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Medical examination within the Reform of the Italian Public Administration

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The Italian Reform of the Public Administration (art. 17 Act n. 124/2015) is opening to the opportunity to re-define the employment relation of the medical examiners – those in charge for controlling over the state of health anyone entitled to sick pay and other social-health-related rights, as well as disability-rights – by means of an agreed Convention with the National Institute for Pensions and Social Security (INPS).

THE FUNCTION OF MEDICAL EXAMINATION OVER ANY ACTIVE OR RETIRED WORKER DECLARING OF BEING SICK OR DISABLE: THE LEGAL FRAMEWORK

Controlling over the correct allocation of social security rights is complementary to the Italian constitutional norm that recognizes social security, art. 38 Italian Constitution. Article 38 recognizes that every citizen who is not able to work and who has no means to live upon, is entitled to social maintenance and social assistance; moreover, every worker has the right to be supported in case of accident, illness and disability. It is up to public institutions and agencies that such support is provided (art. 38 co. 4 Constitution) and the Italian Civil Code too – art. 2010 c.c. – similarly states such a social right. The public bodies so identified, every time it is needed to verify the health condition of workers, call for the intervention of medical doctors who work against any abuse. The present study is focused on medical control regarding abuse of sick pay, but it is connected to the similar control over disability benefits, work related injuries/accidents and professional disease, since the perspective is possibly one calling for an overall view over the function whenever the health condition of any citizen need to be verified.

Assistance and social security, to which the constitutional norm is giving basement, are implemented through diverging organizational systems. Although the discipline aimed at implementing and delivering social benefits has not an explicit basement in the Constitution, it can be argued that its constitutional basement can be found in the fundamental principles of good and impartial public administration (art. 97 Constitution) as well as in the constitutional duty of the State to pursue its own financial equilibrium (art. 81 Constitution) – since social benefits are financed by the State and (partly) by employers of both the public and private sector.

The function that we are dealing with – not including prevention in social security in this study – is setting the figure of the examiner medical doctor at the very centre of the chain of public assistance.

Currently, the function can be executed by medical doctors working as subordinated employees (although having a reduced subordination, since any doctor working for the public administration is qualified as a manager in Italy) but also as self employed. Particularly, the

legal qualification of most of medical doctors examining over workers' declaring sickness (called "fiscal doctors") has been judged to be a form of self employment, performed in a continuing and coordinated collaboration (relevant under art. 409 Italian Civ. Proc. Code, see Supreme Court, United Sections, sentence n. 7835/1991 regarding fiscal doctor employed by INPS, Sentence n.4893/2015 delivered by the Council of the State qualified them as semi-subordinated workers).

The institutional competence for the function is, to this day, identified by statutory law in a plurality of agencies, in the Minister of Labour – in its function of labour inspector – in the Minister of Health, in its function of medical service at the local level (AuSL - Local unique sanitary assistance), in the Minister of Economy and Finance , and, particularly, in other public bodies that appears to be "directly" in charge for this service, INPS and INAIL (the National Institute for Assistance for Labour Injuries). Therefore, we witness to a mixture of disciplines on the part of the employer: starting from 1955 when a Presidential Decree re-organized all the offices of the Minister of Labour (D.p.r n. 502/1955), crossing the later re-organization of the National Health System in 1970 and a series of later legislative and ministerial acts, included D.lgs n. 502/1992 which regards the convention ruling any medical doctors working for the National Health System, it follows a legal frame that is rather complex and far from clear for a labour law analysis.

The present study has been requested by the Italian National Federation of General Practitioners (F.I.M.M.G.) representing the category of fiscal doctors employed by INPS.

Before recalling in details the norms that, according to existing law, do discipline the function, we need to cope with the recent overall Reforms which are concerning the Italian Public Administration and Italian Employment Relations, since they have both a indirect and a direct impact on our topic.

On the one side, the law that aims to re-organize the Public Administration (Parliament Act n. 125/2015) is precisely concerning the qualification of medical doctors working in the public sector for controlling over any abuse of sick pay.

