

“No jab, no job: from employment to human rights and beyond”

The identification of the first anti-Covid vaccines marked a turning point in the process of combating the pandemic. However, in addition to general enthusiasm, the preparation of vaccination campaigns in several Western countries was accompanied by the emergence of a consistent, albeit minority, objection attitude. This has led to serious questions about the possibility and advisability of making anti-Covid vaccination mandatory, if not across the board, at least for certain categories of people.

The aim of this essay is to compare the approach adopted in Italy and in the UK, especially regarding the employment context.

Italian Law

Since vaccines are “health treatments”, the starting point for any reflection is Article 32 of the Constitution.

Article 32, par. I, of the Constitution recognises that the Italian Republic must protect health “as a fundamental right of the individual and in the interest of the community”.

So, from the beginning the complexity of the constitutional provision clearly emerges, as it guarantees a right which presents two faces in constant tension: health is a fundamental right of the individual (the right to choose whether, when and how to treat oneself and, therefore, also the right not to treat oneself), but it is also a primary interest of the community.

The latent conflict underlying this twofold dimension re-emerges in the second paragraph, which states: “No one may be obliged to undergo a given medical treatment except by provision of law”.

Constitutional jurisprudence has for some time now identified the requisites necessary to satisfy the “law reservation”¹ in Article 32. In brief, medical treatment must: a) primarily benefit the person undergoing the treatment, without adversely affecting his health other than minimally; b) improve the health of the community; c) be accompanied by the right to compensation for any damage to health suffered as a result of the treatment; d) be

¹ We use “law reservation” as a translation of the Italian expression “riserva di legge”. This is the legal institution whereby a particular matter may only be regulated by a law issued by the Parliament (or an act that the Constitution states having the force of law).

specifically identified by law; e) be imposed by a law, or an act having the force of law, of the State².

That being stated, it must be said that in the first phase of implementation of the anti-Covid vaccination campaign, the Legislator had not introduced any mandatory vaccination.

However, it was wondered whether the employers could nevertheless oblige their employees to undergo vaccination under the employment contract.

Various answers have been given to this question. According to some Authors, in fact, employers could in any case require the vaccination of employees because of several considerations³.

Firstly, it has been argued by these Authors, the freedom to choose whether to undergo vaccination is liable to be restricted by a contract without derogating from Article 32 of the Constitution.

Secondly, it has been said that the Italian Law already contains legal provisions on health and safety at work which can satisfy the “law reservation”.

The provisions referred to were:

- Article 2087 of the Civil Code, which requires the employer to “adopt in the exercise of the undertaking the measures which, according to the particular nature of the work, experience and technique, are necessary to protect the physical integrity and moral personality of the employees”.
- Article 20 of Legislative Decree 81/2008, which identifies the worker's obligation to “take care of his own health and safety and that of other persons present in the workplace”.
- Article 279 of Legislative Decree 81/2008, according to which the employer shall adopt special protective measures for workers exposed to biological agents, including the provision of effective vaccines.

The majority Doctrine, however, excluded the configurability of a mandatory vaccination for workers in view of the fact that the Art. 32 “law reservation” necessarily requires the presence of a *specific* law that was missing at the time⁴. Anyway, this did not prevent these Authors from admitting that the unjustified refusal of workers to vaccinate could

² See M. Cartabia, “La giurisprudenza costituzionale relativa all’art. 32, secondo comma, della Costituzione italiana”, *Quaderni costituzionali*, 6:2 (2012), p. 458.

³ See, among others, P. Ichino, “Perché e come il dovere di vaccinarsi può nascere da un contratto di diritto privato”, <https://www.pietroichino.it>, 8 January 2021.

⁴ See, among others, O. Mazzotta, “Vaccino anti-Covid e rapporto di lavoro”, *Lavoro Diritti Europa*, 3:1 (2021).

still have consequences on the employment relationship: consequences of an exclusively objective nature, in terms of professional unfitness of the worker, to be assessed in practice.

