The first Italian decision on the status of gig workers denies reclassification

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1. The Foodora case.

A couple of years ago, in October 2016, the German food delivery platform Foodora was at the centre of a perfect storm in Italy.

After Foodora decided to change the payment scheme, shifting from a gross 5,60 Euros hourly pay to a gross 3,00 Euros delivery fee, riders took collective action against the platform, organising demonstrations and launching a campaign that was significantly covered by the media (Rauseo 2018).

Foodora riders' mobilisation brought the issue of the protection of platform work – an issue that was already object of extreme interest for labour lawyers in Europe (Däubler, Klebe 2015; De Stefano 2016; Danenduc, Vendramin 2016; Waas *et al*. 2017; Todolí Signes 2017; Prassl 2018) – at the centre of the Italian public debate and required even the intervention of the Ministry of Labour, after which the company decided to increase the delivery fee to 4,00 gross Euros, but without any return to an hourly-based model of payment.

Some of the riders involved in the mobilisation were substantially fired by the platform, which refused to renew their fixed term contracts after the expiration. Those riders brought a claim before the Labour Tribunal of Turin, demanding the reclassification of their formally self-employment relationship into an employment (subordinate) relationship and other connected claims. In particular, the reclassification of the relationship would have entailed both the right to receive significant wage differentials, to be determined making reference to the national collective agreements applicable to comparable employees, and the illegitimacy of the wrongful dismissal, with the consequent right to reinstatement.

The Tribunal of Turin, with sentence dated 7 May 2018, n. 778, rejected all the claims, finding that the riders were not employees because "*the relationship between the parties was characterised by the fact that the claimants had no legal obligation to render their performance and that the defendant had no legal obligation to receive it*".

In order to understand the reasoning of the Tribunal and to verify whether its conclusions are convincing, it seems necessary to spend a few words on the Italian legal framework with respect to the classification of the employment relationship and on the main characteristics of the relationship between Foodora and its riders.

2. Italian judges restrictive approach to the notion of subordination.

In Italy, as in most jurisdictions, the classification of the employment relationship represents a crucial standpoint. Employees enjoy several statutory protective provisions (on wages, on working time, on leaves, on the discipline of dismissal, without mentioning several social security benefits) that self-employed workers do not, on the ground of their supposed higher bargaining power and economic independence.

Italian labour law provides for a unitary notion of employee, individuated in the subject "*who engaged himself to cooperate for remuneration in an enterprise by working manually or intellectually under the direction of the entrepreneur*" (art. 2094 Civil Code, as translated by Treu 2007). The identification of the characters of the employee's "subordination" – and of the criteria used to distinguish it from the self-employed worker's "autonomy" – has always been an evergreen topic and accompanied the development of Italian labour law from its origins to the new challenges brought by technological evolution.

As the Supreme Court has always been stating that "*any human activity can be performed under the scheme of an employment relationship or under the scheme of self-employed work*" (Cass. 22658/2016; 19701/16; 18320/2016), in the ascertainment of the correct classification of the relationship, Italian jurisprudence tends to give extreme importance to the circumstance that the worker acts under the direction and control of the employer and is bound to perform his/her tasks in a spatial and/or temporal framework determined by the counterpart.

The majoritarian orientation of Italian jurisprudence considers that the element characterising the employment (subordinate) relationship "*is the hetero-direction, consisting in the subjection of the worker to the directive, organisational and disciplinary power of the employer*", which limits the autonomy of the worker and determines his/her insertion in the entrepreneurial organization, while other elements can present only a subsidiary relevance (Cass. 1/2018; 10004/2016; Cass. 2728/2010).

Even the contractual label indicated by the parties (the so-called *nomen iuris*) may play a role in the ascertainment of the workers' status, but only with other elements and in doubtful cases, as by virtue of the principle of reality the parties are not allowed to deny the application of employment rights if the effective modalities of execution of the relationship indicate the existence of an employment relationship (as repeatedly stated by the Constitutional Court: Corte cost. 121/1993; 115/1994).

3. The reasoning of the Tribunal of Turin with regard to the exclusion of Foodora riders' employment status.

As many observers realised immediately, there were some precedents from the past that resulted quite fit to resolve the Foodora case (Biasi 2018; Cavallini 2018).

