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Behind the scenes of Deliveroo's algorithm: the discriminatory effect of Frank's blindness

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Abstract

This article addresses some of the main topics arising from the order issued by the Court of Bologna on 31 December 2020 which has declared the discriminatory nature of the work sessions' "self-service booking" system of the platform "Deliveroo". In the first part, the question of the applicability of anti-discrimination law to cases of discrimination on trade union grounds is positively resolved, on the basis of domestic, European and international legislation and case law. In addition, noting the strategic nature of the action, the hypothesis that anti-discrimination protection could be a more effective means of protection for those workers with a debated legal classification is outlined. In the second part, starting from the description of the discriminatory nature of the digital platform's algorithm system, it concludes with a broader reflection on Artificial Intelligence. This reflection stimulated by the Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act).

Keywords: Platform Work; Antidiscrimination Law; Artificial Intelligence; Algorithm.

1. Introduction.

On December 30th, 2020, the Court of Bologna issued an interim order establishing the discriminatory nature of the work shifts' booking system operated by the Deliveroo platform to manage the delivery riders' workflows until November 2nd, 2020.

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This ruling has been welcomed by most of the literature notably because of its unprecedented nature at European level and, above all, due to the conclusions reached and the reasons leading to the latter.[1]

Contrary to the rulings collected so far on this subject, the question that has been brought to the attention of the Court of Bologna by territorial trade unions, as it will be seen, does not concern the *vexata quaestio* of the legal classification of food and grocery delivery workers[2] (which is, consequently, briefly and incidentally studied by the judge), but rather the assessment of the discriminatory nature of the work shifts' booking system.

In order to be able to make such determination, the judge addresses on a preliminary basis some important issues such as, the applicability of antidiscrimination law to the riders, the interpretation of the term "belief" and the active legal capacity of trade union organisations.

In the following reflections, firstly, it will be analysed the loose cruxes on a preliminary basis by the Court of First Instance and, more particularly, it will be examined the issue of trade union organizations' right to institute proceedings by applying a systematic vision that also takes into consideration previous and subsequent rulings.

Second of all, starting from the considerations that the above issue entails, it will be tried to understand whether the ones found in this case could become a trend and simultaneously a strategy aiming to use the anti-discrimination discipline as a tool for horizontal action for the protection of this category of workers.

Finally, moving on to the implications relating to the merit of the case, it will be discussed both discriminatory nature of the algorithm system used by the platform, and some brief reflections of a broader nature that inevitably accompany this issue, namely those concerning the role and features of Artificial Intelligence (AI) in the light of the European Union's most recent policy interventions.

2. Factual background.

On December 16th, 2019, the local trade unions of Federazione Italiana Lavoratori dei Trasporti - Filt Cgil of Bologna, Filcams Cgil of Bologna and Nidil Cgil of Bologna, brought

[1] *See*, among others, Aloisi A., De Stefano V., *Frankly, my rider, I don't give a damn*, in *La rivista il Mulino*, 7 gennaio 2021; Ballestrero M. V., *Ancora sui rider. La cecità discriminatoria della piattaforma*, in *Labor. Il lavoro nel diritto*, 1, 2021, 104-114.

[2] *See,* among others, UK Employment Tribunal, Central London, England, United Kingdom, 28 October 2016, no. 2202551/2015, Aslam Y., Farrar J., and others v. Uber B.V. and others; Employment Appeal Tribunal, 10 November 2017, Uber B.V. and Others v Mr Y Aslam and Others: UKEAT/0056/17/DA; Court of Appeal, 19 December 2018, Uber v Aslam & Others, EWCA Civ 2748; Sala de lo Social del Tribunal Superior de Justicia de Castilla y Leon, 17 February 2020, no. 992, STSJ CL 992/2020 - ECLI: ES:TSJCL:2020:992; Cour de Cassation, 4 March 2020, no. 374. Trib. Torino 07 May 2018, no. 778; Trib. Milano 10 September 2018, no. 1853; App. Torino 04 February 2019, no. 26; Cass. 24 January 2020, no. 1663. For more details on the rulings of the Italian courts in the context of the domestic legal framework, *see* in this journal: Biasi M., *The On-Demand Work (Mis)classification Judgments in Italy. An Overview,* in *Italian Labour Law e-Journal*, 12, 1, 2019, 49-64; Pizzoferrato A., *Platform Workers in the Italian Legal System*, in *Italian Labour Law e-Journal*, 12, 1, 2019, 93-98; Pallini M., *Towards a new notion of subordination in Italian Labour Law?*, in *Italian Labour Law e-Journal*, 12, 1, 2019, 1-24.

an action under Article 5 par. 2 of the *Legislative Decree No. 216/2003*[3] before the labour section of the Court of Bologna in order to obtain the declaration of the discriminatory nature of the conditions for access to work session as the ones established by the digital platform "Deliveroo".

