Strengthening Platform Workers' Rights Through Strategic Litigation: The Italian (Paradigmatic) Experience

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1. *Litigation strategies for platform workers: issues at stake*

In recent times, platform workers' successful complaints have not only extended (some) protections to them, but have also led platforms to re-arrange the organisational patterns adopted, in order to comply with the judges' rulings and be able to maintain their business models unchanged.

Strategic litigation is commonly referred to as that process of using court proceedings to force a change in the legal framework, beyond the scope of the case being litigated. What is noteworthy about litigation over employment status is its immediate relevance, as far as the employment status is the passport to get access to the employment rights, determining the jurisdiction of courts and tribunals to consider claims of particular breaches.

There are many issues at stake with respect to litigation strategies concerning employment relations in the digital economy, starting from the connection between union struggles and judicial litigation over classification, which means verifying whether and to what extent those struggles can influence the judges' decisions. It is also interesting to highlight riders' individual strategies aimed at provoking disciplinary reactions from the digital platforms' management, in order to unveil the hierarchical nature of the power exercised by them, so to allow the workers to claim for subordination. Moreover, it is worth considering the pros and cons deriving from the introduction of a 'third type' work relationship between employment and self-employment in order to extend labour protections to 'gig' workers. Even the effectiveness or ineffectiveness of labour inspectorate controls can play a role in supporting strategic litigation and, last but not least, the difficulties for gig-economy 'working poor' in accessing judicial protection should be taken in due account.

Not all these issues can be addressed here, even if provoking and fruitful thoughts could be spent on each of them. Looking at the key litigation cases in a comparative perspective, at least three gateways to employment protection are emerging: platform workers' classification, health and safety standard and anti-discrimination law.

In this respect, the Italian approach to strategic litigation can be presented as a paradigmatic experience, since it has gained successful results in terms of protections through several interesting cases.

2. *Workers' classification*

The employment status of platform workers has been highly debated in the courts in Europe, but also in many other countries all over the world. As is well known, in most of the cases platform workers sign terms and conditions of contracts that state that they are self-employed. However, almost anywhere this practice doesn't prevent the judges to disregard these declarations and take into account the reality of the facts, in order to verify if the way workers are treated by the platform correspond more or less to what employers normally do rather than independent contractors would do [1].

In Italian case law every kind of workers' classification has been recognised, to the riders, from self-employment to traditional subordination. The leading case was taken to the courts by some Foodora riders and addressed the all three stages of the jurisdiction.

The first instance Tribunals of Turin and Milan in 2018 classified the Foodora riders as self-employed, grounding their decisions on the fact that, simply deciding not to turn on the app, the worker can exercise his self-determination. In other words, the fact that the workers that went to court were able to decide when and if to show up on the platforms was enough to state that they did not meet the requirements of traditional subordination and therefore of the employment relationship.

The Court of Appeal of Turin, instead, adopted a different classification: Foodora riders were qualified as a *tertium genus*, a third category of workers, intermediate between employee and self-employed, since the platform had the power to determine – for some aspects, such as the place and the time – the way the work performance had to be executed by them (Article 2 of the Legislative Decree No. 81/2015).

Finally, the Supreme Court ruling (No. 1663/2020) changed perspective, adopting a remedial approach instead of relying on workers' classification to extend employment protections to the Foodora riders. First of all, the Supreme

[1] V. De Stefano, I. Durri, C. Stylogiannis, M. Wouters, *Platform work and the employment relationship*, in *ILO Working Paper 27*, 2021, Geneva, ILO.

Court rejected the riders' employment relation classification as a *tertium genus* adopted by the Court of Appeal. The ruling of the Supreme Court was grounded on a far-reaching interpretation of the same legal provision, introduced in 2015 and amended in 2019. According to article 2 of the Legislative Decree No. 81/2015 the employment protections provided for subordinate workers have to be extended to the so called 'hetero-organized self-employed workers', in other words those workers engaged in non-subordinate collaboration in which the client has a unilateral power to define the methods of the job execution [2]. However, the Supreme Court decision leaves enough room to a selective application of the employment protections and what is more it doesn't say the last word on the classification issues, because it has left still open the possibility to classify the riders, or gig-workers more in general, as subordinate workers [3].

