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***Unione Nazionale Dirigenti dello Stato (UNADIS) v*. Italy**
Complaint No. 147/2017

RESPONSE FROM UNADIS TO THE GOVERNMENT'S SUBMISSIONS ON THE MERITS

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Complaint No. 147/2017
National Union Leaders of the State Unadis v. Italy

Unadis' observations on the merits
of the above mentioned complaint

Reference is made to letter 8-2018 LV / KOG dated 11 January 2018, with which, in relation to the complaint proposed by the UNADIS executives' union against the Italian State, the European Committee of Social Rights has sent the observations made in this regard by the Italian Government and granted until 12 March 2018 for the observations of the aforementioned trade union.

First of all, it should be noted that the Italian Government, in their defense, essentially referred to the observance of the rights and principles enshrined in the European Social Charter, arguing, in that compliance with these principles would derive from compliance of their behavior with the provisions contained in Italian law matter.

In particular, the Italian Government recalls compliance with the provisions of paragraph 5 of art. 36 of the legislative decree 30 March 2001 n. 165, in the part in which the law provides - for the only the public employment, unlike the provisions of Italian law in private employment relationships - the impossibility of automatically converting fixed-term employment relationships into fixed-term employment relationships indeterminate even in the cases in which an exceeding of the maximum period of work allowed by the law is achieved, a period which, for the public leadership, is established, lastly, by the legislative decree n. 81 of 2015 in the maximum term of 5 years.

Now, in this regard, it must be observed that the mere conformity of the work of a State with the normative precepts established by national law isn't in itself sufficient to establish a conformity

of that work with the precepts set in the supranational context.

There may well be cases in which national provisions don't (or even violate) respect for the principles and rights established by the European legal system, the national system must harmonize and adapt to the Community system and the latter's task, the strength of its own superordination and with a view also of general harmonization of the degree of protection at European level, is precisely to guarantee this respect.

In this sense, on the other hand, the Italian Constitution also arises when it expressly states that "the Italian legal system conforms to the generally recognized norms of international law" (Article 10 of the Constitution), and when it consents, under conditions of parity with other states, to the "limitations of sovereignty necessary for an order that ensures peace and justice among nations" (Article 11 of the Constitution) and when it states that "legislative power is exercised by the State and the Regions in respect of the Constitution, as well as the constraints deriving from the community law and international obligations "(Article 117 of the Constitution).

The fundamental point, therefore lies not so much and not only in verifying whether the behavior of the Italian State has occurred in compliance with its national law, but rather in assessing whether that order concretely guarantees the protection of those fundamental rights and precepts guaranteed at supranational level, or if any diversified and deteriorated treatment envisaged by an internal legal system can be validly justified.

On the other hand, the Italian legal system (also in order to adapt to the purposes required by Directive 1999/70 / EC) had normatively implemented and formalized as a form of protection for workers at the end abused, the conversion of fixed-term employment relationships into permanent contracts in the cases in which the fixed-term relationship had been reiterated to the point of exceeding the maximum period allowed for flexible forms of work (limit established in thirty-six months). This protection, however, originally (and, in some ways, still) was envisaged in favor of private workers only, considering the possibility of automatic conversion into the public employment excluded; this "lesser protection" of public workers was justified under the constitutional principle (Article 97 of the Constitution) according to which access to public offices can only take place by public competition and was legislatively formalized in the prohibition of conversion provided for by the aforementioned art. 36 of the Dlgd n. 165/01.

Now, regardless of the fact that this alleged constitutional limitation doesn't have, in the Italian legal system, the absolute value that would be deemed to confer - the same article 97 of the Constitution, in fact, does not prejudice the cases established by law for access to public employment other than the competition - it is of paramount importance to recall in this regard that the jurisprudence of the Community has had to intervene several times to censure the discriminatory behavior adopted by the Italian State against public workers recipients of abuse by repetition of fixed-term employment.

In essence, it is a matter of affirming and guaranteeing that the equitable protection of temporary workers, as guaranteed by the supranational system without discrimination between the public sector and the private sector, can operate concretely, beyond formal prohibitions or obstacles imposed by individuals. the laws of the Member States, in particular where the differentiated treatment envisaged by the individual States is not justified by objective and reasonable causes.

In this case, the discrimination against the term managers of the Italian tax agencies doesn't justify any reason that can be defined objective and reasonable, nor can this reason be represented - as claimed by the Italian State - by a formalistic prohibition imposed by a national law, especially when this prohibition doesn't hold the character of reasonableness.

indeed in the case of managers of tax agencies.