In the wake of the reconstruction provided by the parties through allegations and of the testimonies taken during the proceedings, it emerged that the relationship between riders and "Deliveroo" is established through the signing of a self-employment contract by the former. Following the conclusion of the mentioned contract, riders receive the login credentials to the application, which is used by Deliveroo for workflows' organisation and management. Riders must then download it on their smartphone in order to have an easy access when it comes to accepting or rejecting delivery orders.

According to contract's wording, "self-service booking" ("SSB") and "free login" are the two alternative ways to receive delivery orders that the digital platform makes available to riders. In the first case, the flexible self-service booking service allows riders to book slots in which they would be available to receive and carry out the delivery requests, while, in the other one, the connection to the application by the rider is equivalent to expressing their availability to receive service proposals at that moment.

It is to the first of the two systems described that the criticisms of the territorial trade unions are addressed.

In fact, the self-service booking system is a mechanism that calculates in advance the number of riders that are needed to meet the weekly demand. It also sets a corresponding number of work shifts, defined by the platform as "slots", which are made available to riders for bookings on Sundays.

Nevertheless, this system has been programmed in such a way as to stagger access to work sessions' booking into three different time slots (from 11 a.m., 3 p.m. and 5 p.m.), according to each rider's reached score.

The denial of simultaneous access to the booking service for all riders means that riders with the highest score are granted access to the first of the time slots provided by the platform and this allows them to register themselves into all preferred schedules. Otherwise, riders with lower scores are granted access to the second and third time slots and they can only book shifts on which no reservation has already been made by those riders who were able to access the service before them.

The personal score of each rider is defined by two parameters, namely "reliability" and "participation", which are respectively evaluated in consideration of "the number of occasions in which the delivery rider, despite having booked a shift, did not participate where 'participate' meant logging in within the first 15 minutes following the beginning of the shift"[4] and "the number of times [the rider] is available for the most relevant time schedules

[3] Article 5 of the *Legislative Decree No. 216/2003*: "*Trade unions, associations and organisations representing the right or interest affected, by virtue of a delegation granted by public act or authenticated private deed, on penalty of nullity, shall be entitled to take action within the meaning of Article 4, in the name and on behalf or in support of the person subject to discrimination, against the natural or legal person to whom the discriminatory conduct or act is attributable.*
The parties referred to in paragraph 1 shall also be entitled to take action in cases of collective discrimination where the persons affected by the discrimination cannot be identified directly and immediately".

[4] *See* point 4 of the Order of the Court under analysis.

to the consumption of food at home"[5] (from 8 p.m. to 10 p.m. from Friday to Sunday), without prejudice to the possibility for the delivery rider to cancel his booking within 24 hours before the beginning of the round, without affecting his score.

This means that if the delivery rider books a specific work session, does not cancel the booking within 24 hours before the start of the duty period and does not log in within 15 minutes following its beginning (*i.e.,* does not participate), she/he suffers a reduction in her/his score because that workday is counted in the last fourteen working days which are taken into account for the statistics.

In consideration of the platform's operational mode, the claimants asked the judge to declare the discriminatory nature of such a system, insofar as it did not distinguish among the various possible reasons behind the worker's decision to cancel or refuse an assignment.

In other words, the beginning of their shift suffers a reduction in their score that, inevitably, reflects on their working opportunities. Specifically, trade unions denounced the "blindness"[6] or unawareness of the algorithm with reference, primarily, to the possibility of a strike, to which the cases of illness and obligations related to a minor child were added.

Finally, the claimants asked for the change of the work session access mechanism ("self-service booking" service), for Deliveroo to be sentenced to pay a compensation for the non-pecuniary damage caused by the platform's discriminatory behavior and for the publication of the written judgment on its website and in a national daily newspaper.

3. The first question: applicability of antidiscrimination law and collective representation of interests in platform work.

As presented and proven by the parties in place of the facts of the case, the judge of the Court of Bologna upheld the requests of the claimants and, as consequence, declared the discriminatory nature of the system managing the conditions of access to the work shifts' booking ("self-service booking" system).