On the other side, the Ministerial Decree implementing the so called Jobs Act (Parliament Act n. 183/2014), together with the re-definition of any employment contracts in the private sector, is newly defining dependence in employment contacts by including those self directed employees (continuously collaborating to the firm) whose activity is nevertheless organized by the employer .

Moreover, there is a Report by the Parliamentary Commission for Social Affairs that undertook an investigation over this special employment contest (recent economic cuts affected severely many fiscal doctors and rose the necessity to define their employment protection) concluded for more clarity in contractual conditions, it suggested the overcoming of the dual regime that is keeping separate public and private sector, and adoption of a regime coping with not compatible activities, wherein the co-existing conflicting interests and conflicting roles should be faced.

Particularly, Act n. 124/2015, regarding re-organization of the Public Administrations, is apparently giving an occasion on the path to simplify and unite the discipline of both private and public sector. It provides, literally: " to re-organize functions of medical examinations

regarding public servants' absence from work, with the aim of granting an effective control, giving to INPS the relative competence and workforce as currently employed from also other public administrations – based on a preliminary understanding from the Permanent Conference for relations amongst the State, the Regions, the Autonomous Provinces of Trento and Bolzano which would provide over the transfer of funds, and would define the employment model of organization – with no increasing of the public debt and by a recognition of a priority placement of those doctor who are already working according to the existing legal frame (art. 4 co. 10 bis executive Decree n. 101/2013, turned into Parliament Act n. 125/2013)".

It is a norm that is orienting, on the first side, to a transfer of tasks and workforce from other public administrations to INPS only, and, on a second side, it opens to the possibility for a discipline being bargained, rather than stated in ministerial decrees.

SOURCES OF LAW

From the complex legal frame that is so to be considered, which norms will be here after just mentioned, it is emerging a system that is divergent as for governance, and as for a disparity of treatment to be applied to worker of the private sector in respect to worker of the public sector.

Under the aspect of the governance, complexity rose in the plurality of bodies that can be in charge for these employment relations (INPS, AuSL, Minister of Labour, Bar of Medical Doctors, Minister of Economy). Under the aspect of the treatment that is applicable to workers (absent from work because of sickness or disability) there are different requirements as for time of obligatorily staying at home (depending if they are public or private employees), control can be activated by the employer and by the office/institution too in case of private employees, while for public servants it is needed the impulse of the employer.

The state of discipline in the private sector moves from art. 5 of the Statute of Workers (Act n. 300/1970), which forbids any medical verifications by any employer's doctor over his workers' physical ability, sickness and disability, as well as on any absence due to work related injuries or professional disease (no doctor of the premises' rule), while it is only allowed a sanitary verification via the competent public body (that intervenes whenever the employer makes such an instance); the employer cannot verify the worker's physical ability but via those specialized public bodies as well.

Art. 5 of D.lgs n. 463/1983 and Ministerial Decree dated 7.5.198 established the organization and implemented the function of medical control, whenever it is needed in the form of a home sanitary visit (there it is required for sick workers to stay at home from 10 a.m. to 12 a.m. and from 5 p.m. to 7 p.m.); these sources of law established a special contract for fiscal doctors. According to article 12-bis of Act n. 638/1983 INPS is moreover authorized to sign specific conventions with INAIL (therefore any check on work related injuries are covered by medical doctors being employed directly by INAIL or upon a Convention between INAIL and INPS).

Later, Ministerial Decree dated 02.25.1984, and 1.8.1985 established the possibility to sign typical Conventions also amongst INPS and the AuSL for the execution of medical verifications and mandatory staying at home during sickness (see Circolare INPS n. 52 dated 2.2.1985); then, the Ministerial Decree dated 4.18.1996 provided for these fiscal doctors enrolment, and identified some activities that are not compatible with their function. Ministerial Decree dated

10.12.2000 and 05.08.2008 have then updated on economic compensation and other normative aspects.

