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The OHS in Italy during and after the pandemic: lights and shadows for the future*

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1. *Introduction*

The fight against Covid-19 pandemic can probably be considered a sort of pressure test for Italian OHS system. It could be an occasion to wonder if this system worked, and whether there is any experience gained during the pandemic that can be applied in the management of OHS, even outside the specific scope of virus control. On the other side, this experience could help to show if there is something that did not work or did not work well and if it could be improved, both at collective and individual level.

Consequently, this paper aims at focusing that the emergency – with a certain "heterogenesis of ends" – brought out on one side the fundamental role of social participation and, in the perspective of employment relationship, the importance of worker's duty of cooperation. Indeed, although these aspects already existed before Covid, they were even more evident after the pandemic.

At present, therefore, it is even more evident that OHS system must rely on the integration between legislator and social partners at institutional

* This article is the result of a joint reflection. Dr. Emilia D'Avino authored p. 3; 4. Dr. Eufrasia Sena authored p. 2.

level. On the other hand, at individual level it is very important the cooperation between employee and employer; thus, fully implementing European legislation in this field. However, a significant role is played by case law, which is entrusted both the legislator's actions legitimacy at a constitutional level and the assessment of employer's liability or employee's negligence boundary.

2. *The role of trade unions during the pandemic emergency*

As it is known, Italy was the first European country to have been strongly affected by the Covid-19 infection. The lack of adequate scientific knowledge on the characteristics of the coronavirus and its methods of transmission made the first months of the pandemic very difficult to manage, but, beyond the inevitable initial difficulties that led to a wide lockdown, the subsequent management of the fight against the pandemic in the workplaces allowed the continuation of production activities without offices and companies turning into hubs for the coronavirus.

In Italy the state of emergency was declared on 31 January 2020[1], but the first restrictive measures were adopted at the end of February for some areas of the country (i.e. "red zone")[2], and subsequently extended to a wider area, including a large part of the northern Italy[3]. Since 11 March 2020 all the measures have been concerning the whole national territory[4]: all retail commercial and catering services activities were suspended, with few exceptions strictly identified by decree, and all activities in favour of persons, as hairdressers, barber shops, beauty centres, were closed. Companies started to use smart work as much as possible and leaves were recommended for employees for whom this was not possible, in order to close not essential business departments. In each company, anti-contagion protocols had to be adopted, as periodic sanitization and limits to the movement of people within the plant.

Already in this first phase the Italian Government underlined the utility

[1] Resolution of the Council of Ministers of 31 January 2020, published in the Italian Law Journal on 1 February 2020.

[2] Decree of the President of the Council of Ministers 23 February 2020.

[3] Law Decree 2 March 2020, no. 9.

[4] Decree of the President of the Council of Ministers 11 March 2020.

of agreements between companies and unions to better counteract the spread of the virus in the workplace and for the practical implementation of the anti-contagion measures[5]. In this way a participatory management of the safety at work has been put into effect, involving trade unions at all levels, from the national protocols up to the represents for the safety in the companies[6].

Later, on 22 March 2020, another Decree provided for the closure of all industrial and commercial activities in the whole national territory, with the exception of those indicated in the Decree (essential activities, as production, transportation, marketing and delivery of medicines, healthcare technology and medical-surgical devices as well as agricultural and food products; continuous cycle plants; defence industry; other activities of strategic importance for the national economy and any other activity useful to cope with the epidemiological emergency)[7].

On 24 April 2020 a Shared Protocol, regulating measures for the contrast and containment of the spread of the Covid-19 virus in the workplaces, was signed by the Government, trade unions and employers' organizations[8]. According to this Protocol, the continuation of production activities could only take place in presence of conditions that ensure adequate levels of protection for working people.

The Law Decree 16 May 2020 No. 33 ruled that all economic activities, that in the meantime had been going to reopen, had to comply with the Shared Protocol (and its subsequent updates) and the other ones possibly adopted at regional level. Failure to comply with the content of these Protocols would cause the suspension of the activity.

[5] See De Sario, Di Nunzio, Leonardi, *Azione sindacale e contrattazione collettiva per la tutela della salute e sicurezza sul lavoro nella fase 1 dell'emergenza da pandemia di Covid*-19, in *RGL*, 2021, pp. 91-110.