Furthermore, the judge has ordered the company "Deliveroo" to remove the effects of the discriminatory conduct by publishing on its website and in a national newspaper the order issued and, finally, ordered it to pay a compensation for the non-pecuniary damages suffered by the applicants.

However, before entering into the merits, the judge has analysed and resolved four questions on a preliminary basis, of which, in the economy of this paper, the following paragraphs will analyse those relating to the applicability of anti-discrimination law to riders, the interpretation of the term "belief" and the active legal capacity of trade unions.

[5] *Ibid.*

[6] If the claimants talk about "blindness", the "Deliveroo" platform talks about "unconsciousness" in order to describe the behaviour adopted by the digital platform.

3.1. The personal scope of antidiscrimination law.

As mentioned above, the Court has declared the anti-discrimination law applicable also to riders. In order to explain her decision, the judge has followed an argumentative path that, quite rightly, does not dwell on the *vexata quaestio* of the classification of the employment relationship of this category of workers.

In fact, in the case in issue, the trade unions brought to the attention of the judge a circumstance that generally concerns all the riders working for the "Deliveroo" company and who sign a contract of self-employment as declared by the company itself.

Therefore, since the legal *status* of the former is not at issue in the case at hand, the judge clearly refers to Article 47-quinquies of *Legislative Decree No. 81/2015*.[7]

The aforementioned article is part of a body of legislation, namely Chapter V-bis of *Legislative Decree No. 81/2015*, which provides for specific provisions to protect riders, as defined in the Article 47 bis para. 1 of the same legislative decree.[8] Specifically, Article 47-quinquies provides that the anti-discrimination regulations normally applicable to employees shall apply to riders. This is true even in cases where conduct that violates equal treatment is carried out in the phase of "*access to the platform*", as can be said to have occurred in the case in point.

Furthermore, the judge also reinforces this conclusion, namely the applicability of the anti-discrimination rules to this category of self-employed workers, by referring to the Article 3 para. 1 lett. a) of *Legislative Decree No. 216/2003*.[9]

The Court's reference both to Chapter V-bis and to the rules laid down by Legislative Decree No. 216/2003 has highlighted the existence of a twofold regulatory regime capable of ensuring protection for riders if they are victims of discrimination.

The first, the regulatory regime of Chapter V-bis, is a purely domestic law regulation and offers "selective" protection in that it is applicable only and exclusively to self-employed riders as defined in Article 47 bis para. 1.

On the contrary, self-employed workers are expressly included within the scope of application of the rules of *Legislative Decree No. 216/2003*, which has a European matrix.

Consequently, it is a regulation indifferently applicable, meaning that their legal classification cannot cause its restrictive application.

The choice made by the judge not to stop at the sole reference to the Italian legislation on riders, but to refer expressly to Legislative Decree No. 216/2003 could suggest a desire to inaugurate a trend that recognises the "universalisation" of certain protections.

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[7] The Article 47-quinquies of *Legislative Decree No. 81/2015* rules the prohibition of discrimination. It provides that "*The anti-discrimination law and the law on the protection of the freedom and dignity of workers provided for employees, including access to the platform, shall apply to the workers referred to in Article 47-bis.*
Exclusion from the platform and reductions in work opportunities due to non-acceptance of the service shall be prohibited".

[8] Article 47 bis, par. 1, *Legislative Decree No. 81/2015*: "*Without prejudice to the provisions of article 2, paragraph 1, the provisions of this chapter establish minimum levels of protection for self-employed workers who carry out activities of delivery of goods on behalf of others, in urban areas and with the aid of velocipedes or motor vehicles referred to in article 47, paragraph 2, letter a) of the Highway Code, referred to in Legislative Decree No. 285 of 30 April 1992, by means of platforms, including digital ones*".

[9] In circumscribing the subjective scope of application of the equal treatment legislation, the *Legislative Decree No. 216/2003* expressly states that judicial protection against forms of direct and indirect discrimination caused by certain factors also refers, as far as the case in question is concerned, to the area of "*a) access to employment and to work, whether self-employed or employed, including selection criteria and recruitment conditions*".

However, doubts may arise whether the facts of the case can be considered as "*access to employment and occupation*".

In this regard, the case law of the European Court of Justice appears to be consolidated in considering that this expression must be interpreted in a non-restrictive manner, so as to be able to include the existing conditions before the establishment of an employment relationship and to be considered susceptible to include cases that are not literally contemplated or emerging from the case law.[10]

And so, one might consider that such a broad interpretation of the term also lends itself to including the event which occurs in the case in issue, namely access to employment, to be understood as a phase following that of recruitment, where access is subject to a mechanism which acts in effect by means of invisible and non-traditional selection criteria.