In this perspective, even dismissal for objective reasons was considered in principle adoptable (*in extremis*), but it was believed that priority should be given to conservative measures such as suspension from work and pay (in the absence of alternative occupations for which the worker could be considered suitable).

In this general uncertainty, the voice of the Privacy Authority was also added. The Authority clarified⁵ that, in the absence of a law that provides otherwise, the employer may not ask its employees to provide information on their vaccination status (which is a personal data relating to health, as such subject to particularly strict protection under Art. 9 GDPR) even with the consent of employees, since it cannot be a valid condition of lawfulness of data processing due to the imbalance of the relationship between the data subject and the controller in the working context.

With Decree-Law 44/2021 (converted into Law 76/2021) the legislator finally intervened, explicitly introducing a (temporally circumscribed) vaccination obligation limited to those working in the health professions and health care workers.

For these categories of workers, Article 4 of the Decree stipulated that breach of the obligation leads to suspension of the right to perform tasks involving interpersonal contact or entailing, in any other form, the risk of spreading Covid-19 infection.

In the event of failure to vaccinate any of the obliged persons, the employer shall verify the possibility of assigning the person concerned to tasks, even lower ones, not exposed to the risk of transmission of the virus, and the treatment due shall be that corresponding to the tasks performed. Where assignment to different duties is not possible, no pay is due for the period of suspension.

However, different and more favourable rules have been consistently laid down for workers exempted from mandatory vaccination for proven medical reasons.

Given the limited scope of application of Art. 4 D.L. 44/2021, from a systematic point of view, the question was whether the introduction of a specific discipline limited to certain work contexts should lead to its inapplicability to other contexts, or whether, on the contrary, it could have an “expansive potential” in other sectors.

⁵ www.garanteprivacy.it/temi/coronavirus/faq#vaccini.

The debate on this issue, however, has been largely overcome with the entry into force of Decree-Law 127/2021, under which from 15 October to 31 December 2021, all workers (with the sole exception of those exempt from the vaccination campaign for proven medical reasons) must possess and present the “Covid-19 green certification”, which can be obtained through vaccination (duration 12 months), antigenic or molecular test with negative results (duration 48 or 72 hours), recovery from infection with SARS-CoV-2 (duration 6 months).

Workers who do not have the certificate are to be regarded as “unjustified absentees” and are not entitled to pay until they present the green certificate but retain the right to keep their job. It is the employer's responsibility to ensure compliance with the legal requirements.

As regards the profile of data protection, the Privacy Authority had already clarified⁶ that the processing of personal data implied by the certification obligation is to be considered legitimate, provided that it is included within the perimeter outlined by the law and limited only to data that are actually indispensable for the purposes pursued. In any event, verifiers are excluded from collecting the data of the certification holder, in any form whatsoever.

The Legislative Decree has provoked various reactions. A part of the insiders, in fact, welcomed it as a tool capable of giving a further boost to the vaccination campaign and to reconcile in the most effective way the need for safety at work with the fundamental rights of workers, constitutionally protected (Article 32, right to health and Article 34, right to work): the obligation to certify is not an obligation to vaccinate and, in any case, workers without a certificate are guaranteed to keep their jobs.

However, there is no shortage of criticism from those who see the measure as a source of discrimination against unvaccinated workers who, in the absence of a different provision, would currently be burdened with the “costs of safety at work” having to bear the not insignificant cost of antigenic/molecular tests to avoid being denied access to work and pay⁷.

Finally, there is no lack of concern among employers, who on the one hand are called upon to set up a control apparatus in a very short time that is anything but simple and, on the other, are worried about the significant lack of manpower that could occur.

⁶ www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/9696958.

⁷ www.adnkronos.com/sindacati-green-pass-lavoro-sara-obbligatorio_5bTGNICahBWOAgNnG8v2lZ?refresh_ce.

UK Law

Historically, about mandatory vaccinations, there is a great distance between the Italian and English systems: in fact, the former is one of the systems with an “imposing tendency”, while the latter is one of those “based on a promotional logic”⁸.

This is evident if one observes that, while in Italy there is a rather full-bodied list of mandatory vaccinations, in the UK there are none, the Legislator relying “on the individual's sense of responsibility towards society”⁹.