[6] See Marazza, *L'art.* 2087 *c.c. nella pandemia covid-19 (e oltre)*, in *RIDL*, 2020, I, pp. 267-286. According to Pascucci, *Sistema di prevenzione aziendale, emergenza coronavirus ed effettività*, *Giustiziacivile.com*, 2020, p. 73, spec. p. 79, the Italian Government underlined, "due the exceptional nature of the moment, the need for the extraordinary measures to deal with the coronavirus emergency to be shared as much as possible by all the actors, perhaps also to indicate the "common good" here at stake, namely the health of workers, but also, for its through, of the whole population".

[7] Decree of the President of the Council of Ministers 22 March 2020.

[8] See Bologna, Faioli, *Covid-19 e salute e sicurezza nei luoghi di lavoro: la prospettiva intersindacale*, in *RDSS*, 2020, 2, pp. 376-391.

Furthermore, according to art. 29 *bis* of the Law Decree No. 23 of 2020 (converted into Law No. 40/2020), compliance with the requirements contained in the protocol constituted the fulfilment of the safety obligation to which public and private employers were required pursuant to art. 2087 of the Italian Civil Code and in this way the Italian legislator resolved the question of the normative effectiveness of the Protocols[9]. Subsequently, the law converting the Decree introduces a shield for the responsibility of public and private employers too. They actually fulfil their obligation referred to in Art. 2087 Civ. Cod. through the exact application of prescriptions included in the Shared Protocol, in order that the respect for protocols represents the realization of the general duty of care[10].

An update of the Protocol was signed one year later, in April 2021, provided for less stringer rules, having regard to the evolution of the pandemic. So the measures provided for by the Protocols, remained in force until the end of the emergency and they were parameter to be followed in the continuation of economic-productive activities[11].

In the light of the above, the Government's decision to actively involve trade unions in defining and implementing the procedures to counteract the spread of the virus in the workplace, was very useful to the achievement of the goal, because, while there was the need to regulate health and safety in the workplace, to enact a specific regulation for any production sector and for any type of company was impossible, for both technical and temporal reasons. So a participatory mechanism was activated and the obligations falling on employers were identified and negotiated with the social partners, to find a meeting point between health protection and recovery (or continuation) of productive activities. Indeed, "the continuation of production activities could (...) take place only in the presence of conditions that ensure adequate levels of protection for people who work", under penalty of sus-

[9] See Mattei, *La salute dei lavoratori nella pandemia e l'impronta dello Statuto*, in *LD*, 2020, pp. 633-654.

[10] See Boccafurni, *L'art.* 2087 *c.c. e il valore del protocollo sindacato-azienda nella definizione del perimetro della responsabilità datoriale*, in *DSL*, 2020, 2, pp. 62-70.

[11] According to Natullo, *La gestione della pandemia nei luoghi di lavoro*, in *LD*, 2022, 1, pp. 77-96, especially p. 83, it was a "legislative escamotage". See Boccafurni, *L'art. 2087 c.c. e il valore del protocollo sindacato-azienda nella definizione del perimetro della responsabilità datoriale*, in *DSL*, 2020, 2, pp. 62-70; Maresca, *Il rischio di contagio da COVID-19 nei luoghi di lavoro: obblighi di sicurezza e art. 2087 c.c. (prime osservazioni sull'art. 29-bis della l. n.40/2020)*, in *DSL*, 2020, 2.

pension of production "until safety conditions are restored". The obligations concerned not only the adoption of the most suitable individual protective devices based on the specific type of activity carried out, but also an overall rethinking of the common spaces, both those where the production activity takes place and those of support (changing rooms, canteens, etc.) in order to reduce the presence of employees, also through a massive use of agile work, where possible. Furthermore, these obligations do not only concern employees, but anyone, for whatever reason, who has to access company premises (suppliers, employees of contractors, collaborators), in order to minimize contact between people as much as possible and therefore the potential opportunities for contagion.

The decision to involve trade unions in counteracting coronavirus in the workplace and the importance of the role they played in that situation could be useful for the whole Italian trade union system[12].

