# Transformations in public employment from 1990 to today.

*"The paper deals with the 1990s reform of public employment, i.e. the employment relationship with public administrations, in Italy. The reform has realized the "privatization of public employment", so that there was an assimilation between public employment relationship and the private one. The idea was that private regulation is more suitable in order to guarantee efficiency and productivity in public administration, giving more powers to public managers. Unluckily, after 20 years, the reform has not reached the hoped results and for this reason, in 2009, another law was adopted in order to improve efficiency and productivity and to fight absenteeism."*

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## 1. The privatization of public employment in the 1990s reform

In Italy, public employment, i.e. the employment relationship in public administration, has greatly changed from the early 1990s to today.

### 1.1. The situation until 1990

Until 1990, the employment relationship of public employees has been regulated in a different way from that of employees working in the private sector, due to the special organizational requirements of the Public Administration.

The main features of the "public" employees' status, compared to that of private employees, were:

- different regulation: while the private sector was regulated by civil law, the public sector was regulated by public law;
- substantial absence of bargaining, introduced only in the early 1980s in order to regulate a few aspects of the employment relationship as salary, holidays, etc.
- use of "authoritative powers"[1] in the management of the employment relationship and in the organization of public offices;
- salaries not connected to productivity;
- different judges in case of disputes: labour judges for private employees and administrative law judges for public employees.

[1] Authoritative powers are given by law and allow public administration to modify, create or extinguish rights or legitimate expectations of citizens without their agreement.

### 1.2. The 1990s reform

With the public employment reform[2], things changed completely:

- it was introduced the "privatization of public employment", that is to say that both the private and the public employees' status had to be regulated by private law, except for some categories of public employees for which it was necessary to maintain the public regulation, due to their important public functions (e.g. judges, professors, lawyers of the State, etc.); also public management relationship was privatized;
- bargaining scope was greatly amplified;
- "authoritative powers" in the management of the employment relationship were abolished and public managers were made to use the same powers of the private employer, as – for example – disciplinary power;
- also the organizational choices were to be taken by managers with the same powers of the private employer, so that the rules of the administrative procedure[3], typical of administrative measures, do not apply to them; only the fundamental lines of organization of the offices (e.g. the overall staff endowment), continued to be adopted in the form of administrative acts,
- a part of the remuneration, in addition to ordinary wage, has to be distributed by public managers looking at the single employee's productivity;
- same judge (labour judges) for both private and public employees, except for some disputes (as recruitment procedures) and for the non-privatized categories.

The process described above represents "a chapter of the general reform of public administration" which started in the 1990s[4]. It aims at concretizing the efficiency of administrative action, and the proper allocation of public resources, as well as the limitation of public expenditure, through the use of instruments borrowed from private law. For this reason, many powers were given to public managers, who had to play the role of public employer, by using the same powers of private employers.

The underlying idea is that private regulation is more suitable for the pursuit of such ends. In fact, the previous experience had showed that efficiency of Public administration was not guaranteed by

[2] See: law n. 421/1992 followed by legislative decree ( i.e. a law issued by the Government under parliamentary delegation) n. 29/1993 and by legislative decree n. 80/1998, which greatly modified the original reform regulation. See, moreover, legislative decree n. 165/2001 that now contains the whole regulation of public employment relationship.
[3] Law n. 241 of 1990.
[4] Cassese S. (1997), Le ambiguità delle privatizzazioni, in Cassese S., D'antona M., Cecora G., Battini S., D'Auria G, Dall'impiego pubblico al rapporto di lavoro con le pubbliche amministrazioni, (p. 81), Milano, Italy, Giuffrè editore.

the public regulation of employees' status, that often was cause of privileges and reduced productivity.

Nevertheless, the Constitutional Court has underlined that, despite the progressive assimilation of the public employment relationship to the private one, there are still some substantial differences because Public Administration does in fact "maintain nonetheless a special connotation" with respect to private employers, needing to abide by "the constitutional principles of legality, impartiality and effectiveness without any speculative aim". For this reason, for example, the recruitment of public employees needs a public competition procedure, open to everybody and not only to those already working in the public administration, as Italian Constitution provides (art. 97)..

Also the employment relationship of public managers, after the privatization, maintains quite distinct features compared to that of private managers (Const. C. 104/2007).

In particular, while the private employment relationship for managers can be qualified in terms of a trust relationship with the employer, so that the employer's right of withdrawal is always allowed, in public administration, manager status is much more guaranteed. The idea is that efficiency and impartiality of public administration can be granted only by keeping the management separated from the political bodies and by maintaining a certain degree of autonomy in the administration management, albeit respecting the directives coming from the political bodies.

To this end, spoils system has to be used only in a few cases; a sharp division between manager hiring and conferment of managerial tasks, that are temporary, was introduced; a part of the managerial salary was connected to the achievement of the planned results; a specific form of managerial liability for those managers who do not fulfil the set aims was provided.

### 1.3. The failure of the 1990s reform

After twenty years, we are able to say that the results of the reform have not been satisfactory: the efficiency of Public Administration has not improved and public expenditure has greatly risen.

The main reasons of the 1990 reforms failure are the followings:

- politicians has been, in these years, much more interested in gaining the "consensus" of public employees as electors, than in pursuing the efficiency of public administration and saving of public resources;

- Unions have become much more powerful so that they impose their will to the public administration; as a consequence wages grew and promotions (with salary increase) were given almost automatically without a serious selective procedure ( almost 90 per cent of public employees got a promotion from 2001 to 2007); for this reason, the expected curbing of public expenditure has not given the results wished for;
- public managers did not play the role they should have, because their independence from political bodies was not guaranteed enough and, on the other hand, managerial liability was not at all applied, so that they did not have any reason to achieve the planned results;
- as a consequence, the accessory remuneration, that should be connected with productivity, was distributed by managers equally to everybody (only 23 per cent of the accessory remuneration was effectively connected to productivity) and only a few disciplinary sanctions have been applied.