In the public sector, on the other side, the first source of law is art. 55 septies of D.lgs n. 165/2001 and Ministerial Decree dated 12.18.2009, which currently provide for sick workers to stay at home from 9 a.m. to 1 p.m. and from 3 p.m. to 18 a.m. The Ministerial Decree specified that workers who are affected by certain diseases are not obliged to stay at home (this is the case for : a. serious sickness requiring life-saving treatments; b. work related injuries; c. work related disease recognized as such; d. sickness just connected to a recognized disability; not obliged to stay at home are also those employees that already have been visited by fiscal doctors during the time as indicated in the medical certificate). The mentioned law (art. 55 septies) affirms that in case of absence from work for a period that is longer then 10 days, and, in any case, after the second event of sickness in a solar year, the absence is justified exclusively via a medical certificate that is released by an office of the NHS (National Health System) or by a medical doctor working for the NHS.

From the mentioned sources of law, it follows that, as for the perspective of declared sick workers treatment, we see a different regime in case of public servants and private employees, which is not clearly justified, both for the different duration of mandatory staying at home, and for the wider range of disease that do not imply any oblige to stay at home, which is in favour of public servants. The regime is also different when it comes to sanctions: while the Decree on private sector only provides decadence from all benefits received, in the public sector there is a more severe sanction that implies the duty to repair to the damage that the public administration has received because of his employee's breach of law.

To the reverse purpose of unification of the discipline between the public sector and the private sector, there is an administrative disposition by INPS (Circolare INPS, dated 9.12.2011) according to which the system for presenting an instance to check over the employee's health conditions and sick pay is unique: both private and public employers are now asked to make an instance via an IT procedure.

As for the involvement of the strictly sanitary administrations, art. 14, letter q, Act n. 833/1978 (which is the Act that established the National Health System), set upon the AuSLs (local sanitary assistance bodies) the liability to check over the health condition and medical certification having a legal effect. The same Act recognized the right to sick pay and to maternity pay as we know them today: art. 74, delivering such monetary benefits, gives to INPS (in place of the many social security bodies that were delivering the same service before 1978) the management. Moreover, parliamentary Act n. 33/1980 (art. 1) expressly provided that checking over health conditions of those absent from work (according to art. 5 Act 300/1970) is done by medical doctors indicated by the Regions (the chief bodies, as for sanitary competences, between the Central Government and the local bodies). Thereafter there seems to be a management of control over health related benefits that is shared amongst INPS, the Regions, and AuSLs, but recognizing the direct involvement of INPS which is also the creditor of the social benefits hereabout delivered.

The sources of law for medical checking on paid disability can be found in many different statutes nonetheless (Act n. 335/1995, co. 3, lett. d; Act n. 118/1971; Act. n. 104/1992; art. 20 of the Decree n. 78/2009 (converted into Act n. 10/2009; art. 10 co. 4 of the Decree n. 78/2010 (converted into Act n. 122/2010; art. 38 of Decree n. 98/2011 (converted into Act n.

111/2011); art. 1, co.109 of Act n. 228/2010. All these norms makes a direct and indirect reference to the competence of INPS.

From such a complex legal frame we shall establish the delicate institutional equilibrium (concerning labour law, health, public finance and solidarity) that is today at the basement of controlling over delivering of social benefits linked to health conditions of citizens. The system is today involving several institutional bodies with competences that appears to be partly crossing and overlapping, not clearly defined, like in the case of coexisting competence of INPS and Regions as for calling the medical doctors to be employed in such a service, or like that of INPS and AuSL that are both competent over delivering the social benefits and controlling them over.

THE COST OF SERVICE: EMPLOYMENT AND EMPLOYMENT COMPENSATION OF MEDICAL DOCTORS

When it comes to the analysis of the cost for the service that is in point, we see that we are mainly dealing with the labour cost. Consequently, we are dealing with the many financial limits just present whenever a public cost is concerned, in order to achieve a more rational and efficient service. Remarkably, in 2013 statutory law imposed on INPS savings up to 300 millions euros per year, which justified the cut of home visits by fiscal doctors that are activated by the office (rather than by the employers), which fact severely affected these workers' employment perspective.