In Italy, in the last decades, trade unions have been facing a crisis of representativeness and they often failed to be real interlocutors of workers' interests and requests, because workers no longer felt represented by the unions and did not hesitate to disavow what they had agreed, not trusting their ability to correctly interpret needs and demands of workers' community. We can consider, for example, the *referendums* proposed in 2010 by FCA (now Stellantis) to the employees of two plants and concluded with only a measurement approval of company's proposals; or the *referendum* on the Alitalia agreement in 2017, rejected by employees, even if not only trade unions but also the Italian Government had strongly supported it. It is surely a crisis whose scope goes beyond trade union boundaries, because it's part of a more general difficulty of the so-called intermediate corps (political parties too, for example[13]), whose weakness can translate into a direct relationship between citizen and the State just in appearance, but, in reality, it turns into an increase of the stronger party's power (companies, in industrial relations), whose needs end up prevailing[14].

On the other way around, during the pandemic the role of the unions

[12] About the new challenges for Italian industrial relations, see TIRABOSCHI, SEGHEZZI (Eds.), *Welfare e lavoro nella emergenza epidemiologica*, V, *Le sfide per le relazioni industriali*, ADAPT University Press, 2020.

[13] See SANTONI, *Contrattazione collettiva e principio di maggioranza*, in *RIDL*, 2013, I, p. 75.

[14] See MARIUCCI, *Giuslavorismo e sindacati nell'epoca del tramonto del neoliberismo*, *WP CSDLE "M. D'Antona".IT*, *407/2020*, pp. 6-7.

was decisive, maybe because in situations of emergency the importance of intermediate structures to manage some critical issues is particularly apparent and, therefore, trade union consultation carried out during the pandemic could usefully be applied to other issues relating to safety at work[15].

Occupational accidents, sometimes fatal, require a cultural change, rather than a regulatory one: safety should not be perceived as a cost by either employers or employees themselves, but as an opportunity. There are many rules on occupational safety as well as on inspections and there is a system of sanctions, recently also strengthened. But it is clear that labour inspectors cannot be present every day in every plant and a stronger involvement of trade unions, at national, local and company level, could be the right way to promote the safety culture[16]. Even in a widely regulated system such as the OHS, trade unions can play a role in translating provisions into concrete practice, demonstrating the importance of the social partners for the functioning of prevention systems[17].

3. *The pandemic legacy and its potential impact on employees & employers' obligations*

There is also another crucial issue arising from emergency OHS legislative framework, linked to the area of employer and employee obligations. Indeed, pandemic demonstrated that OHS system is adequate to deal with any kind of risk, even the most unpredictable: especially thanks to the general clause in Art. 2087 Civil Code[18]. This Art. delimits employer's liability and it

[15] See Ales, *Quale welfare ai tempi della pandemia?*, in *RDSS*, 2020, 2, pp. 429-438.

[16] About the issue of employees' involvement in the definition and implementation of measures to protect their health and safety, see Menghini, *Le rappresentanze dei lavoratori per la sicurezza dall'art. 9 dello Statuto alla prevenzione del Covid-19: riaffiora una nuova "soggettività operaia"?*, in *DSL*, 2021, 1, pp. 1-55, spec. p. 48 ff.

[17] Natullo, *La gestione della pandemia nei luoghi di lavoro*, in *LD*, 2022, 1, pp. 89-90. See Directive 89/391/EEC and Ales, *Directive 89/391/EEC*, in Ales, Bell, Deinert, Robin-Olivier (Eds.), *International and European Labour Law*, Baden-Baden: Nomos – Hart – Beck, 2018, p. 1210. About the link between shared protocols and Italian social security system, *see* Giubboni, *Contro la pandemia: obblighi datoriali di sicurezza, tutele sociali, questioni risarcitorie*, in *PD*, 2020, 4, pp. 617-642.

[18] Albi, *Sub art. 2087 c.c.*, in De Luca Tamajo, Mazzotta (ed.), *Commentario breve alle leggi sul lavoro*, Cedam, 2013, p. 444; Dell'Olio, *L'art. 2087 cod. civ.: un'antica, importante e moderna*

is adequate to include every possible measure to be taken to prevent occupational risks, including biological risks (such as the Covid-19)[19]. Obviously, as seen previously, an integration with legislative sources and collective bargaining is essential[20]. Indeed, Art. 2087 Civ. Cod. is very broad, including all measures which, although not expressly provided for, are deemed "necessary" to protect worker "according to the particular nature of the work, experience and technique". This broadness risks excessively extending liability, even beyond fault or wilful misconduct. Covid-19 put this principle under stress, so that the legislator had to intervene with a disclaimer in case of compliance with protocols[21]. The legislator's interference in this area is important because