3.2. The term "belief" to be interpreted as including cases of discrimination on trade union grounds.

As a third preliminary issue, the Court examined the possibility of including trade union motives into the discriminatory factor of "belief" as referred to in Article 1 of *Legislative Decree No. 216/2003*.[11]

This question was positively resolved by the Court on the basis of a domestic legislation interpretation in line with the provisions in force at the European level, from which it can be seen that the perimeters of the "religion" and "belief" factors do not coincide.

In fact, the former refers to discrimination on religious grounds, while the second refers to cases of discrimination affecting individuals on account of their membership of an ideological belief, "of a nature other than religious, characterised by specific reasons for belonging to a body which is socially and politically qualified to represent opinions, ideas, beliefs susceptible of protection when the object of possible prohibited discriminatory acts".[12]

According to the Court, this expression is so broad that it also include discrimination on trade union grounds because, as presented in this case, the causes of a possible difference in

[10] *See* ECJ, 23 April 2017, C-507/2018, *NH v. Associazione Avvocatura per i diritti LGBTI – Rete Lenford*, ECLI:EU:C:2020:289; Paladini L., *Parità di trattamento e accesso al lavoro – La Dir. 2000/78 e i pertinenti obblighi internazionali nella giurisprudenza della Corte di Giustizia dell'Unione Europea*, in *Giurisprudenza Italiana*, 11, 2020.

[11] Article 1 of the *Legislative Decree No. 216/2003*: "*This decree lays down the provisions relating to the implementation of equal treatment between persons regardless of religion or belief, disability, age or sexual orientation, as regards employment and occupation, and provides for the necessary measures to ensure that such factors do not cause discrimination, considering the different impact that the same forms of discrimination may have on women and men*".

[12] Cass. 2 Jenuary 2020, No. 1, but also, Cass. No. 10179/2004 and Cass. No. 3821/2011. *See*, point 2 of the order. This issue has been the attention of the scholars already on the occasion of the rulings issued since 2012 in the "Fiat case" (Trib. Roma 22 June 2012, App. Roma, 19 October 2012, Cass. 11 March 2014, No. 5581. *See*, among others, the comments of Ales E., *Dal caso FIAT al Caso Italia. Il diritto del lavoro di prossimità, le sue scaturigini e i suoi limiti costituzionali*, in *Diritto delle Relazioni Industriali*, 2011; De Stefano V., *Tutela antidiscriminatoria e affiliazione sindacale: una possibile lettura "multilivello",* in *Argomenti di Diritto del Lavoro*, 4-5, 2014. Then, it was analysed again in connection with the judgments against Ryanair, *see* Trib. Busto Arsizio, 05 February 2018; Trib. Bergamo, 30 March 2018, Santini F., *I diritti dei lavoratori tra dimensione individuale e collettiva delle tutele*, in *Argomenti di diritto del lavoro*, 6, 2018.

treatment are to be found in a worker's membership and participation to trade union activities.

Understanding whether the company's conduct has given rise to discrimination based on "belief" is not a trivial matter, given that the applicability of the provisions of *Legislative Decree No. 216/2003* and of Article 28 of *Legislative Decree No. 150/2011*[13] depends on such inclusion. The above-mentioned rules are certainly more favourable for the plaintiff as to the burden of proof and because it enables her/him to claim collective discrimination and obtain a much more incisive judgement.[14]

Having said this, one might agree with the judge on the subsumption of discrimination on trade union grounds within the scope of "belief", if only in the light of a systematic interpretation of domestic legislation with European and international legislation.

In fact, the *Legislative Decree No. 216/2003* is the result of the implementation of *Directive No. 78 of 2000*,[15] a second-generation directive, implementing in turn the article 19 of the TFEU.