In the private sector, the first Decree which implemented the function of medical examination for legal purposes (the above mentioned Ministerial Decree dated 1986) clarified that the service is paid by a contribution of those employers who apply for it: employers and social security bodies that apply for the controlling service must reimburse INPS, which is managing the execution of the service, the compensation which is given to fiscal doctors for each visits that they do, up to a sum that is provided by the same Ministerial Decree (including transport expenses and fees). The visits that are occasionally disposed by INPS offices instead, not by any particular employer, are thus at full cost upon INPS itself (as the 2013 cut demonstrated, putting at risk the employment perspective of many fiscal doctors).

In the public sector, instead, cost of service is not explicitly ruled in the statute law, neither in any Decree of implementation. So it should come up from the balance of each employing administration to which the service can be statutorily assigned (AuSL, the Ministers etc. in coordination with the executing competences of INPS); nevertheless, this is happening upon no explicit ruling regarding source and amount of remuneration.

Art. 5 (co. 8), of the mentioned Decree n. 463/1983, ruling compensation of the service, specified that it is up to an harmonized decision by the Minister of Labour and Social Security and the Minister of Health, after consultation with National Federation of Medical Doctor Bars and the Council of Administration of INPS, the establishing of a discipline and implementation of the service, as well as compensation of medical doctors there involved as well (from here it is followed Ministerial Decree dated 1986). It is a norm that, although explicitly regarding the private sector only, fixes a procedure that is leading to a shared decision by the main central authorities; as such, it can represents a referring parameter in the public sector too.

Moreover, art. 5 (co. 9), which is concerning the fiscal home visits only, provides the possibility to set the same discipline via a Convention. Specifically, it is stated that the Minister of Health has a subsidiary power, to be used coordinately with Minister of Labor and Social Security, to

formulate model-type of conventions with the understatement of INPS and the Regions (and AuSL, that are the local administrations of Regions), also having the purpose of delivering a service of ambulatory visits with plural specialized medical competences, for specific certifications.

Decree n. 463/1983 specified that organization of the service is managed by INPS, which relies upon an opinion from the Bar of Medical Doctors in order to establish a special list of doctors who can run the function, both as subordinated employee and as self employed, just coordinated by INPS itself. This list of doctors is the one put at risk by the 2013 cut, and that Decree n. 101/2013 (converted into Parliamentary Act n. 125/2013) transformed into a closed list. So there is the possibility for INPS to utilize both employee and self employed doctors. Contemporarily, the Minister of Health and the Minister of Labour and Social Security, the National Federation of Bar of Medical Doctors and INPS, have the possibility to set the economic content of these employment relationship, although the Government can set them as well – according to the same harmonized procedure.

Conclusively, today the discipline finds its final source in the Ministerial Decrees, but it is plainly clear that it is well possible that in the next future the same discipline will find its source directly in a Convention (which is apparently the same purpose of Act 124/2015 when it recalls the closed list of doctors already ruled according to 1983 legal frame, which essentially would merge, as for the needed workforce, checking over the public sector and checking over the private sector).

Stability Act for 2014 (L. 147/2013, co.339) was confirming the competence of AuSL over the checking we are dealing with. It contained rules for the sharing of funds amongst Regions to cover the medical examinations regarding employees of the public sector. Remarkably, we are dealing with a cost of around 75 millions of euros just paid by AuSL (working on both private and public sector), which is rather distant from the cost that is paid by INPS for the same service for sickness in the private sector, which amount is around 25 millions euros per year, and, even more surprisingly, it is referring to a number of medical certificates and medical home visits that is double if compared to those done by AuSL . The Stability Act confirmed this AuSL competence even against a constitutional jurisprudence (Sentence n. 207/2010) observing that costs for medical examinations are not the same as the sanitary essential necessities (Essential Level of Assistance) as for their financial coverage: medical examinations should not belong to the balance of health administrations while covering essential costs for assistance.