This opportunity was taken by the Tribunal of Palermo in November 2020. The Court reinstated a Glovo rider and reclassified him as a full-time, permanent employee, to be remunerated according to the collective bargaining agreement for the logistic and transport sector, on the grounds that his autonomy was merely nominal, since the platform could organise the execution of the work performance and discipline no compliance through rigorous instructions issued by the internal booking system. The judge agreed that the platform retained a command-and-control position over the rider, who was subjected to its managerial powers, coherent with the classical category of "subordination" [4].

Indeed, the issue of algorithmic management is certainly something that the litigation on platforms has brought to attention, clarifying that workers' surveillance can also be exerted through technological means, even by them only, and it is equivalent to the control exerted in person [5].

3. *Health and safety standards*

In order to extend labour law protections to platform workers, another strategy was put in place, which deal with promoting judicial decisions grounded on occupational health and safety legislation. This alternative option came as a con-

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[2] A. ALOISI, '*With great power comes virtual freedom*': *A Review of the First Italian Case Holding that (Food-delivery) Platform Workers are not Employees*, in *Comparative Labour Law and Policy Journal,* Dispatch No. 13, 3rd December 2018.

[3] C. SPINELLI, *I* riders *secondo la Cassazione: collaboratori etero-organizzati regolati dale norme sul lavoro subordinato,* in *DLM*, 2020, 172-181.

[4] A. ALOISI, *Demystifying Flexibility, Exposing the Algorithmic Boss: A Note on the First Italian Case Classifying a (Food-Delivery) Platform Worker as an Employee*, in *Comparative Labour Law and Policy Journal,* Dispatch No. 35, June 2021.

[5] G. GAUDIO, *Algorithmic Bosses Can't Lie! How to Foster Transparency and Limit Abuses of the New Algorithmic Managers*, in *Comparative Labor Law & Policy Journal*, Bocconi Legal Studies Research Paper forthcoming, available at SSRN: *https://ssrn.com/abstract=3927954*.

sequence of a large mobilization and protest movement organized by many riders and their Unions, to denounce the worsening of working conditions, in the face of the intensification of their working activities during the pandemic.

The Tribunals of Florence and Bologna, in April 2020, decided on a riders' claim regarding personal protective equipment (such as masks, gloves, sanitising gels), which would have allowed them to carry out their activity safely in the light of Covid-19 outbreak and spread.

According to the rulings of these first instance Courts, health and safety protection shall be granted not only to employees but also to hetero-organized self-employed workers, as defined by Article 2 of the Legislative Decree No. 81/2015. In the vein of the Supreme Court ruling, both Tribunals stated that these workers are entitled to the same protection provided for employees, surely including health and safety standards [6].

Even more relevant is the fact that the first instance Court of Florence also explored the possibility to solve the lawsuit applying the specific regulation foreseen by art. 47-*bis* of the Legislative Decree No. 81/2015, which provides for a minimum level of protection to self-employed riders who perform their work through digital platforms. The judge argued that health and safety protection to be granted to these workers cannot be limited to that one provided for to the other self-employed workers, otherwise the ad hoc legal provision concerning self-employed platform workers (Art. 47-*septies*, par. 3) would be deprived of any sense. On the contrary, that norm has been enacted in order to strengthen the riders' protection when they perform work as self-employed.

As confirmed by the case law, the Italian legislation already ensures adequate health and safety protections to platform workers, regardless how their work relationship is classified. Nevertheless, these judgments have had a relevant impact in digital platform managerial practices adopted during the pandemic.

4. *Antidiscrimination law*

Anti-discrimination law presents distinct strategic advantages for the advancement of the workers' rights in the gig economy. In this respect, an important decision was taken in December 2020 by the Tribunal of Bologna in a lawsuit whose claimant were local trade unions. Noting the strategic nature of the action, the judge outlined the hypothesis that antidiscrimination law could offer more effective means of protection for those workers with a debated legal classification.

