the business is, the more difficult it is to develop an effective bargaining process. In the end, the new regulation amount to a tangible shift of bargaining power from workers to employers[24].

The legal reform on this subject corresponds to three different axes. First of all, firm level collective bargaining are given priority over sector-wide agreements (provincial, autonomous –regional– and national). Being true that new provision limits the subjects concerned, it must be aknowledged that those are precisely the most relevant working conditions, including quantity of base salary and

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[21] In that sense I would consider naïf DOLADO's judgment on the 2012 reform when he asserts that it "… aims at increasing overall external flexibility (facilitating dismissals for workers with permanent contracts) with the hope that this threat will enhance internal flexibility (i.e., adjustments in wages and working time) ["The pros and cons of the lastest labour market reform", *Spanish Labour Law and Employment Relations Journal* (April-November 2012), vol. 1, No. 1-2, p. 26].

[22] MERCADER UGUINA, J.R. "Care crosses…", *op. cit.*, p. 19.

[23] It is noteworthy to take into account that more tan 4 million workers are employed by companies with fewer than 25 employees.

[24] DOLADO, J.J. "The pros…", *op. cit.*, p. 26.

complementary salaries, schedule and distribution of working time or adaptation of the system of professional classification, among others mentioned under article 84.2 Workers' Statute. The intention to enhance flexibility is clear, but we should not ignore that there is a serious risk that in the long run the higher level of collective bargaining tends to seriously reduce its relevance.

Close related to the scope of internal flexibility instruments, it is foreseen that the content of a collective bargaining agreement –firm or sectoral level – can be cancelled on certain, but not strict, conditions in order to better adapt to the economic environment. On one hand, Workers' Statute typifies the working conditions that might be affected (article 28.3), but all the main ones (salary, working time) are included in much broader definition than before.

On the other hand, this suppression of the collective agreement must be adopted on the grounds of economic, technical, organisational or productive reasons. As far as the economic cause is concerned, the law now includes as such simply a fall on sales or incomes for three consecutive quarters, apparently not considering any other circumstances.

And, finally, although the decision to opt out from the collective agreement cannot be unilaterally decided by the employer, the new regulation envisages that in case of disagreement between employer and employee's representatives both parties will be submitted to mandatory arbitration by the National Consultation Commission for Collective Agreements (*Comisión Consultiva Nacional de Convenios Colectivos*) –or the corresponding organs of the Autonomous Community's Administration–, a possibly unconstitutional provision[25].

The third axe of this part of the reform refers to renegotiation of collective agreements focusing on the so-called "ultraactivity" (*ultraactividad*) whereby the content of an agreement is extended beyond expiration until a new agreement is in place. Under article 86.3 Workers' Statute, the new regulation establishes that a expired and not renewed collective agreement will now be extended just one year (before the reform that extension was indefinite) losing validity afterwards. At that point two possible solutions to determining the new legal framework are foreseen: the first one is to apply a collective agreement of higher level. But, in case that it does not exist –not an uncommon situation given the supremacy of company agreements–, there will be no collective regulation to be applied; then the only remaining limits will come from the legislation in force, i.e. Workers' Statute.

### E. *A new regulation of dismissal: an easier and cheaper layoff.*

It is a widespread idea that the Spanish labour market is rigid mainly because it is difficult and/or expensive to dismiss permanent workers. Quite the opposite,

[25] SUÁREZ CORUJO, B." Ruptura laboral y posibles aspectos inconstitucionales", *El Cronista del Estado Social y Democrático de Derecho*, No. 31, 2012 , p. 34.

"OECD Indicators of Employment Protection"[26] shows that such a conclusion is not accurate. And, likewise, should it be so difficult to layoff it would strange that companies have decided more than four millions dismissals since the beginning of the crisis.

It is true that pre-reform practice of dismissal was perverted –its origin goes back to Aznar's 2002 labour reform–, for it "promoted" termination on disciplinary grounds instead of redundancies (objective –collective or individual – dismissals): the former was more expensive, but easier (automatic); while the latter was cheaper, but uncertain in case of judiciary control. The 2012 reform puts an end to this anomaly, but as we will see the solutions it offers are probably the wrong ones. Entrenching the same logic as the rest of the reform, it introduces a new regulation that favours employers as it makes dismissal evidently cheaper and easier by contrast leaving workers in a much more vulnerable position.

Basically, such aims –not openly expressed by the preamble to Act 3/2012– are pursued in two different ways. The first one has to do with reducing the termination costs of employment relationships. Setting aside for the moment the simplified procedure for collective redundancies –a lawful dismissal with a relatively low severance pay of 20 days' salary for each year of service[27]–, the new compensation to unfair (unjustified, unlawful) dismissal is reduced from 45 days' salary for each year of service up to a maximum of 42 months' salary to 33 days per year with a maximum of 24 monthly payments. What is the reason behind this measure?