In the late 80s Italian judges faced the issue of the classification of pony expresses, delivery boys who were formally classified as self-employed workers. Several first instance judges acknowledged the existence of an employment relationship, emphasising the economic dependency of the worker, his/her insertion into an entrepreneurial organisation, the degree of control exercised by the company and the continuity of the performance. Higher courts, on the contrary, found that the freedom of the worker to refuse the tasks assigned on a day-by-day basis was sufficient to exclude the existence of a tie of subordination (Cass. 7608/1991; Cass. 811/1993) and such interpretative solution has been repeatedly upheld by the Supreme Court (e.g. Cass. 1238/2011).

Several decades after the "pony express" cases the Tribunal of Turin reached the vary same conclusions with reference to Foodora riders, considering that they were free to give or not their availability for one of the slots of the calendar, as well as the platform was free to accept such availability and to insert the workers in the slots or not.

This freedom of the worker to determinate his/her working schedule, according to the Tribunal of Turin (but also to the Appeal Court of Paris, which rejected the claim brought by Deliveroo's riders: Cour d'Appel de Paris, 22 November 2017, n. 16/12875), is incompatible with the tie of subordination characterizing the employment relationship, because without the power to demand the execution of the performance the employer cannot even exercise the directive and organizational power.

Some elements of the relationship, actually, could have been valorised in order to recognize the employment status of the riders, such as the facts that the delivery itinerary was planned by the app; that Foodora could verify in any moment the location of the worker by virtue of the GPS system integrated in the app and evaluate the quality of the performances via reputational systems; that the rider had a limited time to execute the performance (30 minutes per delivery); that the riders were invited to wear clothes provided by Foodora, exhibiting the platform's brand. However, all these circumstances were deemed insufficient to prove the subordinate nature of the relationship and were considered just an aspect of the element of the "coordination" that characterises the so-called "coordinated and continuative collaborations", a form of self-employed, quasi-subordinate

relationships enjoying only a few statutory employment law provisions (art. 409, n. 3, of the Civil Procedure Code).
As such restrictive approach to the notion of subordination is very stable in Italian case law, the Foodora decision was not a surprise and results at least *de iure condito* convincing, notwithstanding the circumstances that pointed out quite clearly the existence of a tie of subordination, which were valorised in other jurisdictions where the relationship of gig workers was reclassified (the reference is obviously to the decisions of the Tribunal of London, and then of the Appeal Court of England and Wales, rendered in the Uber case (Davidov 2017) and to the US litigation (Cherry 2016)).

4. The reasoning of the Tribunal of Turin with regard to the exclusion of the element of "hetero-organisation" (which would have entailed the application of statutory employment law).

The part of the decision that creates more perplexities deals with the exclusion of the element of the so-called hetero-organization of the relationship (art. 2, Legislative Decree 81/2015), a notion introduced by Italian legislator in 2015 in order to extend the provisions of statutory employment law to those workers who do not act under the direction and control of the employer but still "continuatively collaborate, by providing exclusively personal work, with a main client who can organise the activity also with respect to the time and the place of work" (in English see Del Conte, Gramano 2018).
The provision created a huge debate among Italian labour lawyers, divided between who sustained that the legislator extended the notion of *employee* beyond the area of hetero-direction, in order to include the area of hetero-organisation, and those who argued that hetero-organised relationships still belong to the field of self-employed work and that the legislator extended only the application of employment rights to some self-employed workers, but without intervening on the notion of *employee*.
According to another interpretative option, elaborated by an Author who also defended as an attorney Foodora before the Tribunal of Turin (Tosi 2016), the aforementioned art. 2 should be regarded as an "illusory provision", because it only codifies some criteria – *i.e.* the degree of spatial and temporal flexibility – that were already used by Labour judges and it is therefore incapable to produce any new effect on the system of Italian labour law.
Such interpretation has been completely embraced by the Tribunal of Turin, which sustained that "*the provision has even a narrower scope than art. 2094 of the Civil Code*", because it requires that the employer does not only exercise the directive power during the relationship but does also organise the time and the place of work.
In other words, the Tribunal refused to valorise the provision of the aforementioned art. 2, which – as it has been noted (Aloisi 2016) – could represent an extremely useful tool in order to provide an adequate protection to platform workers, guaranteeing the application of employment law even outside the domain of hetero-directed relationships.
However, such reasoning does not seem convincing, as it finishes to give an *interpretatio abrogans* of a provision that was certainly supposed to enlarge the field of the beneficiaries of statutory employment law and that seems quite fit to apply to those platform workers – such as the Foodora riders – who are at the same time bound to schedule their working time within a frame calendar organised by the platform and to work inside a geographical area that is determined by the platform, which also "suggests" a specific itinerary to follow.
Moreover, it is important to stress out how the Foodora contract specifically provided for the obligation to execute the delivery in less than 30 minutes and to guarantee at least five deliveries every three months. Also, the reputational system implemented by Foodora allowed the platform to reward the most productive workers by guaranteeing them a wider set of options in the phase of the