Recital No. 4 of the Directive itself acknowledges the right to equal treatment the status of a universal right "*recognised by the Universal Declaration of Human Rights, … by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories*", as well as by *Convention No. 111 of the International Labour Organisation*, which specifically refers to discrimination in matter of employment and working conditions.[16]

In detail, Article 2 of the *Universal Declaration of Human Rights* recognises the rights and freedoms set out in the text for all individuals, without distinction because of "*race, colour, sex,*

[13] The Article 28 of *Legislative Decree No. 150/2011* lays down the rules applicable to interim proceedings for discrimination litigation. This article states that "*Discrimination litigation referred to in Article 44 of Legislative Decree No. 286 of 25 July 1998 those referred to in Article 4 of the legislative decree of 9 July 2003 No 215, those referred to in Article 4 of the Legislative No. 216 of 9 July 2003, those referred to in Article 3 of Law No. 67 of 1 March 2006, and those referred to in Article 55-quinquies of legislative decree no. 198 of 11 April 2006, shall be governed by the interim procedure, unless otherwise provided in this Article.*
The court of the place where the claimant is domiciled has jurisdiction.
In proceedings at first instance, the parties may be heard personally.
Where the appellant provides factual information, including statistical data, from which the existence of discriminatory acts, agreements or conduct may be presumed, the burden of proving the absence of discrimination shall lie with the defendant. Statistical data may also relate to recruitment, contribution schemes, assignment of duties and qualifications, transfers, career progression and dismissals in the company concerned.
With the order that defines the judgement, the judge may sentence the defendant to pay damages, including non-pecuniary damages, and order the cessation of the prejudicial discriminatory behaviour, conduct or act, adopting, also with regard to the public administration, any other measure suitable to remove its effects. In order to prevent the repetition of the discrimination, the judge may order the adoption, within the time limit fixed in the measure, of a plan for the removal of the ascertained discriminations. In cases of collective discriminatory behaviour, the plan shall be adopted after hearing the applicant collective body.
To assess the damage, the judge shall take into account the fact that the discriminatory act or behaviour constitutes a retaliation to a previous legal action or an unfair reaction to a previous activity of the injured party aimed at obtaining the respect of the principle of equal treatment".

[14] Ballestrero M. V., nt. (1).

[15] *See* Muir E., Waddington L., *Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation,* in Ales E., Bell M., Deinert O., Robin-Olivier S. (eds), *International and European Labour Law. Article by article commentary*, Nomos, Baden-Baden, 2018, 520-547.

[16] Recital No. 4 of the *Council Directive 2000/78/EC* provides that "*the right of all persons to equality before the law and protection against discrimination constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination against Women, United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human*".

language, religion, political or other opinion, national or social origin, property, birth or other status".[17] Furthermore, Article 7 states that in the event of discrimination in violation of the provisions of the Declaration, all individuals must have equal protection.[18] Finally, Article 23 refers to the right for everyone to "*form and join trade unions for the protection of his or her interests*".[19]

It is also important to note that Article 11 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* ensures the freedom to form and join trade unions for the protection of one's interests,[20] whereas Article 14[21] prohibits discrimination with the same terms as the ones used in the Universal Declaration of Human Rights.[22]

Article 1 para. 1 lett. A) of ILO *Convention No. 111 of 1958* defines discrimination as "*any distinction, exclusion or preference based on race, [...], religion, political opinion ... which has the effect of denying or impairing equality of opportunity or treatment in respect of employment or occupation*".[23]

In addition, Article 21 of the *Charter of Fundamental Rights of the European Union* (Nice Charter) also prohibits discrimination based on a number of factors such as "*sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion …*"; a Charter which, following the intervention of the Lisbon Treaty, has acquired the same legal value as the Treaties, thus legally binding on Member States.[24]

The scope of the above-mentioned regulations does not present any element that could cast doubt on the fact that the expression "belief" does not coincide with that of "religious motives" and can even include discrimination on trade union grounds which are protected by all the sources referred to, as seen above.

[17] Article 2 of the *Universal Declaration of Human Rights*: "*Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made because of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty*".

[18] Article 7 of the *Universal Declaration of Human Rights*: "*All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination*".

[19] Article 23 para. 4 the *Universal Declaration of Human Rights*: "*Everyone has the right to form and to join trade unions for the protection of his interests*". About Article 23 of the Universal Declaration of Human Right, *see*, among others, Källström K., Asbjørn E., *Article 23*, in Gudmundur A., Asbjørn E. (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement*, Martinus Nijhoff Publishers, Leiden, 1999.

[20] Article 11 para. 1 ECHR: "*Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests*".

[21] Article 14 of ECHR: "*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*".

