Visit of the European Union Civil Service Tribunal

to the Italian Council of State

(Roma - 29th October 2012)

Administrative judges and labour judges in the disputes involving public employment: competences and powers.

1. The previous role of administrative judges as the judge of public employment disputes.

Until the 1990s, the administrative judge was the only judicial authority dealing with disputes involving public employees and Public administration, while concerning their employment relationship. The labour judge, on the other hand, dealt only with disputes between private employees and their employers. Therefore, we can state, the public or private nature of the employer had as a consequence the jurisdiction respectively of the administrative or labour judge.

The reason of this system has to be found in the circumstance that public employees' status had, since the beginning of the XXth century[1], a different regulation compared to that of employees working in the private sector, due to the special organizational requirements of the Public Administration. As a result, at that time public sector was regulated only by public laws and bargaining was limited to a few aspects of the employment relationship like salary, holidays, etc. In addition, Public Administration could use its authoritative powers in the management of the employment relationship and in the organization of public offices.

Thus, the legislative choice of conferring the disputes regarding public employment to the administrative judge was clearly due to the public nature of the employment relationship with the public administration. In fact, before continuing our discussion, it has to be clarified that, as a general rule, administrative judges do not have jurisdiction in a dispute only because a public administration is one of the parties. Indeed this happens only when the Administration uses its public and 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" as the Administration simply acts as a private person. In fact, ordinary judges can only decide not to

[1] Royal Decree, 22 November 1908, n. 693.

apply an administrative act, but he or she is not entitled to the power to set it aside[2], except in exceptional cases regulated by the law (for example traffic fines for which the jurisdiction belongs to ordinary justice, and more specifically to the judges of peace).

In particular, the jurisdiction over these disputes was exclusive (giurisdizione esclusiva) according to art. 103 of the Italian Constitution[3]: it means that the administrative judge could deal with both legitimate expectations (interessi legittimi) and subjective rights, thus simplifying the system. This choice, assumed in 1924, 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, otherwise, would have pertained to the civil judge jurisdiction).

Only for claims regarding compensation for damages, the competence was still of the civil judge, who was the only judge – until 1998 – who could deal with such disputes even regarding Public administration and public employees.

Under this regulation, as it can be easily understood, public employment disputes were representing a large number within the whole activity of administrative judges.

2. *The current allocation of jurisdiction between Labour judge and administrative judge after the so called "privatization of public employment".*

With the "public employment reform", introduced in 1992[4], started a deep transformation, opening the so called "privatization of public employment". Its immediate consequence was that the status of private employees and civil servants had to be regulated by civil laws. The reform excluded some categories of public employees for whom, in view of their important public functions (e.g. judges, lawyers of the State, military personnel and police forces, Diplomats, personnel of prefectoral career, employees of Independent Authorities, Fire brigades, Professors, etc.) it was considered necessary to maintain the public regulation. In addition,

[2] Art. 5 l. 2248/1865, Annex E.

[3] Art. 103 of Italian Constitution provides that:
The Council of State and the other bodies of judicial administration have jurisdiction over the protection of legitimate interests before the public administration and, in particular matters laid out by law, also of subjective rights (…)"
See moreover article 113, which states that: "The judicial safeguarding of rights and legitimate interests before the bodies of ordinary or administrative justice is always permitted against acts of the public administration. Such judicial protection may not be excluded or limited to particular kinds of appeal or for particular categories of acts. The law determines which judicial bodies are empowered to annul acts of public administration in the cases and with the consequences provided for by the law itself."

[4] See: law n. 421/1992 that enabled the Government to deliver the legislative decree n. 29/1993, and that continued with the enactment of the 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 and also the recent innovative measures brought by the so called "Riforma Brunetta" (law n. 15/2009 that had delegated the Government to enact legislative decree n. 150/2009).

public management relationship was privatized, against a contrary advice of the Italian Council of State[5].

It was a revolutionary innovation as according to the new regulation:

- a work contract has to be signed by parties at the end of the selection procedure for the recruitment, instead of an administrative act of designation;

- bargaining scope in public sector is greatly amplified;

- "authoritative powers" in the management of the employment relationship are abolished and public managers are made to use the same powers of the private employer, as – for example – disciplinary power;

- also the organizational choices are to be taken by public managers with the same powers of the private employer, so that the rules of the administrative procedure, 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 salary, had to be distributed by public managers looking at the single employee's productivity.