norma, in Dell'Olio, *Inediti*, Giappichelli, 2007; Delogu, *La funzione dell'obbligo generale di sicurezza sul lavoro. Prima, durante e dopo la pandemia: principi e limiti*, Aras, 2021; Giubboni, *Covid-19: obblighi di sicurezza, tutele previdenziali, profili riparatori*, in *WP CSDLE "Massimo D'Antona".IT - 417/2020*; Natullo, *Covid-19 e sicurezza sul lavoro: nuovi rischi, vecchie regole?*, in *WP CSDLE "Massimo D'Antona".IT - 413/2020*; Russo, *L'art.* 2087 *c.c. al tempo del Covid*-19, in *LLI*, 2020, 1.

[19] On the use of a risks approach in Italy Ales, *The 'Risk Approach' in Occupational Health and Safety (with an Eye to Italy): Alternative or Complement to the "Core/Contingent Approach"?*, in Ales, Deinert, Kenner, *Core and Contingent Work in the European Union*, Bloomsbury Publishing, 2017, p. 255.

[20] See Lgs. D. 81/2008. Albi, *Adempimento dell'obbligo di sicurezza e tutela della persona. Art. 2087 c.c.*, Giuffré, 2008; Ales, *Occupational Health and Safety: a European and Comparative Legal Perspective*, in *WP CSDLE "M. D'Antona".INT*, 120/2015; Lazzari, *L'obbligo di sicurezza nel lavoro temporaneo, tra ordinamento interno e diritto comunitario*, in *DLRI*, 2009, p. 633; Natullo (ed.), *Salute e sicurezza sul lavoro*, Utet, 2015; Pascucci (ed.), *Salute e sicurezza sul lavoro a dieci anni dal d.lgs. n. 81/2008. Tutele universali e nuovi strumenti regolativi*, Franco Angeli, 2019; Persiani (ed.), *Il nuovo diritto della sicurezza sul lavoro*, Utet, 2012; Rusciano, Natullo (eds.), *Ambiente e sicurezza del lavoro*, Utet, 2007; Tiraboschi (ed.), *Il testo unico della salute e sicurezza nei luoghi di lavoro. Commentario al decreto legislativo 9 aprile 2008, n. 81*, Giuffrè, 2008; Zoppoli, Pascucci, Natullo (eds), *Le nuove regole per la salute e la sicurezza dei lavoratori, Commentario al Dlgs 9 Aprile 2008, n. 81*, Ipsoa-Wolter Kluwer, 2008; Montuschi (ed.), *La nuova sicurezza sul lavoro. D.lgs. 9 Aprile 2008, n. 81 e successive modifiche*, Zanichelli, 2011. In a comparative perspective Ales (ed.), *Health and Safety at Work. European and Comparative Perspective*, Alphen aan den Rijn, Kluwer Law International, 2013.

[21] See Art. 29-*bis* l. no. 40/2020. Aa.Vv., *Responsabilità ed obblighi di lavoratori e datori di lavoro dopo i nuovi protocolli sicurezza e vaccini*, La Tribuna, 2021; Balletti, *Obblighi dei lavoratori*, in Zoli (ed.), *I Principi comuni*, in Montuschi (Dir.), *La nuova sicurezza sul lavoro. D.lgs. 9 aprile 2008, n. 81 e successive modifiche. Commentario*, Zanichelli, 2011, p. 196 ff.; Del Punta, *Diritti e obblighi del lavoratore: informazione e formazione*, in Montuschi (Dir.), *Ambiente, salute e sicurezza*, Giappichelli, 1997, p. 158; Picco, *Lavorare durante l'emergenza in violazione delle prescrizioni: le responsabilità datoriali*, in Filì (ed.), *Covid-19 e rapporto di lavoro*, in Garofalo, Tiraboschi, Filì, Seghezzi (Dir.), *Welfare e lavoro nella emergenza epidemiologica. Contributo sulla nuova questione so-*

it removes liability assessment from the discretion of judges. Normally, on the contrary, the ex-post assessment aimed at excluding employer's liability is a prerogative of courts. Consequently, case law above all played a decisive role in this field, especially in case of worker's co-responsibility for negligence.