It has been upon these financial consideration that finally the reform in 2015 introduced the possibility of assigning the function that is today run by doctors working for AuSL and other administrations to INPS only: INPS will be controlling the employment relation apparently as a unique employer.

Moreover on complexity of analysing the labour cost, it must be said that to this day, according to INPS Circular n. 110/1994, a part of medical doctors working in the ambulatories, but assigned to do medical examinations as well, are working by virtue of a not better defined agreement between the National Federation of Medical Doctors and INPS which applied the Convention of specialized medical doctors.

THE MEDICAL EXAMINATION IN THE PERSPECTIVE OF A UNIQUE CONVENTION (UNIQUE EMPLOYMENT ROLE)

To this day the many medical doctors who are in charge for the function are thus operating by virtue of different contractual models; this is possibly leading to conflicting interests between the role of different administrations, and it can lead to unequal treatment to employed doctors working for the same administration .

There is an unavoidable functional dependence that must be considered, connecting any medical examiner, being he or she a subordinated employee (of a managerial level) or a self employed one, to his or her employer, which is confirmed by the duty to refrain from any not compatible activity, meant as an activity capable to rise a conflict of interest (a doctor could otherwise be the trusted personal doctor of an employer and the examiner of sick employees working for that same employer). In this perspective the ministerial discipline limited the range of activity of fiscal doctors very rigidly. At the same time, the peculiarities of the working duty (sanitary inspection) played in favor of a substantial exclusivity of the employment relation, even when these professionals are working as self employed.

The same regime of incompatibility is not clearly traced for medical doctors working in the ambulatories as subordinated doctors; according to art. 15 quarter and art. 15 quinquies of Delegated Decree n. 502/1992 these have the possibility to opt, year by year, for a regime of non-exclusivity with their employing administration (in place of an exclusive type of relation that is paid with an additional remuneration just collectively agreed). Incompatibilities might derive from a ruling at the premise level, while a general regime for incompatibility is only stated at a statutory level for fiscal doctors whose discipline is reported in Decree n. 463/1983 and Decree 1986.

These professionals have in common that they are granting a public function which, both for the reason of the physical proximity to the human being, both for ethical reasons (the relation between the doctor and the patient reports the public function of controlling over the human being) does have an institutional character, and it cannot be abolished nor reduced on merely financial considerations; it is not a function having an aleatory nature, being it linked to the state of health of workers, where aleatory can only be the number of visits that are required. The service is aimed at granting a system of labour relations, social security relations and public assistance that is meant to be sane and not corrupt, through methods that are equally running for workers and retired workers of both the private and public sector. It must be here remarked that the Italian Criminal Code (art. 357) clarifies that, to the effect of criminal law, anyone who exercises a public function, be it legislative or judiciary or administrative (administrative is the nature of the medical checking) can be called “public official” and to the same effects it is public the function of those exercising an administrative function by means of certificating powers.

From here it moves a logic project of uniting the function of sanitary inspections under the perspective of a Unique employing Role, for a unique category of medical examiners, having an equal treatment and employment opportunities, that will be running both examinations at the ambulatory and examinations at the domicile; a working category that, also in consideration of the institutional incompatibilities as to be respected, shall rely upon guaranties, also of an economic nature, that stays to maintain their independence . To this day the absence from work in the public sector has been ruled in a way that it is up to the AuSL the charge of controlling over medical certificate, and they have done it reaching a very high expense, much higher than the expense paid by INPS for the same function in the private sector; it is thus

appeared to be rational to create a Unique Role by INPS that can help through a lighter organization, a more efficient service as for releasing of medical certificates and checking. Moreover, there is a project to introduce a special commission by every public administration that is meant to deal with employees attitude and sickness .