### 1.4. The new reform Act of 2009

In order to find a solution to this situation, a new law has been approved in 2009[5].

This "second step" of the reform aims at reducing Unions' power and the scope of bargaining and at amplifying the scope of law (e.g. about disciplinary liability, productivity evaluation, promotions, ect.); moreover, stricter restrictions were introduced in the collective agreements procedure in order to respect the budget forecast.

In order to reach the goal of improving efficiency and productivity of public administrations, prizes for merit and stricter disciplinary sanctions for low productivity and absenteeism have been introduced. The idea is that the productivity of employees will increase if their "performances" are evaluated by an independent body ( a committee that should be created in every office), following a strict procedure regulated by the law, and if good results are effectively remunerated by a wage increase.

Moreover, the new law asks the public managers to use their prerogatives more effectively in the management of public employees. To this end, public managers have been obliged to distribute the accessory remuneration only to those employees who have had good results and to punish those who have had bad ones. If public managers do not act this way, they would lose an important part of their remuneration (30%) and would be punished for managerial liability.

[5] Law n. 15/2009, followed by legislative decree n. 150/2009.

It is too early to see if this new law will obtain the planned results. What we can say now is that the 2009 law does not deal with another important aspect of the failure of the public employment reform: the lack of effective independence of managers from politicians. Moreover, the idea that problems can be solved by imposing by law certain behaviours can produce an exaggerated regulation that can put at risk managerial autonomy and the efficiency of the system itself.

## 2. The allocation of jurisdiction after the privatization of public employment

As it was already said, the privatization of public employees has had, as logical consequence, the shift of jurisdiction from the administrative law judge to the civil labour judge. It must be clarified, before going on, that that, as a general rule, administrative law judges do not have jurisdiction in every dispute in which a public administration is involved, but only when Public administration has used its "authoritative powers". On the other hand, civil or labour judges can also deal with disputes involving public administration but only when there are no "authoritative acts" because the Administration has simply used its private law legal capacity.

### 2.1.The reasons for previous choice of administrative law judges

The legislative choice of conferring the disputes regarding public employment to the administrative judge was originally due to the public nature of the employment relationship with public administration. Moreover it was motivated by the need to avoid complicated distinctions of jurisdiction in cases which contained a mixture of authoritative acts and private-law acts (which, without this choice, would have pertained to the civil judge jurisdiction), thus simplifying the system. This kind of jurisdiction of the administrative judge, which in the previous regime was the general rule for public employment disputes, withstands, as already said, only for the non privatized categories of employees.

### 2.2. The current allocation of jurisdiction after the privatization

With the privatization of public employment, the jurisdiction now belongs to the labour judge, who deals with all the disputes regarding the employment relationship at any phase, from the beginning to the end, including all the disputes concerning recruitment, conferment and revocation of managerial tasks, and managerial liability, as well as those concerning the retirement bonus.

As it was highlighted, it is quite difficult to understand why the legislator has decided to assign the jurisdiction on the acts of conferment and revocation of managerial tasks to the ordinary judge, since these acts greatly affect the administrative organization and the management of public

interests, and since, for these acts, the Constitutional Court – as we have seen – requires procedural guarantees very similar to the ones envisaged for the administrative measures.

Disputes regarding the competitive exam procedures finalized to recruitment, however, are still under the jurisdiction of the administrative judge because the competitive exam procedure is an administrative one. These procedures have been equated by the Supreme Court to the selective procedures for promotions or developing career [6].

Administrative law judges deal also with those disputes concerning the few administrative acts of organization, like the fundamental lines of organization of the offices (e.g. the overall staff endowment), being acts of authoritative and public nature.

The labour judge, within the scope of his/her jurisdiction adopts towards all public administrations all the judgments required by the nature of the safeguarded rights. In particular, he/she can make decisions of ascertainment, orders for payment of damages or for a specific behaviour, etc. The legislator has specified that when the judge recognizes the right to recruitment, or on the contrary declares that the recruitment has occurred in violation of substantive or procedural rules, the judgment itself can respectively create or extinguish the employment relationship. Finally, the ordinary judge will be able to allow compensation for illegal acts or behaviours enacted by the public administration in its role of private employer. Nevertheless, labour judges still cannot quash administrative decisions, that, in Italian law, can be annulled only by the administrative judge.

**2.3. Consequences of this new allocation of jurisdiction**

The overall opinion on the outcome of the reform, regarding the specific aspect of the allocation of jurisdiction in disputes concerning public employees, cannot be particularly positive, even if it must be said that the system has also some advantages.

The main negative effects of this allocation are that:

- it is now much more difficult to find the competent judge, with consequent jurisprudential disagreements and lengthening of trials;
- the protection of public employees has been reduced, especially because the ordinary judge cannot bring himself to review the employer's resolutions as in the past the administrative judge reviewed the discretionary decisions of the public employer; in fact, the ordinary

[6] See this important decision of the Supreme Court Cass. SU15 October 2003, n. 15403.

judge’s review on fairness and good faith is not structurally ideal to evaluate if the public employer is really pursuing public interest, since its aim is to safeguard the positions of the contracting parties and not the good practice of public administration, as the administrative judge does instead.

This however does not exclude, in relation to other aspects (protection of wealth rights and of rights issuing from collective agreements), that labour judge can guarantee a more incisive protection than the adiministrative judge.

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