The preamble to the Act 3/2012 argues that this reduction of severance pay for unfair –it is important to underline it– dismissal seeks to approach costs of termination of temporary and permanent contracts as an effective way of reducing the endemic segmentation of the Spanish labour market. The truth is that experience shows that this pursued effect is not at all guaranteed[28]; but moreover it seems to forget, first, that this measure affects unjustified dismissals and, second, that the reform softens the requirements for redundancies for economic reasons (article 51 Workers' Statute). That is precisely the second line of the 2012 reform.

Three major changes in favour of more (company) flexibility have to do with collective redundancies. Firstly, we must mention the new definition of

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[26] http://www.oecd.org/employment/emp/oecdindicatorsofemploymentprotection.htm.

[27] It is noteworthy that employers with fewer than 25 workers pay just one part of that compensation (12 days' salary); the rest of it is reimbursed –subjetc to some limits– by the "Wage Guarantee Fund" (*Fondo de Garantía Salarial, FOGASA*).

[28] Before the 2012 reform there were two different types of open-ended contracts: the ordinary one and the so-called contract for the encouragement of indefinite-term hiring (*contrato para el fomento de la contratación indefinida*). The difference between them lied in the quantity of severance pay: 45 and 33 days' salary, respectively. Despite being more expensive, it was the ordinary permanent contract the one overwhelming preferred by companies, even when the eligible groups of both types were almost equivalent.

economic reasons that allow companies to layoff workers on such grounds. With the intention of eliminating the uncertainty of a hypothetical judicial control, the 2012 reform includes two relevant novelties: one consists of erasing the requirement of justifying the dismissal's reasonability; the other refers to a specific provision whereby a negative economic situation exists when the level of ordinary revenues or sales is lower during three consecutive quarters.

Secondly, the administrative authorization of collective redundancies is no longer required. That condition used to be original in the European context and its singularity was harshly criticized by the employers' representatives, among others, as a determining factor that raised compensation costs. But it had likewise a positive effect, since it favoured settlements between the parties. The reinforced position of employers as a consequence of the authorization's elimination is presumably going to provoke –it has already done so– a very important reduction of agreements.

And, thirdly, another significant novelty is the possible application of collective redundancies (or objective layoffs) on economic, technical, organizational or productive grounds when it affects organizations and entities in the public sector. From a legal perspective, it is important to point out the vague (arbitrary?) definition of economic reasons identified, under Additional Provision 2nd Act 3/2012, as those concurring when the financing of the corresponding public services is affected by an unexpected and persistent situation of budgetary insufficiency. And it is specified right after this requirement is fulfilled when that insufficiency proves during three consecutive quarters.

Certainly this last measure has facilitated a intense downsizing of administrative structures with a very negative effect in terms of raising unemployment and, at the same time, serious damage to public services, two important reasons to question the provision whereby internal flexibility measures are not applicable to public sector (Additional Provision 3rd Act 3/2012).

## 3. 2013: More than desperate measures against an increasing unemployment.

A long year after its approval, the results offered by the 2012 labor market reform are very unsatisfying in terms of (un)employment[29]. So much that the Spanish Government yields to the pressure of the EU and passes a new *Royal Decree-law 4/2013, of February 22, 2013, on measures to support entrepreneurs, stimulate growth and create employment*. Surprisingly enough, it is the first legal initiative specifically addressed to young workers, even though they are the main victims of the loss of employment in the unfolding of the economic crisis. In some way, these new measures complete the 2012 reform

[29] According to the "Economically Active Population Survey" (*Encuesta de Población Activa*, EPA) employment dropped by 798,500 persons in 2012, that means an annual variation rate of employment of –4.58%. In the same period, the total number of unemployed persons increased by 563,200 persons (http://www.ine.es/en/daco/daco42/daco4211/epa0113_en.pdf).

since they focus on an area where novelties were probably less relevant: the entry to labour market.

From a general perspective, three comments are to be made on the content of this Decree-law. Firstly, most of the measures seek an immediate effect; they are early impact measures that try to create any job, no matter how unstable it might be. Secondly, one might speak of an strengthening of business-leaned flexibility. Thirdly, although the Strategy and this legal initiative are allegedly in line with the objectives of the Youth Guarantee recently proposed by the European Commission[30], the results fall far short of what it is outlined in the Youth Employment Package. And, finally, not less relevant is that this series of legal changes was not agreed with the social partners.

The attention of the measures contained in the Decree-law 4/2013 focus on two main areas: one, incentives for hiring –basically– young workers; the other, promotion of entrepreneurship and self-employment. As I will try to show, they are not the appropriate solutions. On the contrary, in my opinion the former involves a serious risk of aggravating precariousness, whereas the latter drives many young people to professional activities wherein they will not enjoy such a legal protection as they would do in the labour scope and, moreover, enhances a fragmented business network which is precisely one the main structural problems of the Spanish economy.