The issue of worker negligence allows to reflect on another aspect that strongly arose during the pandemic. Indeed, emergency helped to make it clearer that worker is not only the beneficiary of occupational safety protection measures, but he is also co-responsible for compliance with the relevant regulations[22]. In this respect, European perspective based on the worker's duty to cooperate emerged loud and clear during pandemic[23]. Without any doubt, worker's negligent conduct may reduce or exclude employer's liability[24].

Therefore, on the one hand employee has the right and the power to demand that the employer fulfil his safety obligation and he/she could legitimately refuse to work if he fails to do so. On the other hand, employer must rely to employee's cooperation duty, and he may demand the fulfilment of worker's obligations to ensure healthy and safety. The dutifulness of employee's cooperation is based on the duty of safety, which is introduced both in the employee's and employer's interests. Articles 1175 and 2104 Civil Code and Articles 20 and 21 lgs. D. No. 81/2008 favour this interpretation.

In the context of employment relationship, employee is obliged to fulfil his obligation properly (pursuant to Art. 1175 Civil Code), with diligence and complying with employer's directives (pursuant to Art. 2104 Civil Code). Employer can expect and demand the employee cooperation in his obligation to protect health and safety of all workers. This duty is even clearly in Art. 20 lgs. D. No. 81/2008, that expressly states that "every worker must take care of his or her own health and safety and that of others in the workplace on which the effects of his actions or omissions fall, in accor-

ciale, Adapt University Press, e-Book series, 2020, 89, vol. I, p. 52 ff.; Soprani, *Il ruolo del lavoratore nel sistema di sicurezza aziendale*, in *ISL*, 2021, p. 397 ff.

[22] Barassi, *Il contratto di lavoro nel diritto positivo italiano*, II ed. Vol. II, S.E.L., 1917 as quoted by Pascucci, *Sicurezza sul lavoro e cooperazione del lavoratore*, in *DLRI*, 2021, p. 421.

[23] Art. 13 European Directive 89/391/CEE.

[24] This would be a case of elective risk. See also Art. 18, p. 3-*bis*, Lgs. D. 81/2008. Among others, Tullini, *Sicurezza sul lavoro: posizione di garanzia del datore e concorso di colpa del lavoratore*, in *Labor*, 2017, p. 125 ff.

dance with his training, instructions and the means provided by the employer". Therefore, depending on the skills and professional activities, the intensity of this obligation may differ, but it can never be waived. This explains also the reason of the introduction of a compulsory Covid-19 vaccination for certain categories, such as healthcare or educational sectors, among others, with the provision of suspension of employment relationship in case of no vaccination[25].

In this perspective, mandatory vaccination is not surprising, because it is fully consistent with the purposes described so far. On the other hand, the aim to reinvigorate its content through the express provision of the suspension from employment and salary is to be appreciated.

Indeed, without doubt employers could activate disciplinary proceedings in the event of a refusal to take the only suitable measure to prevent contagion. The sanction of suspension in case of no-compliance with mandatory vaccination is characterised by one particularity: it is aimed at balancing the right to self-determination of medical treatment (Art. 32 Italian Const.) and the community health protection. In this balancing act, worker's right to keep his job is maintained, protecting in this way him from dismissal due to the breach. Despite this, the introduction of suspension from employment as a "para-sanction" has been much discussed, to the extent that it has been brought to the attention of courts. Compulsory vaccination and its suspension of employment for non-fulfilment have been considered as a veiled threat, or an indirect coercion. Indeed, appeals have been filed before the administrative courts and orders of referral to Constitutional Court on the legitimacy of this framework, relating to the violation of Articles 3, 4, 32, 33, 34, 97 Italian Constitution, having regard to the right to work and to the compression of the freedom of health self-determination, especially in relation to pharmacological treatments liable to give rise to adverse effects that are neither slight nor transitory. Anyway, the Constitutional Court in the ruling of 15 February 2023, No. 15 clarified that worker suspension represents,

[25] See Decree Law No. 44/2021, Artt. 4, 4 *bis*, 4 *ter*, 4 *quater*, 4 *quinquies* signed into Law no. 76/2021 as amended and supplemented. Mandatory vaccination it was introduced also for people aged over 50 who are in jobs, either in the public or private sector (Art. 4 *quater*). Erikson, *Mandatory Vaccination against COVID-19 in the Employment Relationship*, and Maraga, *Covid-19 vaccination and employment relationships in Italy. The vaccination obligation pursuant to Law Decree April 1st, 2021, no. 44 and the general employer's duty to ensure safety at work*, in *ILLEJ*, 2022, 2.

