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DUTIES AND RESPONSIBILITIES OF THE PUBLIC EMPLOYEE. ABSENTEEISM AND RESPONSIBILITY FOR DAMAMGE TO THE PUBLIC ADMINISTRATION IMAGE

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ABSTRACT: *Usually, access to the public employment is through a public competition, open to all citizens who own participatory requirements foreseen by the law (Article 97, co. 4, Italian Constitution). The recruitment service is perfected by entering into an individual work contract, specifically a negotiating act between the parties.*
As any subordinate employment relationship, public employment also generates rights and duties for the same employees, that derive from constitutional principles, national rules and collective bargaining of the various work areas. Among the most recent regulatory provisions in this area, we find DPR n. 62 of April 16, 2013 (Rule on the behaviour code of public employees), that defines the minimum duties of diligence, loyalty, impartiality and good conduct that public employees are required to observe. The violation of these obligations, which lie on the public employee, determines its disciplinary responsibility in accordance with the provisions of Art. 55 of Legislative Decree 165 of 2001, recently renounced by Law n. 124 of August 7, 2015 (Delegations to the Government on the Reorganization of Public Administrations). The goal of this last rule is to regulate, more precisely, disciplinary dismissal rules of the public employee and to repress more effectively those behaviours that attest to false presence on duty.

KEYWORDS: *Public Administration; public employee; duties; absenteeism; responsibility*
JEL CODE: *K 3*

1. ACCESS TO PUBLIC EMPLOYMENT: THE INDIVIDUAL EMPLOYMENT CONTRACT

Article 97 of the Italian Constitution stipulates that access to public employment is normally performed through a public competition open to all citizens who have legal requirements for participation.

Similarly, Article 35 of Legislative Decree no. 165/2001, provides for access to public employment by means of selective procedures that ensure impartiality, effectiveness and speed through adequate advertising of the selection and the manner in which it is carried out[1].

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[1] "Art. 35 of Legislative Decree no. 165/2001. Recruitment of public employee. 1. The access to public employment is through by an individual employment contract: a) by selective procedures, in accordance with the principles set out in co.3, required for recruitment, that guarantee access from outside in an appropriate manner;...omissis."

But, in any case, once the competition phase has been depleted and the ranking is approved, the act of recruitment, being as of private nature, takes the form of an *individual contract of employment* and hence it stands as a negotiating act between the parties, with the mandatory referral to the applicable CCNL (National Collective Employment Contract), whose provisions, by that route, also become binding for an employee who does not belong to any of the stipulating Unions.

In particular, the individual contract of employment consists of «*the contract by which the lender undertakes to make his work available to the employer who in turn is obliged to pay the lender a remuneration*». It concerns therefore a contract having the following characteristics:

- *burdensome*, as there is a need for a remuneration that is the natural countervailing of work;
- *synallagmatic*, since it is a contract for performance benefits;
- *cumulative*, in the sense that law and collective bargaining establishes precisely the amount of performance and compensation;
- *hetero-determined*, since the content of the employment contract is predetermined as per time and means by the employer attending the purposes the business organization has set up.

The most accredited doctrine (Ghera, De Luca Tamajo) has highlighted that the contractual nature of the employment relationship must be acknowledged that it is still constituted by the will of the employer and the lender.

Any restrictions on the autonomy of the individual parts of the employment relationship, derived from law and collective bargaining, do not affect the source from which it originates. The contract is therefore a necessary tool so that arises the subordinate employment relationship and on which apply the relevant typical discipline.

The employment contract for the establishment of a public employment relationship must always have the written form.

It is undisputed, and repeatedly stated both by the Court of Cassation and the Council of State, that it is only by the means of signing the individual contract of employment of the public administration that the employment that takes place. For any contract made by the PA, even if this entity acts in *iure privatorum*, the written form must be *ad substantiam* and, therefore, the employment contract must, in its entirety, be drawn up in the formulation of a specific document, which includes the employee's subscription or it is void. The document must hold the signature of the empowered trustee by the Body legally in force against third parties, from which it can be deduced the concrete establishment of the relationship with the indispensable determinations of the performance to be made and the compensation to be paid [2].