Presented as early impact measures, the ones aiming at promoting entrepreneurship and self-employment have in fact a more structural dimension in so far as they form a significant part of an emerging frame for developing this sort of activities. As we will confirm, these new legal provisions are not very ambitious, but apparently harmless. However, there are reasons to be more critical, because they seem to ignore the current circumstances of economic adversity and skip the measures urgently needed to keep businesses alive, i.e. easier access to credit more than a limited reduction in Social Security contributions.

That is precisely the most relevant new rule: when a young person –under 30– starts a self-employed activity registering with the RETA (Special Regime for Self-Employed Workers) he/she will pay a reduced contribution to Social Security during the first year[31]; that is helpful, but certainly not enough to overcome the current difficulties –mostly financial ones– that someone must face when starting up a business in the current circumstances.

The rest of the new regulations to promote self-employment mostly refer to different aspects that have much to do with unemployment benefits. Thus, it is made compatible for those under 30 to start a new activity that requires

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[30] Cf. Communication form the Commission to the European Parliament, the Cuncil, the European Economic and Social Committee of the Regions, on Youth Employment Initiative [COM(2013) 144 final].

[31] 80% reduction during the first six months; 50% reduction during the following half a year (article 1).

registration with the RETA (Special Regime for Self-Employed Workers) maintaining the unemployment benefits previously accrued for a maximum of nine months, again a provision that falls short from an effective measure to favour entrepreneurship. Furthermore, young self-employed workers that previously were entitled to unemployment benefits will have the opportunity to collect them again if the new activity fails and he is force to deregister with the RETA as long as no more than five years have passed. However this purposed "safety-net" will have a very limited impact given the fact that few young workers usually do not accrue such benefits.

As far as the *incentives for (precarious) hiring* of young people under 30 is concerned, the most significant measures are the ones conceived to encourage the enrolment of workers without a previous labour experience. Here it are to be included the following ones.

Firstly, a new type of temporary contract –from 3 to 6 months– which simply requires a lack of experience of the young employee, ignoring the "principle of causality" that rules the short-term employment in the Spanish Labour Law. Secondly, incentives for work experience contracts for youngster under 30 that have completed their training no matter when –an exception to the limit of five years laid down by article 11 Estatuto de los Trabajadores– through a reduction in the employer's Social Security contribution for common contingencies of up to 50%. And, thirdly, an incentive for part-time employment of young people under 30 with no work experience –or, alternatively, who come from a different productive sector or have been unemployed for more than twelve months–, providing that they went through a process of training in the previous six months or that they reconcile the job with accredited training or any type of training in languages or information and communication technologies even when it has nothing to do with the job itself.

Additionally, the Royal Decree-law 4/2013 contains two measures to stimulate open-ended hiring. The main one, focused on young people under 30, sets out a one-year 100% reduction on the employer's contribution to the Social Security for the first open-ended contract concluded by micro-enterprises –self-employed workers and companies having up to nine employees– with an specific kind of worker –unemployed aged under 30–. The other one tries to encourage young self-employed workers to take on long-duration unemployed workers aged over 45 through open-ended contracts that benefit from a, again, one-year 100% reduction on the employer's contribution to the Social Security; a certainly imaginative way of conciliating the interests of both parties that probably will have no significant impact.

To end up this short overview on the Royal Decree Law 4/2013, we must refer to the new regulation on the "training and apprenticeship contract" –that type of contract where the employee combines two activities: paid work in a company and training within the vocational training or the education system–. In a coherent line with the 2012 Spanish labour reform, more flexibility is introduced by eliminating restrictions on concluding a "contract for practicum" [contrato en prácticas] based on qualification previously gained through a "training and apprenticeship contract". Furthermore, from now on temporary employment

agencies are allowed to supply manpower in the cases provided for the mentioned “contracts for training and apprenticeship”.

Again, these measures deserve a negative judgment. It is evident what their purpose is: they seek to stimulate the enrolment of young people –generally without previous labour experience– trying to fulfill the employer’s expectation to have labour costs reduced. Although most of these measures are provisional –they will be into force while the unemployment rate is above 15%–, they will probably be applied for a long time (ten years?). So we cannot consider them really provisional measures; on the contrary, they are the evidence of a double political failure. Firstly, the regrettable state of our labour market as consequence of “austerianism”[32]; and, secondly, a turning back to the “old bad recipes” that have decisively contributed to the endemic problem of employment instability, specially among young workers.

[32] A policy of fiscal austerity, i.e. “… spending cuts and tax hikes when the economy [is] already deeply depressed” (KRUGMAN, P. *End This Depression Now!*, Norton, 2012, p. 193)