TRANSFER OF COMPETENCES FROM SUBORDINATED DOCTORS TO DOCTORS WORKING UPON CONVENTION

Being this, de iure condito, the normative frame, thereafter we need to clarify few aspects under employment legal theory, in order to consider de iure condendo a re-definition of the institutional equilibrium, also by using the tool of the Convention – in place of the Ministerial Decree.

Preliminarily, it must be minded that any employment relation, be it qualified as a subordinated one or an autonomous one, cannot consist of doing a single task: in any subordinated employment the power of the employer to direct the worker implies the possibility to ask for several type of tasks and obligations to be performed, while in the autonomous work the need to realize a certain result does imply that the worker can achieve it by arranging himself different duties, independently from the unitary nature of the function . It derives that the mixing of competences, home visits and ambulatory visits, does not pose any specific problems, apart from adaptation of working time and compensations.

The transfer of duties from AuSL (and other administrations) to INPS, essentially prospects a reduction of duties of subordinated doctors – to be coped within the reform of medical managers duties and liabilities, which is waited nonetheless from the Reform – and, for the self employed doctors on the other side, an increasing of duties (regarding particularly ambulatory visits). To this day, both the categories of fiscal doctors and ambulatory doctors can be called to work for controlling at the domicile or in the ambulatory, in the private sector and in the public sector as well, although the coordination of the needed work force and the required controlling intervention in both sectors, public and private, is far from being clearly defined, as told above .

So, the perspective that is meant to be realized is one wherein medical examiners who have been working till this day as self employed will be disciplined by a Unique Role into which also ambulatory visits – today done mainly by subordinated doctors – will be assigned and executed, under the supervision of INPS as a unique employer. The Convention, that appears to be implicitly considered by Act n. 124/2015, would establish a control over sickness of public servants by means of the 1300 fiscal doctors that are today already employed in such a function according to regime dated 1983 and later Decrees; more doctors will be employed, since also the certification and ambulatory activity that is today executed by AuSL, on workers' sickness and disabilities, will be transferred to INPS. Therefore, it is a project that empowers the category both in functions and workforce, upon a discipline that is collectively bargained rather set by ministerial decree.

COLLECTIVE BARGAINING INTERESTS

From a collective bargaining point of perspective there are several important aspects which are here in point. From the qualification of the employment relation, and the inherent directional power of the employer, especially on point of working time, to the definition of what is the range of the examining functions, till the determination of the doctors compensation, whether by contract or by ministerial decree.

An issue that rises the interest of labour unions is reasonably to define the employment relation in terms of employment stability, in order to prevent from other suffering like that of the 2013 cut, as well as in order to cope with the difficulty to undertake other activities because of the strict incompatibilities that are connected to this public function. For fiscal doctors already employed the need for stability has been partly granted by Parliamentary Acts which are recognizing their priority employment on others.

Also the perspective of a full time employment is of interest for labour unions – considering the increase of competences and tasks, ambulatory visits included – and considering the regime of exclusivity that plays against the chance of increasing the income of part time job with other type of activity.

To this purpose it is arguable at law that to cover such an institutional function by means of a temporary work-force appears to be questionable; also the increasing of competences highlights the need for permanent job positions rather then temporary, but for any consideration to the opportunity to opt for a higher remuneration in place of a stable job. It should be a long term type of employment also according to the Constitutional Court that recently delivered an important decision on collective bargaining in the public sector, stating that "it is at stake a necessary long term perspective for the financial equilibrium, which is not allowing analogies with past situations when financial provisions where based on temporary objectives". Therefore, respecting annual stability Acts that are indicating the limits for expenditure in re-new employment collective agreements in the public sector (see art. 11, co. 3, lett. g, Act. 196/2009 and art. 48 co. 1 Dlgs 165/2001), Conventions with the NHS included, it should not be questionable that discipline for fiscal doctors is better to be an ordinary one of permanent employment. The fact that collective bargaining needs to interact with the tree years-based public financial program (see again art. 11 Act 196/2009 regarding financial public stability, and art. 17 of the same Act giving others limitations) does not justify provisions that are meant to rule employment relations temporarily, especially whenever they serve institutional functions .