However, following the launch of the Covid vaccination campaign, the issue of the impact of vaccine availability on workplaces has also become central in the UK.

In July 2021, Public Health England published guidance for employers which recognises their “unique position to support the anti-Covid vaccination programme” and urges them to “encourage their employees to vaccinate”.

However, the question is whether employers can go beyond mere encouragement by implementing stricter vaccination policies.

A distinction must now be made. For care home workers, the Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021 amended the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (SI 2014/2936) by requiring mandatory vaccination of regulated care home workers from 11 November 2021, except for those who have refused the vaccine on clinical grounds.

From 11 November, workers who are not fully vaccinated (not for clinical reasons) will be denied access to care homes. In these working contexts, employers, faced with the workers’ refusal to vaccinate, after assessing the lack of alternatives (such as the use of smart working or the suspension of the worker for the time necessary to receive the vaccine administration), could rather easily claim that they have a fair reason for dismissal: the workers’ conduct, in fact, is in breach of a duty which the legislation imposes and continuing the relationship would mean violating it¹⁰.

⁸ P. Passaglia, *La disciplina degli obblighi di vaccinazione*, Corte costituzionale - Servizio studi - Area di diritto comparato, October 2017, p. 9.

⁹ S. Pasetto, “Regno Unito”, P. Passaglia (curated by) *La disciplina degli obblighi di vaccinazione*, Corte costituzionale - Servizio studi - Area di diritto comparato, October 2017, p. 41.

¹⁰ S. Hayes, “Compulsory vaccination in care homes”, parissmith.co.uk/blog/compulsory-vaccination-in-care-homes/, 3rd August 2021.

For all other workers, it is necessary instead to start from the Health and Safety at Work Act 1974, which obliges every employer to ensure, as far as reasonably practicable, the health, safety and welfare at work of all his employees. Since the vaccine is undoubtedly the most effective means of preventing contagion available, it could be assumed that employers are entitled to order their employees to be vaccinated, in accordance with their safety obligation.

Since it is implicit in every employment contract that employees are obliged to obey their employer's reasonable instructions, if the employees refuse to be vaccinated, the employer might react, for example, by reassigning them to jobs with a lower risk of infection or by requiring them to work under smart working arrangements, and if these options are not available, dismissal might in principle also be an option.

However, if the employer chose this path, he would have to overcome several legal challenges¹¹.

Indeed, dismissed employees (with two years' service) could bring an unfair dismissal claim. The burden of proving the reasonableness of the claim and thus of the dismissal would then be on the employer.

At the moment, there is still no case law on the subject, but it is easy to see that while in the health and social care sector employers have a good chance of finding favour with the Courts (given the higher risk to which workers are exposed in this case, as well as their professional duty to take care of the weak people with whom they come into contact), for all the other sectors their position will be more disadvantageous¹².

Secondly, the dismissal or otherwise unfavourable treatment applied to non-vaccinated workers with certain protected characteristics under the Equality Act 2010 could give rise to indirect discrimination¹³. This could be the case where the administration refusal is due to medical reasons (such as the presence of pathologies that make vaccination inadvisable), religious (for example, because of the animal origin of the substances in the vaccine composition or the process used to develop it) or philosophical belief (provided

¹¹ See, among others, McEneny, Elizabeth, "Can Employers Legally Require Staff to Be Vaccinated Against COVID-19 and what are the Key Risks?", www.cm-murray.com/knowledge/can-employers-legally-require-staff-to-be-vaccinated-against-covid-19-and-what-are-the-key-risks/, 4 January 2021.

¹² www.cipd.co.uk/knowledge/fundamentals/emp-law/health-safety/preparing-for-covid-19-vaccination#ref.

¹³ N. Hurley, "COVID-19 Vaccination – can an employer make it compulsory for employees?", www.charlesrussellspeechlys.com/en/news-and-insights/insights/employment-pensions-and-immigration/2021/covid-19-vaccination--can-an-employer-make-it-compulsory-for-employees/, 13 July 2021.

that the belief is genuinely held, concerns a substantial aspect of human life and behaviour, and is serious and worthy of respect in a democratic society)¹⁴.