- the alleged provisionality of the needs that have prompted the Italian tax authorities to reiterate over time contracts of executive management work with their officials is denied in fact by the same period of use of this flexible form of work carried out since the birth of the Italian tax agencies and therefore, in some cases, even for 15 years, that is well beyond the maximum limit allowed by the same Italian legal system!
- in the fifteen years of this management recruitment system, tax agencies have never carried out any public competition for access to management, thus effectively denying even their employees in charge of management functions the opportunity to access "by competition ", in a stable form, in the managerial role and thus demonstrating, in practice, to favor this form, transitory and more economic, of workers' use; all at the expense of the protection and "work stability" of these employees who, in this way, have been deprived of a fundamental good for the peaceful explication of the human being in the family and social sphere!
- Officials in charge of term management relationships were also originally recruited for the public administration, in which they are therefore regularly classified and the discrimination against them is even more unreasonable when they also have the qualification (diploma degree) necessary for access to management, if not even provided with additional post-graduate degrees of specialization;
- their status was not different from that of the role managers in terms of the tasks performed, the functions performed and the responsibilities assumed, so much so that in these aspects these workers were subject to the employment contract of the managerial sector; this status, however, as better specified in the introductory complaint, was distinguished by its discriminatory character in terms of protection and social security and welfare rights recognized to workers!

To all this we must add that the Italian State, in the general context of the public employment, substantially the result of the interventions carried out by European bodies, repeatedly tried to subtract normatively some categories of public workers from the protection of the conversion of the recognized working relationship to workers recipients of abuses from repetition of futures contracts, citing in support of such exclusion presumed peculiarities of the employment relationship or particular needs related to the specific function performed by the workers in question

Indeed, these exclusion clauses of some workers from the benefit of the conversion of the employment relationship were, in some cases, brought to the examination of the superordinate European bodies with the consequence of the enactment of censorial sentences or infringement procedures against the Italian State.

As a result, at least for some categories of public workers, the Italian State had to adapt to the European precepts on fixed-term employment contracts, subsequently introducing specific regulations that expressly recognized that those employees who were abused had the right to automatic conversion. of the report: emblematic case is that of the public staff of the school to which, following the infringement procedures suffered by the Italian Government and following the Mascolo ruling, the right to enjoy direct training in the roles of school staff has been legislatively recognized.

The case of the term managers of the Italian tax agencies, however, hasn't yet been brought to the attention of European judicial bodies, also due to the reluctance of the national courts to carry out the referral orders to the European Court of Justice.

Also for this reason it is confident that finally a European body of particular relevance such as the Social Rights Committee can bring to equity a discriminatory situation that has now taken paradoxical connotations.

As an alleged general solution on the problem of public precarity, the Italian State has thus adopted the legislative decree 25 May 2017 n. 75 (so-called Madia decree on the civil service) in which it provided, in Article 20, some stabilizing mechanisms for personnel who, by virtue of repeated contracts, carried out more than 36 months of employment in the employment of public administrations.

In this regulatory context, however, the Italian legislator has expressly excluded, once again, only the managerial staff from the stabilizing protection!

This omission of protection by the national legislature against public managers is even more serious and guilty if we bear in mind that the specific case of the officials of the Italian tax agencies, recipients of repeated contracts, has been repeatedly examined by the bodies Italian MPs and, in more circumstances, these have found a serious discrimination against these public workers and have highlighted the need to intervene promptly with regulatory instruments that led to fairness the abusive case in point.[1]

Despite this, the Italian legislator didn't work for these public workers!

Moreover, in support of the presumed justification of this attitude, the pronunciation n. 37/2015 of the Constitutional Court (and the alleged impassable limit imposed by Article 97 of the Italian Constitution) which the Italian Government also quotes in its observations now formulated to the European Committee.

In this regard, in fact, on the sidelines of the already mentioned degree of superordination of the European legal system which in itself would suffice to repudiate the "nationalist" justification put forward by the Italian Government, some clarification should be made regarding this ruling and recall even the most recent position taken on the subject by the Italian Constitutional Court, a position that was omitted in government's observations.

More specifically, from the first point of view, it should be noted that the Italian Constitutional Court, with sentence no. 37/2015, didn't affirm the inapplicability of the conversion of the employment relationship towards the term tax executives.