[22] In matter of Article 11 of ECHR, *see* Van Hiel I., *The right to form and join trade unions protected by art 11 ECHR,* in Dorssemont F., Lörcher K., Schömann I. (eds), *The European Convention on Human Rights and the Employment Relation*, 2013, 287 – 308; Dorssemont F., *The right to take collective action under art 11 ECHR,* in Dorssemont F., Lörcher K., Schömann I. (eds), *The European Convention on Human Rights and the Employment Relation*, Hart Publishing, London, 332-365; Id., *The Right to Form and to Join Trade Unions for the Protection of His Interests under Article 11 ECHR - An Attempt to Digest the Case Law (1975-2009) of the European Court on Human Rights*, in *European Labour Law Journal*, 1, 2, 2010, 185-235; with reference to Article 14, *see* Bruun N., *Prohibition of discrimination under art 14 European Convention of Human Rights,* in Dorssemont F., Lörcher K., Schömann I. (eds), *The European Convention on Human Rights and the Employment Relation*, Hart Publishing, London, 2013, 367-379.

[23] About discrimination in ILO Convention No. 111 of 1958, *see*, among others, Teklè T., *ILO Convention 111 Discrimination (Employment and Occupation) Convention, 1958 (No. 111*), in (14), 612-630; Nielsen H.K., *The Concept of Discrimination in ILO Convention no.111*, in *International and Comparative Law Quarterly*, 43, 04, 1994, 827-856.

[24] For a commentary on the regulation, *see* Bell M., *Article 21 CFREU Non-discrimination*, in nt. (14), 203-209.

As stated by the Court of Appeal of Rome on 19 October 2012, the term in question encompasses a series of categories that define a person's "right to be" and can range "from ethics to philosophy, from politics to the sphere of social relations".[25]

In fact, those theories that rely on the literal wording of the provision and, specifically, on the presence of the adversative "or" between the word "religion" and the expression "belief" in order to take the opposite view are not convincing.[26] This is quite simply because there is the same adversative between the reference to age and sexual orientation too, making it clear that these words are expressions from distinct concepts.

In order to support this position, European case law can be referred to. In the absence of rulings by the Court of Justice, the judgments of the Strasbourg Court are of relevance. Having been called upon to interpret Article 11 of the Convention in order to resolve the question of the recognition of negative right to trade union freedom, the Court has made a transversal contribution to an interpretation of the term "belief" in the sense of including trade union affiliation.[27]

Indeed, the Strasbourg judges expressed a principle according to which, in some cases, Article 11 must be interpreted in the light of Articles 9[28] and 10[29] of the same Convention because personal opinions are "one of the purposes of the freedom of association guaranteed by Article 11". Firstly, it should be noted that Article 9 of the Convention protects the "right to freedom of thought, conscience and religion", which also includes the freedom to change one's belief.

As stated in the "Guide on Article 9 of the Convention - Freedom of thought, conscience and religion",[30] the provision protects not only religious opinions and beliefs, but also non-religious ones. Now, the Court referred to this article in order to safeguard the right of an individual not to join a trade union association by virtue of not agreeing with the policies and activities carried out by that trade union association because they were clearly in conflict with his or her trade union convictions.

Thus, it can be assumed that if one of the purposes of forming and joining a trade union association is to protect/see protected one's personal beliefs, the nature of which is evidently trade union, then, the term "belief" cannot be said to coincide with religion and can include trade union convictions.

[25] App. Roma, 19 October 2012.

[26] *See*, for instance, the comment on the ruling of the Court of Rome on the "Fiat case" on semantic issues by Zilio Grandi G., *Notarelle sulla vicenda Pomigliano in "appello": dove non arrivano gli impegni pubblici del datore di lavoro arriva la discriminazione*, in *Diritto delle Relazioni Industriali*, 2012, 4, pag. 1144-1145.

[27] *See*, among others, European Court of Human Right, 7 December 1976, *Kjeldsen, Busk Madsen and Pedersen*, par. 52; European Court of Human Right ,13 August 1981, *Young, James and Webster v. the United Kingdom*, par. 57; European Court of Human Right, 11 January 2006, *Sørensen and Rasmussen v. Denmark,* par. 54.

[28] Article 9 para. 1 of the ECHR: "*Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance*".

[29] Article 10 para. 1 of the ECHR: "*everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises*".

[30] Guide on Article 9 of the Convention - Freedom of thought, conscience and religion, Updated on 31 December 2020, 8, available at the following link https://www.echr.coe.int/Documents/Guide_Art_9_ENG.pdf (last access 10 May 2020).

Having clarified this fundamental aspect the expression "belief" is suitable to protect the worker from discrimination due to his trade union affiliation and because of his participation to a strike, contrary to what is maintained by a part of the scholars.[31]

Once the term "belief" is understood in the sense that it can also include trade union beliefs, anti-discrimination law can be considered applicable to protect trade union freedom.