2. RIGHTS AND DUTIES OF THE PUBLIC EMPLOYEE

The Public Employment relationship is a bilateral legal bond, resulting in the existence of a series of rights and obligations that concern both the worker and the public

[2] see Cons. No 7147 of 11 December 2005, No 7147, Sector I, 3 July 2002, No 1849, Italian Civil Code, II, 25 November 2003, No 17891, TAR Sicilia-Palermo, Section III, 23 October 2013, no. 1920

administration and deriving from constitutional principles, national rules and collective bargaining agreements in the various labour sectors.

The frequently quoted Legislative Decree 165/2001, in particular Articles 54 and 55, established that the definition of the duties of the employee was in conformity with the «uniform» code of conduct adopted for all administrations by the Department of Public Service – in consideration of the representative trade unions - and to the individual codes of conduct adopted by the individual administrations and containing any additions and specifications to the general code that were made necessary after verification of their applicability.

This legislation was later updated with Italian D.P.R. n. 62 of 16 April 2013 (the *Rules on the Code of Conduct for Public Employees*), which defines the minimum duties of diligence, loyalty, impartiality and good conduct that public employees are required to observe in the context of their employment relationship with Public administration[3].

This new Code is the reference point for delineating public servants' duties and responsibilities and fits in with the Reform of Public Administration in the direction of recovering the legality, transparency and the democratic nature of administrative action.

These duties, better defined as obligations for workers so-called privatized, are mainly due to certain rules of the Italian Constitution and the Civil Code, such as:

• the duty of loyalty to the Republic (Article 51 Cost);

• the duty of impartiality and the principle of good performance (Article 97 Cost.);

• the duty of diligence, obedience and commitment (Articles 2104 and 2105 of the cc).

But such duties also have a precise enunciation in individual collective agreements, whose provisions must always be coordinated with ordinary legislation.

Their violation determines the disciplinary liability of the public employee, according to the provisions of Article 55 of Legislative Decree 165/2001, recently avowed by Law no. 124 of 7 August 2015, entitled "Delegations to the Government on the Reorganization of Public Administrations", by Legislative Decree no. 116 of 20 June 2016 on disciplinary dismissal, which entered into force on 13 July 2016[4] and by Legislative Decree 20 July 2017, no. 118 (published in Official Gazette 181 of 4 August 2017)[5], containing the supplementary and corrective provisions of the Legislative Decree of 20 June 2016, no. 116, amending Article 55-quater of Legislative Decree no. 165, pursuant to Article 17, paragraph 1, letter s) of Law 7 August 2015, no. 124.

3. HIGHLIGHTS OF ITALIAN RECENT LEGISLATION ON DISCIPLINARY DISMISSAL OF THE PUBLIC EMPLOYEE

The main purpose of this last legislation is to regulate more precisely the disciplinary dismissal rules of the public employee and to more effectively suppress the conduct of attesting falsely the presence on duty.

Disciplinary dismissal means the *"sanction applied by the employer to the worker where, through his conduct, he violates certain rules of law, collective agreements or even the disciplinary code of the company to which he belongs*."

[3] http://www.gazzettaufficiale.it/eli/id/2013/06/04/13G00104/sg

[4] http://www.gazzettaufficiale.it/eli/id/2016/06/28/16G00127/sg

[5] http://www.gazzettaufficiale.it/eli/id/2017/08/4/17G00131/sg

The dismissal is therefore a unilateral act which may outcome subsequent to certain behaviour of the worker and which holds certain peculiarities.

The novelties with the Legislative Decree 116/2016 (amended by Article 55-quater of Italian Legislative Decree 165/2001) are aimed at preventing the false testimony of the presence of the public employee caught in flagrant by means of surveillance or registration of accesses or attendance, thus delivering greater responsibility to their responsible managers.

This Decree also provides for timely disciplinary procedures and the possibility of condemning the employee for damages to PA's image.

Recent news stories in a number of Italian public administrations show that the 2009 Reform by Brunetta Minister did not work, so the government has once again come back to dealing with the problem of absenteeism, conferring greater responsibility to leaders, certainty and speed of process time, and setting up a new type of employee responsibility, that is, damage to the PA image.