reservation of the shifts on the calendar, while less productive workers would have found less available shifts, with a significant limitation to their freedom to choose the working schedule.
Under these circumstances, it seems that the conservative approach followed by the Tribunal of Turin in the Foodora case is not justifiable, as Italian law does actually provide adequate instruments in order to face the challenges of (new and old) forms of non-standard work.

Bibliographic references

Aloisi A., *Il lavoro "a chiamata" e le piattaforme "online" della "collaborative economy": nozioni e tipi legali in cerca di tutele*, in *Labour & Law Issues*, 2016, n. 2, p. 41.

Biasi M., *Dai* pony express *ai* riders *di* Foodora*. L'attualità del binomio subordinazione autonomia (e del relativo metodo d'indagine) quale alternativa all'affannosa ricerca di inedite categorie*, in *bollettinoadapt.it* n. 11/2017.

Cavallini G., *The Classification of Crowdwork and Work by Platforms: Alternatives and Implications*, in E. Ales *et Al*. (eds.), *Working in Digital and Smart Organizations. Legal, Economic and Organizational Perspectives on the Digitalization of Labour Relations*, Palgrave Macmillan, 2018, p. 113.

Cherry M., *Beyond Misclassification: The Digital Transformation of Work*, in *Comparative Labor Law & Policy Journal*, 2016, vol. 37, n. 3, p. 577.

Danenduc G., Vendramin P., *Le travail dans l'économie digitale: continuités e ruptures*, WP ETUI, 2016.03, Bruxelles 2016.

Däubler W., Klebe T., *Crowdwork: Die neue Form der Arbeit – Arbeitgeber auf der Flucht?*, *Neue Zeitschrift für Arbeitsrecht*, 2015, p. 1032.

Davidov G., *The Status of Uber Drivers: A Purposive Approach*, in *Spanish Labour Law and Employment Relations Journal*, 2017, n. 6, p. 6.

Del Conte M., Gramano E., *Looking to the Other Side of the Bench: The New Legal Status of Independent Contractors under the Italian Legal System*, in *Comparative Labor Law & Policy Journal*, 2018, n. 3, p. 579.

De Stefano V., *The Rise of the "Just-in-Time Workforce": On-Demand Work, Crowdwork, and Labor Protection in the "Gig-Economy"*, in *Comparative Labor Law & Policy Journal*, 2016, vol. 37, n. 3, p. 474.

Rauseo A., *Riders on the Precarious Digital Work. Foodora and the Riders' Collective Action in Italy*, in *Economia e Lavoro*, 2018, p. 43.

Prassl J., *Humans as a Service. The Promise and Perils of Work in the Gig Economy*, Oxford University Press, Oxford 2018.

Todolí Signes A., *El trabajo en la era de la economía colaborativa: la clasificación jurídica de trabajadores y autónomos y los efectos de la reputación online en la economía de las* plataformas *virtuales*, Tirant lo Blanch, Valencia, 2017.

Tosi P., *L'art. 2, comma 1, d. lgs. n. 81/2015: una norma apparente?*, in *ADL*, 2015, n. 6, p. 1117.

Treu T., *Labour law and industrial relations in Italy*, Wolters-Kluwer International, 2007.

Waas B. *et Al*., *Crowdwork – A Comparative Law Perspective*, Bund-Verlag, Frankfurt am Main, 2017.