As a consequence of this deep transformation, the competence on both private and public employees disputes, except for some disputes (as recruitment procedures) was given to the labour judge, while the administrative judge kept its exclusive jurisdiction over the non-privatized categories, mentioned before, besides its usual legitimacy jurisdiction (giurisdizione di legittimità) over the administrative acts of the recruitment procedures.

The new allocation of jurisdiction between Labour and administrative judges after the privatization of public employment, as it is stated by art. 63 of the legislative decree n. 165/2001, is the results of various laws that have finally determined the current content of the article.

In particular, it provides that the Labour judge has jurisdiction over all the disputes regarding the employment relationship, at any phase, from the beginning to the end, including all the

[5] C.d.S., ad. gen., n. 146/1992.

disputes concerning conferment and revocation of managerial tasks, and managerial liability, as well as those concerning the retirement bonus.

Conversely, disputes regarding the competitive exam procedures finalized to recruitment, 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]. The reasoning of the decision is that promotion to an upper level, with more important functions, has to be seen as a new recruitment. Thus also the procedures finalized to promotion have to be qualified as administrative acts, within the competence of administrative judges.

Administrative judges deal also with those disputes concerning the few administrative acts of organization that are still acts of authoritative and public nature, according to art. 2 legislative decree n. 165/2001. They are the fundamental lines of organization of the offices, the overall staff endowment, ect.

Nevertheless, the distinction between the jurisdiction of Labour and administrative judges on this kind of controversies can be sometimes difficult.

The Supreme court has stated that the *discrimen* between the two jurisdictions has to be found in the moment in which the administrative procedure finalized to recruitment (or to a developing career) ends and the ranking of the winners of the competition is approved. The disputes concerning the previous phase should be on the competence of administrative judges, the other ones on the competence of labour judges because concerning the right to sign the work contract. Even though this criterium appears very simple, there are still some controversial issues: for example the case in which, in presence of a not yet expired waiting list, the administration decides to deliver a new call for applicants to recruit other personnel instead of using the waiting list. Difficulties in the individuation of the competent judge can be found also every time ~~that~~ a controversy involves an administrative act of organization which - as said before – has still public nature, because it is not clear whether the administrative decision must be challenged before the administrative Courts or can be simply not applied by the Labour judge.

[6] See this important decision of the Supreme Court Cass. SU, 15 October 2003, n. 15403.

Obviously, the effects of the transfer of competences were not immediate: only claims which were relating to facts happened after 30 June 1998 have to be presented before the Labour Courts.

The labour judge, within the scope of his/her jurisdiction, towards public administrations adopts 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. He or she can only not apply them when recognize an illegitimacy.

Administrative judges have, in the controversies involving public employment, the same powers which they usually have in their jurisdiction. In particular, they can quash the administrative acts (ad example of a recruitment procedure), if recognize them affected by a violation of law, incompetence or abuse of power. Moreover, they can condemn the administration to pay compensation for damages caused by administrative decisions or, but only for the non privatized categories, can condemn to pay the due sums.

3. Consequences of this new allocation of jurisdiction.

The most evident consequence of this new allocation of jurisdiction is, on the one hand, the sensible decrease of the claims presented to the administrative courts in the matter of public employment.

Data show a constant reduction, year after year, of the new cases and correspondingly of the pending cases. For instance: in 2010 the number of new cases concerning public employment was 13% of the total in the administrative tribunals (7.585) and 17% in the Consiglio di Stato (1.927). In 2009, this number was significantly higher: 15,5 % in the administrative tribunals (8.281) and 2.575 in Consiglio di Stato[7]. The same trend is evident in the studies of the Italian body of statistics (ISTAT) with regard to the previous years. In fact, for the years 2006-2008 a

[7] These data are taken from Carlo e Silvia TALICE, *Analisi dell'attività della giustizia amministrativa nel 2010*, in Giursdizione it, 2011.

sensible reduction of the backload in such matter has been obtained (from 183.154 to 155.283 pending cases).