THE INSTRUMENT OF A CONVENTION IN PLACE OF A MINISTERIAL DECREE OR A TRADITIONAL COLLECTIVE BARGAINING

It is important to recall the perspective of the new Reform for collaborations and self employment continuing contracts, as contained in the 2014 Jobs Act, particularly in art. 2 of the new Decree n. 81/2015, although they are not directly concerning the function and professions that here are under analysis. The new Decree defines the content of a subordinated type of employment by focusing on the "organizational setting", orienting at reducing the abuse of ambiguous form of employment between dependence and autonomy, but to this purpose avoids to mention those legal concepts adopted by the previous legislator – specifically the concept of "economic dependence" and the employment "on project". The Reform is rather giving high value, also in the perspective of the employment contract qualification, to collective bargaining , while it appears to be increased the power of judges as for the final recognition of labour rights, especially whenever they are different from the minimum rights as recognized also in the constitutional paper. Specifically, art. 2, co. 1 of Decree n. 81 states that the regime of subordination is applicable to collaborations that are performed exclusively by the person, continuously and which method or execution are "organized by the committing party also in regards to working time and working place": it is thus given meaning to the concept of controlled organization rather than to that of controlled activity, it remarks the context of organization rather than the hierarchical position, implying the power of the employer to organize the employment as for time and places .

Although this Reform is not directly applicable to medical examiners – firstly because these are intellectual professionals responding to a ruled Bar, secondly because this regime of subordination is not applicable whenever there is a collective bargaining signed at the national level (like the Convention for specialist doctors is, for example) which is covering the same context, thirdly because the regime is neither applicable to public administrations.

It is nevertheless important that we investigate over the general implications deriving from the Reform, especially when it recognizes so much more power to collective bargaining.

We have seen that Decree n. 463/1983 gave the possibility to public administrations (Minister of labour, Minister of Health, National Federation of Medical doctors, INPS) to rule the employment under analysis via Convention (this is coherent to indications of also D.lgs n. 502/1992, that mentions medical employment ruled both by Convention and by traditional collective bargaining under art. 40 Decree n. 165/2001 - subordinated public servants), although it recognizes a subsidiary power of the Minister as well. Nowadays, Conventions are signed between INPS and AuSL, and the Convention that is applicable to specialist doctors has been "somehow" applied to medical examiners working within the ambulatories as well, but at the general level these professionals are ruled by Ministerial Decree. Moreover, considered the perspective of being the public sector expressly involved, the Minister of Public Administration is opportunely going to be consulted in the process.

The Convention is a tool that is already experimented within the National Health Service, and, differently from the collective agreement as ruled in art. 40 D.lgs 165/2001 for the public servants, it can regard contracts for self employment and coordinated self employment too. The discipline of a Convention would thus be giving much more autonomy – from the public power to organize the service – to the medical doctors' representatives, coherently with a meaning of the medical profession wherein the medical liability is highly recognized and linked to the medical actions just strictly considered.

Feature of the Convention (for example the Convention ruling the employment of specialised and veterinary doctors working in ambulatories) is that it can actually rule the employment relation with a discipline that – in terms of directions, working time and disciplinary powers – is very similar to a regular subordinated contract of public service. At the same time, it is a tool that gives the chance to activate, in a given context, a contract for service rather than a contract of service – where it is accepted that the former does not imply a direct control by the public employer.

Also the load of employment, meant as the needed work force, as well as the organization of offices and management prerogatives is managed in the Convention much more autonomously, although respecting the legal principles as stated in D.lgs 502/1992 and the limits just given by the stability acts is a requirement for its validity (according to statutory law in 2009 management prerogatives are not shared anymore by the social parties and their collective bargaining: the Government stated that collective bargaining in the public sector should refrain for only ruling over disciplinary issues and performance evaluation).