Territorial trade unions brought an action under Article 5 par. 2 of the Legislative Decree No. 216/2003. The Unions asked the judge to declare the discrimi-

[6] C. SPINELLI, *Le nuove tutele dei* riders *al vaglio della giurisprudenza: prime indicazioni applicative*, in *Lab. Law Issues*, 2020, 1, 89-105.

natory nature of the condition for having access to the work session, as the ones established by the digital platform Deliveroo, insofar such a system did not distinguish among the various possible reasons behind the worker's decision to cancel or refuse an assignment. More precisely, the trade unions denounced the "blindness" or unawareness of the algorithm with respect to the reason related to the decision to refuse or cancel, like, primarily, the possibility of a strike or cases of illness or caring the children.

According to the Court, "to treat in the same way those who do not participate in a booked session for futile reasons and those who do not participate because they are on strike (or because they are sick, have a disability, or assist a disabled person or a sick minor, etc.) in practice discriminates the latter, possibly marginalizing him from the priority group and thus significantly reducing his future opportunities for access to work". So the Tribunal upheld the request of the claimants and as a consequence declared the discriminatory nature of the system managing the conditions of access to the work shifts' booking [7].

On a preliminary basis the judge analysed some important issues, such as properly the applicability of anti-discrimination law to the riders and the active legal capacity of trade unions organisations.

The first question was positively resolved on the basis of both domestic and EU legislations. The judge ruling relied on Article 47-*quinquies* of Legislative Decree No. 81/2015, according to which the anti-discrimination regulations normally applicable to employees shall apply to self-employed riders. Furthermore, the judge reinforced his conclusion also referring to Legislative Decree No. 216/2003, which has a European matrix in the Employment Equality Directive No. 2000/78/CEE.

The other preliminary issue afforded by the Tribunal of Bologna, concerning the active legitimacy of the claimant trade unions, contested by Deliveroo, was resolved on the basis of two decisive criteria: on the on hand, people harmed by the discrimination have to be not directly and immediately identifiable; on the other hand, the representativeness of the association with respect to the collective interest in question has to be verified. The judge found that both these criteria were met in the case in issue [8].

In the same vein, territorial trade unions filed a complaint before the Tribunal of Palermo, even though on a different legal basis, i.e. acting through the special anti-discrimination procedure provided for by art. 28, Legislative Decree No. 150 of 2011. The first instance Court confirmed the applicability of the anti-discrimination regulation not only to employee and hetero-organized self-employed workers, as defined by Article 2 of the Legislative Decree No. 81/2015,

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[7] V. PIETROGIOVANNI, *Deliveroo and Riders'Strikes: Discriminations in the Age of Algorithms*, in *International Labor Rights Case Law*, 7 (2021) 317-321.

[8] I. PURIFICATO, *Behind the scenes of Deliveroo's algorithm: the discriminatory effect of Frank's blindness*, in *Italian Labour Law e-Journal*, *Issue* 1, Vol. 14 (2021).

but also to self-employed riders, according to Article 47-*quinquies* of the same Legislative Decree [9].

The Court of Appeal of Palermo, then, in a judgement of 23rd September 2021, confirming the ruling taken at the end of the precautionary procedure by the Tribunal, declared that "it constitutes an act of indirect discrimination for trade union reasons the *ante tempus* withdrawal from a collaboration relationship by a platform when the latter has proposed to workers who do not consent to the application of a new collective agreement stipulated by a trade union association other than that to which they belong the immediate termination of the work contract in progress, since it is a matter of conduct suitable to compel the negotiating freedom of collaborators who have expressed their dissent, limiting their trade union freedom".

The analysed case law confirms that anti-discrimination law can offer adequate protection to both platform workers' individual and collective rights. Nevertheless, another pathway has been explored in Italy in order to defend platform workers' collective rights in courts.

5. *New frontiers to explore: litigating for collective rights*

As reminded above, these last rulings in comment should be taken in due account because they deal with what appears to be the most challenging project of strategic litigation to engage for trade unions, in order not to remain focused only upon individual employment rights.