The first amendment made by the Government concerns *the definition of false attestation*, so the new paragraph 1a of art. 55-quater clarifies that "*it constitutes false attestation of presence during service, in addition to the presence recorded through the alteration of presence detection systems, any fraudulent modus operandi, even by exploiting third parties, to mock up the employee in service or mislead the administration at which the employee is liable to work according to his/her working time.*

About the violation will also respond those who will facilitate the fraudulent conduct with their active conduct or by omission."

Another peculiarity is that the government wanted to reduce the time of the procedure; in fact, in the new paragraph 3-bis of the same article, it is stated that "*the false attestation of presence in service, ascertained in flagrancy or through means of surveillance or registration of access or attendance, will result in immediate suspension from duty without a salary without prejudice to the right to a food allowance to the extent provided for in the relevant regulations and contractual provisions, without the prior hearing of the person concerned. "*

This is, in practice, a mandatory suspension that must be made by the head of the structure in which the employee works - or, if first acquainted with, by the Office for Disciplinary Procedures (UPD) - with a reasoned decision immediately and in any case within forty-eight hours from the time the above subjects become acquainted.

In the present case, the Government has concerned that the brevity of the term does not adversely affect the proceedings and has therefore ruled that the violation of that period will not result in the expiration of the disciplinary action or the ineffectiveness of the interim suspension, any liability of the employee to whom it is attributable.

Another point of innovation of the Decree is the greater responsibility attributed to executives, or, in the non-managerial bodies, to the relevant service managers.

In fact, if they learn of the fact:

- *failure to report* disciplinary proceedings to the Office;
- *the omission of activating* the disciplinary procedure;
- *the omission of adoption* the precautionary measure;

without unjustified reason, will constitute a disciplinary offense punishable by dismissal and will have to be notified by the competent office for disciplinary proceedings to the judicial authority for the purpose of establishing the existence of any offenses.

Of course, the responsibility of the responsible manager will only be triggered in the event of knowledge of the fact and of the incident "without justified reason" in the final text (see Opinion Council of State No. 864/2016).

Since the complaint to the PM and the report to the relevant Regional Court of Justice of the Court of Auditors must take place within 15 days, the Court of Auditors' Prosecutor's Office, when the conditions are met, will have to file a claim for damage within three months from conclusion of the dismissal procedure.

Responsibility action must be exercised within one hundred and twenty days after the denunciation, without any possibility of prolongation and the amount of compensable damage will be restored to the equitable judgment of the judge in relation, also, to the relevance of the fact to the media and in any case any conviction may not be less than six months of the last awarded salary, plus interest and expense of justice.

The highlight given by the press organs to the issue will then make a difference.

In fact, the Council of State, in its Opinion no. 864/2016, found that the damage to the image of a public administration, due to absenteeism occasionally highly targeted by media, is evident in cases of absenteeism so called *in flagrante* and that the compensation actions against absentee employees are a means of re-balancing situations perceived by public opinion as serious injustices.

The innovations, however, made with the recent Legislative Decree 118/2017, relate, in particular, to the acceptance of parliamentary opinions on the introduction of a general obligation for public administrations concerning the communication to the Inspectorate for the function public of the initiation and conclusion of the disciplinary proceedings and the outcome thereof.

In order to allow for effective and timely monitoring, the acts of initiation and conclusion of the disciplinary procedure as well as the possible suspension of the employee's interruption shall be communicated to the Inspectorate for the Public Service by the competent office of each administration, electronically, within twenty days from their adoption.

Finally, the new text foresee in its draft, the acquisition of the agreement at the State-Regions Conference and, after the preliminary examination by the Council of Ministers, the agreement among the Conference and the United Conference.

4. **CONCLUSIONS**

Over the last few years, in Italy, there have been many "adjustment" rules aimed at countering the absenteeism problem in the Public Administration, hoping to prevent such phenomena from continuing to occur massively at the expense of an efficient and effective public administration.

But, given the recent modification rule, any positive effects of the new provisions can only be evaluated in a few years.

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