The Act n. 124/2015, art. 17, lett. l, here in point, does not refer expressly to the Convention when it states the transfer of competence to INPS; nevertheless, the Convention is implicitly concerned since 1) INPS already work via Conventions while directing the service according to D.L. 463/1983; 2) art. 17 refers to the Conference for permanent relations between the State

and the Regions – that recall both the shared competence of the State and Regions as for employment issues and the discipline of Conventions based on D.lgs n. 502/1992, taking the form of the Understatement adopted by the named Conference). Nevertheless, for assuring the use of a Convention, in such a lack of express indication by the statutory law, it is needed an express statement by the implementing source, giving consideration to also the normative aspects that will be maintained as not derogable by negotiation, granting harmonization with other institutional bodies as just concerned (in particular the Bar of medical doctors and the Minister of Health).

Conclusively it will be required to focus the attention over the limits that are external to negotiation (meant as not derogable by the social parties), like it is already happening for the other categories of conventioned sanitary professionals (general practitioners, pediatricians, specialist medical doctors and veterinaries working in the ambulatories, which conventional discipline is limited by art. 8 Dlgs n. 502/1992 and later modifications). Inderogability needs to be remarked not only in the perspective of the concerned public function of sanitary examinations and certification: also the implication in managing via collective bargaining – rather then by statute – the qualification of employment contracts, be it possibly subordinated or autonomous in the mixing of competence to be performed both in the public administration premises and out of the public administration premises, generally by use of different IT software, rises issues are connected to the minimum labour law standards.

EXTERNAL SOURCES LIMITING THE POWER OF COLLECTIVE (CONVENTIONED) BARGAINING

It is now possible to imagine the development of the Convention for "fiscal doctors", but for the need to identify and set its external limits.

From a legal theory point of perspective, it is preliminary important to state the scope of applicability of the Convention, both on the part of the objective competences and tasks (what functions are involved, what is going to be controlled, what is going to be sanitarily examined?) and on the part of the citizen/workers who will be possibly interested (public employees, private employees, retired citizens, disabled etc.), and on the parts of the employed workforce. Clarity on who is doing, being controlled by who, is the main step to accomplish the Report by the Commission for Social Affairs as mentioned above.

The Convention which is already applicable to the specialist medical doctors, and which has been "somehow" extended to ambulatory doctors doing medical examinations, could represent a first basement for articulating a proper Convention regarding the INPS medical examination, but for the need to preliminary adapt it to the special functions that will be concerned.

Together with the range of functions and persons just concerned, it shall be clarified the ruling that coordinate the presence of the different Public Administrations and Institutions.

It should not be left to collective bargaining the granting of a minimum compensation , being possibly uniform all over the national territory , while the Convention remains the best tool to discipline any variable economic elements.

Dealing with minimum standards, it would be opportune to take the chance of this implementation in order to clarify the distance between the notion of essential level of assistance as for the sanitary sector, and the notion of the essential level of economic protection as for labour rights, whenever this might clarify the competence between the

Minister of Labour and the Minister of Health, as well as the competence of Regions – while keeping an eye over the evolution of the constitutional discipline over the sharing of competences and connected economic funds.

More so, out of collective bargaining shall remain the social security system in its essential benefits.

For similar considerations, to an external source shall be left the identification of a regime stating the activities that are not compatible to the main function that is assigned to these professionals; as well as the discipline over dismissal, and working time limits.

The discipline regarding the access to the new Role by INPS shall nevertheless be not derogable by the social parties whenever they like, especially considering that they have the power to manage the overall load of employment as needed. The Convention can always be ruling any operative aspect regarding the access to the Role, and it is in position to open to new hiring, for example by formulas like the following one : "the position of those medical examiners already enrolled is stable and they are called to work with precedence, but, according to INPS requirements, more medical examiners can be enrolled according to the norms for accessing the job position, good administration, impartiality and transparency, in order to do the same functions and joining the same labour contract.

As for the operative aspect to achieve the Convention, certainly the external sources must with priority recognize rules over representativeness and bargaining procedure, which could be similar to those already operating in the public sector.

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