The experience of Italian jurisprudence on digital platform workers

Thank you for inviting me to this meeting on these very topical and interesting topics. I believe, however, that the need to ensure adequate forms of protection for new forms of work through platforms necessarily requires a "global" judicial policy strategy and the consequent sharing of experiences at least in Europe.

I am convinced, in fact, that the way for the recognition of rights for such workers passes through the enhancement and rediscovery of supranational sources and common principles and values in social matters sanctioned long time ago by the Fundamental Charters.

The solution for the future is for me already present in our past.

These supranational sources, not affected by the contingent regressive regulatory policies linked to emergency and crisis legislation, ensure a solid regulatory basis to extend forms of safeguards to new jobs and prevent "digital precariousness".

It is no coincidence, in fact, that the two most important decisions of the Italian Constitutional Court (judgment 120/18 and 194/18) on trade union rights and protection against dismissals are mainly based on the European Social Charter.

The rediscovery of the Fundamental Charters in social matters is, moreover, a completely new phenomenon in the Italian jurisprudential panorama that today with increasing frequency uses these instruments to resolve disputes in which the domestic law shows all its inadequacy.

With reference to platform work, the Italian judicial experience is exclusively focused on the employment relationship of riders.

The first judicial initiative was promoted in Turin by a group of self-organized riders who claimed the subordination against Glovo. The Court of First Instance in 2018 rejected the application on the grounds that the freedom to refuse the proposal of delivery granted to the riders excluded the subordination. The Court of Appeals, while confirming the autonomy of the service, however, considered to recognize in part the discipline of subordinate employment by applying a special rule (Article 2 of Legislative Decree 81/15) that extends to hetero organized autonomous services the regulation of subordinate employment.

The Court of Cassation in 2020 confirmed the decision by rejecting the appeal of the food delivery company.

Pending this judgment, the Italian Legislator, also due to strong pressure from the trade union, introduced with Decree Law 101/19 a special regulation for riders that ensures a series of minimum safeguards including the right to health protection, the prohibition of discrimination, the prohibition of piecework pay and the application of the disciplines of collective agreements in related sectors in the absence of a specific collective agreement for riders.

The absence of litigation due to the widespread unwillingness of riders to take legal action led Cgil in December 2019 to bring an action against Deliveroo for the repression of collective discrimination implemented through the preferential reservation system based on the reputational ranking that affects the booking hours of work sessions.

With this lawsuit brought before the Court of Bologna, the union asks the judge to affirm that the reputational ranking system is a form of discrimination that penalizes with the loss of scores in the statistics the so-called late cancellation of slots, i.e. the cancellation of work sessions booked with less than 24 hours notice, and the late geolocation in the first 15 minutes in the work area.

The system as it penalizes any late cancellation or any late geolocation is "blind" to the multiple reasons that may be the basis of such behavior. In essence in the judgment it is expected that this mode of penalty that affects the possibility of access to work, although abstractly the same for all,
actually penalizes workers who intend to exercise a legitimate right to strike because the loss of ranking affects future employment opportunities as well as workers who for family reasons are in the sudden difficulty to fulfill for reasons not attributable to them.

The system, therefore, determines a treatment that discriminates against the exercise of prerogatives related to trade union freedom and personal and family conditions.

The judgment, which also claims the right to take collective action by self-employed workers, recently affirmed in the decision of the European Committee of Social Rights in complaint 123/16, is in its final phase and should be concluded within the current year.

In the course of the Covid-19 epidemiological crisis, numerous judicial initiatives to ensure compliance with protocols and prevention measures also against riders have been successfully promoted. The Courts of Rome, Florence and Bologna between April and June 2020 have all upheld the appeals filed by riders based on the special legislation provided for hetero organized workers and in any case for riders by Decree 101/19. In these judgments, however, the nature of the employment relationship was not examined.

Finally, the association representing food delivery companies, in order to avoid the application of collective bargaining in related sectors imposed by Legislative Decree 101/19, in September 2020, entered into a controversial collective agreement with a right-wing trade union organization (Ugl Rider) that allows piecework pay and, in affirming the autonomy of the relationship, concretely determines a regression in the level of protection.

The controversial contract was almost instantaneously signed by the minority trade union organization which obtained the recognition of strong economic incentives for its "trade union activity”. Such contract was harshly criticized by the Ministry of Labour, which considered the signatory trade union lacking adequate representation.

The contract was also imposed by the food delivery companies on all riders through a simultaneous communication of withdrawal from employment contracts with the simultaneous offer to continue the activity on condition that they accept the new regulations.

Some riders have not accepted and will be disconnected as of November 2, 2020.

Therefore, during October 2020, numerous actions have been presented throughout the national territory in order to ascertain the invalidity of a regulation introduced through a minority trade union that has obtained undue economic benefits by renouncing to the individual and collective rights provided by the normative framework.

In the disputes promoted, the nature of the trade union "of convenience" of the signatory party is affirmed and it is noted that the (not only) economic aid obtained by the signatory trade union organization to the detriment of representative trade unions necessarily constitutes a form of trade union discrimination that leads to a reversal of the burden of proof by requiring the demonstration of the genuineness of the union in the hands of the companies and not the workers.

In the appeals filed, it is finally pointed out that the disconnection and termination of the relationships of the entire network of riders constitutes, regardless of the qualification of the relationship as subordinate under national law, a collective dismissal because, under Directive 98/59/EC, the right to trade union consultation is of a general nature and can not be restricted by qualifying operations implemented by national regulations.

Aware of what stated by the order of the Court of Justice of 22 April 2020 C-692/19, which excluded from the notion of worker the English drivers of Yodel Dekuery Network, in the appeals the right to consultation is claimed also referring to Article 29 of the European Social Charter.

These judicial proceedings are still at an early stage.
It is therefore possible that the spring of 2021 will bring some news regarding the protection of platform workers that hopefully will finally extend the rights of these workers.

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