for the employer, the fulfilment of a nominal safety obligation, included in contractual synallagma. Furthermore, since during the suspension there is not the respect of mutual consideration principle, the denial of remuneration is not a sanction and it is justified: indeed, remuneration is linked to the performance of work, except in cases where, in the absence of work as a result of an unlawful refusal by the employer, the obligation to pay remuneration is in any event owed by the latter.

4. *The issue of compulsory vaccination legitimacy*

The debate on mandatory vaccination for Covid-19[26] makes it possible to move from reflections on workers' obligations arising from employment relationship to a broader perspective, linked to the need protecting collective interests[27]. Indeed, vaccination imposed on health care workers is not only a provision responding to an obligation of safety and protection in the workplace, in contact with the public, but also to the equally fundamental principle of safety of care, linked to an interest of the community. Actually, this debate is not new at all, even if it is a topical issue in the light of the Covid-19 compulsory vaccination.

Indeed, it is part of a wider discussion on the relationship between the compulsory nature of health treatments, the protection of community and the individual freedom.

Without a doubt, the introduction of mandatory vaccination aims at protecting a "higher" interest. In this way, the right to individual choice is sacrificed because workers are obliged to protect the community, especially when they have a social contact responsibility (e.g. health workers). In this perspective legislator acts within the framework of the "unavailability" of

[26] Pascucci, Delogu, *L'ennesima sfida della pandemia Covid-19: esiste un obbligo vaccinale nei contesti lavorativi?*, in *DSL*, 2021, p. 81; Lazzari, *Gli obblighi di sicurezza del lavoratore, nel prisma del principio di autoresponsabilità*, and Tiraboschi, *Nuovi modelli della organizzazione del lavoro e nuovi rischi*, both in *DSL*, 2022, 1, pp. 1 and 136; Pascucci, Lazzari, *Prime considerazioni di tipo sistematico sul d.l. 1 aprile 2021, n. 44*, in *DSL*, 2021, p. 152; Vinceti, *COVID-19 Compulsory Vaccination of Healthcare Workers and the Italian Constitution*, in *Annali di Igiene: Medicina Preventiva e di Comunità*, 2022, p. 208.

[27] See, among others, Cons. Stato 3 October 2022 No. 8434; 20 June 2022 No. 5014; 20 October 2022 No, 7054.

collective right to health, provided for in Art. 32 Const[28]. In other terms, the latter is an interest certainly prevailing over the right to work and over the right to self-determination.

In this debate the Constitutional Court already made an important contribution in the past, ruling on the constitutionality of laws on compulsory vaccination in particular situations or for certain categories.

Legislative provision constitutionality lies in Art. 32 Const. According to this Article, health treatment may be provided for by provision of law. Considering the duty to protect health as an interest of the community, legislator must provide for compulsory vaccination if it is necessary. In other words, Italian Republic has the duty to protect those in greater danger if an individual and unmotivated worker's choice results in a risk of collective health.

Art. 32 textually establishes that "a determined" health treatment can be imposed only by legal provision. "Determination" of the treatment implies the need to specify the purpose and the disease it wants to fight. The lack of this specification can make "indeterminate" a health treatment imposed and – therefore – nullified the aim of Art. 32[29].

This is the first, essential step, that allows legislator to take responsibility for the balance between free individual determination and protection of collective health and that ensures the necessary awareness of the treatment imposed. Therefore, this indication is essential to allow the review of legislative choice non-unreasonableness, in a judgment of constitutional legitimacy of laws.

Indeed, mandatory vaccination and introduction of sanctions in case of breach are legal only if they are proportional and reasonable, considering the concrete situation and the real need for workers and workplace safety.

In the ruling of 1 December 2022 No. 14, and in the ruling of 9 February 2023 No. 15, the Constitutional Court confirmed this position and also the choices on Covid-19 compulsory vaccination were considered neither unreasonable nor disproportionate.