However, in the case in point, one cannot stop at such a statement since workers would be discriminated because of the exercise of the right to strike. As a consequence, the anti-discrimination law needs to be applied to all forms of manifestation of trade union freedom in order for the riders of "Deliveroo" to be considered protected.

One agrees with the aforementioned ruling of the Supreme Court,[32] in so far as it considers not only the worker's membership, but also her/his participation in trade union activities as an expression of a "belief". Moreover, the reasoning refers also to the observation that the right to carry out trade union activities – of which a strike is clearly a manifestation – constitutes one of the forms of expression of trade union freedom, together with the right to create and join a trade union association. They are therefore two sides of the same coin.

This is also confirmed by that part of the scholars who have analysed some of the Strasbourg Court's rulings relating to the application of Article 11 of the ECHR.[33] The result of this analysis shows that one of the aims of trade union freedom is to protect the interests and rights of workers and that this aim is pursued by means of three instruments, one of which is collective action, including the strike.

Given that a strike is one of the most important means for a trade union to protect the interests of its members[34], it is considered that unequal treatment arising from participation in a strike should also be protected by anti-discrimination law.

Similarly, the observation that it is not the strike, but the simultaneous connection of all delivery riders to the application without being operational that constitutes the most effective mode of collective abstention,[35] is not considered relevant.

In fact, as it has been described by scholars,[36] the one indicated represents an innovative organisational strategy conceived by the delivery riders to cope with the impossibility of proceeding by the traditional ways (collective abstention from work). This situation is mainly

[31] Puccetti E., Tosi P., *Rider, la valenza discriminatoria del* ranking *oltre l'affiliazione sindacale*, in *Guida al Lavoro*, 2, 2021, 115 ff..

[32] *See* Cass. 2 January 2020, No. 1 where, at point 9.6 of the decision, the judge has stated that "within the general category of beliefs, characterised by the heterogeneity of the hypotheses of ideological discrimination extended to the sphere of social relations, discrimination on trade union grounds may also be included, contrary to what the company maintains, with the consequent prohibition of acts or conduct likely to bring about a difference in treatment or prejudice because of the worker's affiliation to or participation in trade union activities".

[33] Dorssemont F., *The Right to Form and to Join Trade Unions for the Protection of His Interests under Article 11 ECHR - An Attempt to Digest the Case Law (1975-2009) of the European Court on Human Rights*, in *European Labour Law Journal*, 1, 2, 2010, 185-235.

[34] *See*, European Court of Human Rights, 6 February 1976, *Schmidt and Dahlstrbmv. Sweden,* no. 5589/72; European Court of Human Rights, 2 July 2002, *Wilson and the National Union of Journalists and others v. United Kingdom*, 15573/89.

[35] Puccetti E., Tosi P., nt. (31).

[36] Marrone M., *Rights against the machines! Food delivery, piattaforme digitali e sindacalismo informale*, in *Labour and Law Issues*, 5, 1, 2019.

due to the peculiar organisational modalities of the platform which, by design, provides itself with a fleet more numerous than necessary to make up for the riders who may abstain from work so as to recruit them "just in time". Therefore, this is a system aiming to discourage their participation into strikes.

Consequently, it is a form of organisation "in response" to the obstacles placed in the way of ordinary action by digital platforms. Hence, it seems superfluous to assess its greater or lesser effectiveness compared to a strike if workers are not free to organise it in practice.

3.3 The active legal capacity of trade union organisations.

The last issue that was preliminarily analysed by the first instance judge was the objection raised by "Deliveroo" regarding the lack of active legitimacy of the plaintiff trade unions.

The question was resolved by the Court in the sense of considering the active entitlement and legal capacity of the aforementioned trade unions basing its conclusion on the provisions of Article 5 par. 2 of *Legislative Decree No. 216/2003*.[37]

Given the absence of a legislatively regulated criterion attributing active legitimacy, the judge established that a twofold assessment must be carried out on a case-by-case basis: on one hand, there must be a condition such that the people harmed by the discrimination are not directly and immediately identifiable; on the other, there must be the "representativeness of the association with respect to the collective interest in question".[38]

As the judge has rightly found in the case in issue, it can be concluded that the first condition set out above has been met since it is generally all the riders participating or intending to participate in a strike who are affected, therefore making it impossible to identify them by name.