The leading case was addressed by the Tribunal of Florence on February of 2021. It was based on Art. 28 of the so called "Workers' Statute" (Law No. 300 of 1970), that gives unions the right to sue an employer who limits the union's freedom of association and violate the right to promote a strike. It represents a corner stone of the promotional legislation and has substantially contributed to support effective freedom of association in workplaces and the implementation of employees' social rights.

The judge ruled on a claim brought against Deliveroo Italy by three national Federations of one of the major representative Italian trade unions, the Italian General Confederation of Labour (CGIL). The judicial decision stated that such a claim based on Article 28 of the Workers' Statute could have been actioned only in relation to anti-trade union practices arising from employment relationship, where an employer can be identified as counterpart, excluding similar protection to gig-workers and their trade union representatives. The Tribunal adopted a strict literal interpretation of the norm [10].

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[9] T. Palermo, 12.4.2021, in *ADL*, 2021, n. 4, 1081 ff., commented by Iervolino.

[10] G.A. RECCHIA, *Not So Easy, Riders: the Struggle for the Collective Protection of Gig Economy Workers*, *Italian Labour Law e-Journal*, Issue 1, Vol. 14 (2021).

However, this ruling was reversed by the same Tribunal at the end of the ordinary procedure which follows the precautionary procedure when the unsuccessful party makes opposition. The Court recognised the feasibility of the appeal pursuant to article 28 of Workers' Statute against conducts carried out by clients of hetero-organized collaborations [11]. The judge stated that, according to art. 2, Legislative Decree No. 81/2015 both substantial and procedural protection that labour law grants to employees shall be extended to the hetero-organized self-employed workers. As a consequence, their representative trade unions are entitled to file a lawsuit before the court in order to pursue collective interest and protect collective rights. This preliminary ruling was the access point to ascertain the violation of trade unions information and consultation rights and hinder the bad practice to sign collective agreements with "yellow" trade unions, in order to derogate to legal guarantees [12] (according to Art. 2, par. 2, Legislative Decree No. 81 of 2015).

The same reasoning had been adopted by the Tribunal of Milan (28th March 2021) and the Tribunal of Bologna (14th April 2021) in a lawsuit sued before both of them, because of the respective territorial competence, concerning another category of platform workers, the 'shoppers'. The CEO of a shopping platform had invited his workers to sign up for a newly created trade union so as to finalise a pre-prepared agreement on their working conditions. However, the Courts didn't agree on the existence of an anti-trade union practice, offering a different interpretation of the alleged facts [13].

The latest step in litigation strategies put in place to enforce collective rights is a new initiative with possible disruptive effects for the labour market, whose positive outcome would allow all riders to obtain adequate salaries and working conditions according to the sectoral collective agreements applicable. The first class action (August 2021) for the gig-economy workers in Europe and the first in Italy in the field of labour law, has been filed before the Court of Milan by the CGIL Federations Nidil, Filcams and Filt, to oppose the application of the Assodelivery-Ugl Rider collective agreement, claiming it establishes an illegal economic treatment for riders if compared to the collective agreement which the Federations have signed, considered as the most representative of the related sectors.

At the time of the gig economy, characterized by a job market fragmented and individualized, it may seem paradoxical the overexposure of the collective interest. On the contrary, in sectors affected by instability and weakness of the workforce, such as the food delivery, the action in Courts of representative trade un-

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[11] F. MARTELLONI, Riders: *la repressione della condotta antisindacale allarga il suo raggio*, in *Labour Law Issues*, vol. 7, n. 2, 2021.

[12] See also Trib. Bologna 30.06.2021, in *RGL*, 2021, II, 485, commented by Martelloni.

[13] A. DONINI, *Condotta antisindacale e collaborazioni autonome: tre decreti a confronto*, in *Labour Law Issues*, vol 7, n. 1, 2021.

ions has proven to be a particularly valuable way to protect workers from platform abuses.

The effectiveness of strategic litigation is debated: on the one hand, its potential is recognised and seen as a useful pick for introducing new protections, albeit in combination with other tools and other measures; on the other hand, strategic litigation is considered a weak means with limited impact, especially for the most vulnerable categories of workers. However, as the Italian experience demonstrates, a window of opportunity has been opened for digital workers, which savvy lawyers and committed trade unions should promptly exploit.

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