Once again, the Court already specified that a law on health treatment is not incompatible with Art. 32 Const. under the following conditions: if

[28] See Ales, Miranda, Giurini, *Italy: From Occupational Health and Safety to Well-being at Work*, in Ales, *Health and Safety at work*, cit., p. 232.

[29] Constitutional Court 20 February 2023 No. 25.

the treatment is aimed to preserve the state of community health; if it does not affect the state of health of the person subjected to it, except for those consequences which appear normal and, therefore, "tolerable"[30]. Therefore, it is excluded mandatory vaccination legitimacy only if vaccinated health status exceeds normal tolerability: serious and fatal adverse events are tolerable if they are few in relation to the vaccinated population. Since it is never possible to exclude in general adverse reactions possibility to any type of drug, the discrimen should be found in the hypotheses of accidental and unpredictability of individual reaction, even if this criterion would involve delicate ethical profiles (for example, who is responsible for identifying the percentage of citizens "expendable")[31].

Consequently, this matter had to be resolved only by the individual risks assessment.

5. *A final reflection*

If we would consider the Covid-19 pandemic as a pressure test for Italian OHS system, we could say that Italy has stood this test also thanks trade unions and their involvement in counteracting the spread of the virus in the workplaces, but this "Covid-test" has highlighted some issues too.

For instance, the link between occupational safety system and local health service didn't work well, for the truth more for problems related to the management of the latter, and to the political choices about it, than for issues related to the OHS. This is not the place to analyse the functioning of the Italian health system, but probably the pandemic has shown that health is also guaranteed through a capillary and effective local medical service, that should have closer link with safety at work.

On the other hand, however, about the individual employment relationship, the issue on mandatory vaccination revived two aspects.

The first is linked to worker's obligation to cooperate, through a balance

[30] Furthermore, the other requirement is that in the event of further damage, the provision is in any case made for the payment of an equitable indemnity in favour of the injured party, irrespective of the parallel compensatory protection. Constitutional Court Judgments No. 258 of 1994 and No. 307 of 1990.

[31] Constitutional Court No. 14/2023.

between individual and collective health rights. As also reiterated by the Constitutional Court, "in this balancing between the two declinations of the right to health, individual and collective, imposition of compulsory health treatment finds justification in that 'principle of solidarity' which represents the basis of social coexistence normatively prefigured by the Constituent"[32]. Also in the case of Covid vaccination, legislator respected this principle of solidarity, trying to squeeze the rights of individuals as little as possible and complying with principle of proportionality. For example, the temporary consequence of suspension in case of mandatory vaccination breach for healthcare workers – which is not of a sanctioning nature – falls within legislator's responsibility to identify a "calibrated consequence"[33], in terms of sacrificing healthcare worker rights.

The second aspect is related to the role of jurisprudence both in the full implementation of Article 2087 Civil Code and in ascertaining the legislative legitimacy of rules that sacrifice individuals' right to self-determination of health treatment. Indeed, the legislator during pandemic intervened in areas normally left to case law: exoneration of employer liability, disciplinary or para-disciplinary proceedings in the event of employee obligations breach. This was in response to the urgency of providing legal certainty at an exceptional historical moment. Without this action the uncertainty of liability framework in case of no vaccination and the length of judgments would have created additional risks. So, in other terms, the discretional power was taken away from the judge to ensure legal certainty in the pandemic emergency. However, for the future, the role of jurisprudence must undoubtedly be re-established, because general clauses require a concrete evaluation. In this future context, there is no doubt that latest Constitutional Court clarifications will help to increasingly affirm employee's duty of cooperation.

The final feeling, therefore, is that the OHS system is adequate, but its flexibility would risk leaving areas of protection uncovered, or ineffective, without the active role of all those involved in this system, at every level.

[32] Constitutional Court No. 15/2023, referring to the Constitutional Court No. 75/1992.

[33] Constitutional Court No. 14/2023.

Abstract

This paper aims at focusing that the emergency, with an "heterogenesis of ends", brought out the fundamental role of trade unions in managing the OHS system. On the other hand, in the perspective of employment relationship, emerged the importance of the worker's duty of cooperation and the role played by jurisprudence in the ordinary legal framework, both in the full implementation of Article 2087 Civ. Cod. and in the assessment of legislative legitimacy of rules that sacrifice individuals' right to self-determination of health treatment.

Keywords

Health and safety at work, trade unions, workers' duty to cooperate, right to health.