He rather declared the constitutional illegitimacy of the rules that had excessively prolonged a system of managerial recruitment in tax agencies that instead had to be limited in time (up to the completion of ordinary competitions); from another point of view, the Italian Constitutional Court itself, when more recently was called upon to rule on the legality of the legislation adopted on the subject of school precariousness (so-called "law on good school"), clarified its position explicitly stating (see sent No. 187 of 2016) that in the public employment, when similar repeated abuses

[1] In this sense, the parliamentary committees responsible for the matter were expressed by the Senate and the Chamber of Deputies (11th Senate Labor Commission in the session of 5.04.2017; 1st Senate Constitutional Affairs Commission at 3.05.2017; Labor Commission of the Chamber at the session of 3.05.2017, 11th Senate Labor Commission at 4.10.2017). In accordance with the aforementioned opinions, a few Orders of the day have also recently been expressed (Agenda 9/3098-A / 1 of 17.07.2015 approved by the Chamber on request: Riccardo Gallo, Catanoso, OdG 9/3262/154 of 04.08.2015 approved from the Chamber on request: Nicoletti, Aiello, Centemero, OdG G / 2611/53/5 dated 06.12.2016 accepted as a recommendation by the Senate on request: Uras, OdG G / 2942/67/5 in AS 2942 before 5th Comm. Senate approved on request: Liuzzi, G. Mauro).

occur in the use of fixed-term contracts, the adoption of a legislative protection concretized with "automatic classification" in the professional role constitutes a preferable solution as " far-sighted".

Therefore, the same Italian system, on several fronts, would seem ready to conclude a regulatory protection against the public administration subjected to abuse by excessive reiteration of fixed-term contracts, but, at the same time, doesn't seem to have sufficient determination to implement and channel such protection in a specific legislative act, preferring perhaps to wait for a superordinate body to intervene in a subrogation that "pushes" to the adoption of this act.

After all, this is what has happened not only in the school sector, but also in the similar question concerning honorary magistrates, which is also being examined by the European Committee for Social Rights. Indeed, even more than the previous similar one, today's category of term managers in tax agencies finds itself in a situation of discrimination even more unacceptable than that suffered by honorary judges and in an expectation, still "more legitimate", than a proper protection.

For the term managers of the tax agencies, in fact, unlike the honorary judges, not even the observations at the time opposed by the Italian Government and in fact omitted in today's case are not valid. Indeed:

- Officials of tax agencies were originally hired in the public administration with an ordinary public competition and therefore exercised their managerial duties not as part of an honorary service, but on the basis of an already existing, genuine, relationship of dependence on public administration.
- They were selected, for access to the performance of managerial functions, on the basis of their qualifications and the outcome of a specific internal procedure that assessed the requirements of all the participants.
- They have exercised managerial positions at tax agencies not part-time, nor in coexistence with other professional activities, but full-time and in exclusivity in the relationship of dependence with the same tax administration.
- In the case of the term managers of the tax agencies, the behavior of the public employer denoted a discriminatory legal treatment that can't find its justification even in the margin of autonomy granted to the Member States on the possibility of adopting legal treatment distinctions, since, in this case, the situation has openly resulted in the unreasonableness and in the absence of any objective reason which could justify the diversified treatment granted to these public officials compared to the tenured managers and to the private sector workers.
- In the case under consideration the distinction of treatment didn't pursue a legitimate aim, nor was proportionate to the aim pursued, but rather was determined by the unilaterally utilitarian purpose of the public employer tending to employ "precarious" and less expensive personnel, the everything in exclusive and specular damage of the category of workers.
- The arguments put forward by the Italian Government to justify the difference in treatment are related to the nature and organization of the work and don't have the character

of objectivity and reasonableness also in consideration of the fact that they are exactly equivalent workers, from a functional point of view, to the role managers.

- Last but not least, it should be recalled that, following the sentence handed down in the matter by the Council of State (CdS Section IV, No. 4641/2015), the management positions conferred for years on the officials of the tax agencies, will not, due to illegitimacy derivative of the rule that constituted the presupposition, to be validly considered in the context of possible insolvency procedures for managerial rolw. This implies that the appointed officials haven't only been deprived of their function and their managerial role, but, moreover, they would be deprived of any chance of being able to usefully compete in the access for competition to the managerial role.

For all the above reasons, and for the reasons detailed in the introductory complaint to which reference is made in any case, the European Social Rights Committee is confident that, in the context of its competence, it will detect the reported violations of the European Social Charter committed by the Italian State and recommend its removal.

All to be adopted, also in consideration of the timeliness with which the present observations are provided with respect to the wider term granted and compatibly with the commitments of this European Committee, with kind urgency, within the first useful session, in order to reduce the already long periods of discrimination suffered by the workers in question.

Rome, 22nd January 2018

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