Other factors of indirect discrimination could be age (younger people may be more reluctant to vaccinate given the lower risk of contracting aggressive forms of Covid-19), sex (risk of blood clots from the vaccination seems higher for women so they may be less persuaded to vaccinate), race (according to several studies, the choice to vaccinate differs significantly between different ethnic groups).

In all these cases, the employer is exposed to the risk of a discrimination claim, and if he is not able to demonstrate that the alleged indirect discrimination is legitimate because it is not only necessary to pursue a legitimate aim (such as safety at work), but also because it is appropriate and proportionate (which appears more difficult) he could be condemned to pay even very significant damages.

Still, it cannot be excluded that the employer's decision to make mandatory employees' vaccination (with all that follows) conflicts with Article 8 of the ECHR (Right to respect for private and family life).

However, Article 8 itself admits that the right in question may be restricted in a democratic society, inter alia, in the interests of the economic well-being of the country, for the protection of health and the rights and the freedoms of others.

Recently, in *Vavříčka and others v Czech Republic*, the ECtHR reaffirmed that mandatory vaccinations may be among those "measures necessary in a democratic society" to which Article 8, second part, refers: the judgment concerned a case certainly different from that of employers who require employees to be vaccinated, but it is not to be excluded that those principles can be derived valid also for this hypothesis¹⁵.

Lastly, there are issues relating to the protection of personal data.

According to the guidance¹⁶ published by the Information Commissioner's Office on the subject, employers are not precluded from knowing the vaccination status of their staff in view of the safety obligation incumbent on them and the existence of public health interests.

However, employers need to be careful in this area, which can be very slippery: vaccination data's collection will be legitimate, as long as it is transparent, safe,

¹⁴ Grainger Plc & Ors v. Nicholson [2009] UKEAT 0219_09_0311 (3 November 2009).

¹⁵ L. Lewis, "Coronavirus vaccination - FAQs for employers", www.lewissilkin.com/en/insights/coronavirus-vaccination-faqs-for-employers, 17 August 2021.

¹⁶ ico.org.uk/global/data-protection-and-coronavirus-information-hub/coronavirus-recovery-data-protection-advice-for-organisations/vaccination-and-covid-status-checks/.

proportionate, relevant and necessary for a specific and legitimate purpose, and all this should be clear from a "data protection impact assessment" prepared by the employer.

Considering the issues described above, it is clear that the choice to implement a policy of mandatory vaccination by employers (in the absence of a legislation) opens up still unexplored and very insidious scenarios.

Therefore, persuasion and encouragement of staff still seem to be the preferred way forward.

A cost-effective strategy for the employer will then consist in adopting all possible measures to remove any resistance to vaccination on the part of the staff, e.g. by ensuring that the employee is paid if he/she is absent to receive the injection, by guaranteeing that the staff receive the usual pay in the event of illness related to the vaccination, and by not recording the vaccine-linked absences in absence records¹⁷.

Conclusions

In conclusion, it can be said that also in relation to Covid-19 the historical distance between Italy and the UK about mandatory vaccinations has been confirmed. While in Italy, in fact, the Legislator intervened with a series of obligations using the employment law to give impetus to the vaccination campaign, in the UK the line of exhortation without imposition was generally maintained.

However, some further observations can be made. Firstly, in relation to the hypothesis of mandatory vaccination for workers, in the absence of a legal provision to that effect, the problems and solutions put forward in the two systems were very similar. Secondly, it should be emphasised that the United Kingdom has also recently introduced a mandatory vaccination, albeit in a limited way. Moreover, there is nothing to exclude further action in this direction since the UK Government has already launched a consultation on mandatory vaccination for all frontline health and care staff in England¹⁸.

¹⁷ As suggested in www.acas.org.uk/working-safely-coronavirus/getting-the-coronavirus-vaccine-for-work.

¹⁸ www.gov.uk/government/news/consultation-on-mandatory-vaccination-for-frontline-health-and-care-staff.