On the other hand, obviously, the number of cases presented in labour courts constantly increases.

The *Relazione per l'inaugurazione dell'anno giudiziario 2012* of the First President of the Supreme Court shows that new claims presented in 2010 before Labour Courts of first instance were 35.135 and the appeals were 7.471, while in 2011 new cases were 47.412 (with an increase of 34,9%) and the appeals 7.782 (with an increase of 4,2%). The total of pending cases has increased by 21% in the first instance and by 9,1 % in the second instance.

Thus, it clearly appears that the preeminent role in public employment disputes is now played by Labour judges. The administrative judges instead are called to decide a few (although sometime very important) controversies, mainly on recruitment or promotion procedures.

The overall opinion on the outcome of the reform, regarding the specific aspect of the allocation of jurisdiction in disputes concerning public employees, is not particularly positive, even if one must admit 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 undergone a reduction, mainly because the ordinary judge cannot review the employer's resolutions as in the past the administrative judge used to review the discretionary decisions of the public employer. In addition it is to put in evidence that the law on the administrative procedure (law n. 241/1990), which provides the duty to give a motivation of administrative acts, cannot be applied regarding the employer's resolutions, since they have civil nature. Moreover, we must not ignore the fact that the ordinary judge's review on fairness and good faith is not structurally ideal to evaluate if the public employer is actually pursuing the 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.

4. Final remarks on the effects of privatization of public employment.

The process described above was considered as "a chapter of the general reform of public administration" which started in the 1990s ([8]). It aimed 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 was that private regulation was more suitable for the pursuit of such aim. In fact, the previous experience had showed that efficiency of Public administration was not guaranteed by the public regulation of employees' status, that, instead, was too often ground for 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 in fact "maintains 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, which – as it has already been said – was privatized, maintains nevertheless quite distinct features compared to the one 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.

[8] S. Cassese, *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 amministrazion*i, (p. 81), Milano, Giuffrè.

To this end, as the Constitutional Court has constantly affirmed, 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.

Unfortunately, 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 significantly improved and public expenditure has greatly risen.

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

- politicians have 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– expected;

- 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 to productivity, was equally distributed to everybody by managers (only 23 per cent of the accessory remuneration was effectively connected to productivity) and only a few disciplinary sanctions have been applied.

In order to find a solution to such a situation, a new law was approved in 2009[9] . This "new reform", also known as "Riforma Brunetta" from the name of the Minister who proposed it, 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, more

[9] Law n. 15/2009 which has delegated Government to enact legislative decree n. 150/2009.

severe restrictions were introduced in the collective agreements procedure in order to respect the budget forecast.

In order to reach the goal and improve efficiency and productivity in the 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.

Finally, this law has modified the procedure for conferring and revoking managerial tasks in order to apply the principles stated by the Constitutional Court in its numerous judgments about spoil system. Thus, procedural guarantees very similar to the ones envisaged for the administrative measures have been provided to assure public managers' impartiality (for example duty of motivation in any case of revocation or not renewal of the managerial task after the expiring date; motivation based only on negative results of the previous activity in case of revocation before the expiring date; right to be herd, publication on the website of the administrations of the number and type of available places to allow interested people to apply for them, etc.).

Nevertheless, this law has not modified the previous allocation of jurisdiction and the jurisdiction on the acts of conferment and revocation of managerial tasks still belongs to the ordinary judge. Despite the fact that these acts greatly affect the administrative organization and the management of public interests, they have to be delivered following procedures very similar to the administrative ones.

Actually, in the last two years, other laws[10] have weakened the guarantees for public managers which have just been introduced (the duty of motivation has been abolished in case of non renewal of the managerial task after the expiring date).

In conclusion, we can state that, in spite of the efforts of the Constitutional Court, the effective independence of public managers from politicians cannot be really granted if the legislator does not give coherent rules and if acts of conferring and revoking managerial tasks are still being qualified as private law decisions that the public employer takes on its private capacity.

[10] See: law decree n. 78 31.5.2010, n. 78, ratified with modifications by law l. 30.7.2010, n. 122 and law decree n. 138 del 2011, ratified with modifications by law 14.9.2011, n. 148