In addition to this, regarding the second criterion, it is required that the association's statute assumes as its purpose to protecting the collective interest. In this way, the conducts violating that interest produce an injury to the institutional purpose of the entity which, therefore, assumes the right to act.

In the case in point, as the judge has underlined, the statutes of the applicant trade unions assume as their purpose to "combat all forms of discrimination in working conditions and ensure representation in all forms of contract"[39] and, consequently, they can be recognised as having legitimacy as referred in Article 5 para. 2 of *Legislative Decree No. 216/2003*.

3.4. Anti-discrimination law as an alternative pathway to protect trade union rights from the perspective of riders' work.

The affirmative resolution of this preliminary issue by the Court of First Instance provides an opportunity to reflect on the role that anti-discrimination regulation can play in the system

[37] Article 5 of the *Legislative Decree No. 216/2003*, nt. (3).
[38] One can observe in this case as well that the judge referred to the consolidated guidelines of the Supreme Court and the pronouncements of the Court of Justice of the European Union supporting his decision.
[39] *See* point 3 of the Order.

of protection of workers' rights, through the provisions of Article 5 of *Legislative Decree No. 216/2003* and the activation of the procedure under Article 28 of *Legislative Decree No. 150/2011*.

In fact, since the judgment of the Tribunal of Rome of 21 June 2012,[40] the doctrine has been engaged in the debate, that had been started in the Courts, on a process of rethinking anti-discrimination law as a complementary means respecting the traditional anti-union protections.

The two forms of protection mentioned above would act on two different fronts of protection. More specifically, according to these rulings, anti-union protection (Article 28 of the *Workers' Statute*[41]) should be applied in cases where the employer's conduct limits or prevents the exercise of trade union freedom, thereby affecting the collective interest of trade unions, an interest that is "distinct and autonomous from that of individual workers". Otherwise, anti-discrimination protection would protect individual workers against discriminatory conduct towards them on account of their trade union orientation.

It follows from this that in the first case, the trade union organisation would take legal action to protect its own interests, whereas in the second case it would act in the capacity of a proxy to protect the interests of the workers who would not be identifiable by name in the hypothesis set forth in Article 5 para. 2 of *Legislative Decree No. 216/2003*.

If the discriminatory acts affect not only the individual interest of the worker, but also the collective interest of the trade union, the latter may act under Article 28 of *Legislative Decree No. 150/2011* to protect the interest of unidentifiable individuals affected by discrimination (pursuant to Article 5 para. 2 of *Legislative Decree no. 216/2003*) and under Article 28 of the *Workers' Statute* to protect its collective interest.

A further contribution to this reflection is provided by a ruling made a few months later than the one under comment, Tribunal of Florence, 9 February 2021, in which the Court of First Instance was called upon to rule on a different issue from the one studied in this case. Nonetheless, the ruling is relevant because the judge denied the existence of the legitimacy to act of trade unions that had brought an appeal to assert the anti-union conduct of the "Deliveroo" platform under Article 28 of the *Workers' Statute*.

Without going into the details of the reasons raised, the Court of Florence has denied their legitimacy to act under Article 28 of the Workers' Statute based on the classification of the subjects they represent, namely the delivery riders.

[40] The first ruling in the "Fiat case". *See* nt. (44).

[41] *Law 20 May 1970, No. 300*, Article 28: "*If the employer engages in conduct aimed at preventing or restricting the exercise of trade union freedom and activity as well as the right to strike, upon appeal by the local bodies of the national trade union associations that have an interest in such conduct, the magistrate of the place where the alleged conduct takes place shall, within two days of convening the parties and obtaining summary information, if he deems the violation referred to in this paragraph to exist, order the employer, by reasoned and immediately enforceable decree, to cease the unlawful conduct and remove its effects.*
The enforceability of the decree may not be revoked until the judgement by which the labour court judge decides on the proceedings instituted under the following paragraph. An appeal against the decree deciding on the appeal may be lodged within 15 days of the decree being communicated to the parties with the municipal labour court, which shall give its decision in an immediately enforceable judgment. Articles 413 et seq. of the Code of Civil Procedure shall apply.
An employer who does not comply with the decree referred to in the first paragraph or with the sentence pronounced in the opposition proceedings shall be punished pursuant to Article 650 of the Penal Code.
The judicial authority shall order the publication of the criminal conviction in the manner established by Article 36 of the Penal Code".

According to this Court, Article 28 of the Workers' Statute, on the one hand, constitutes a rule of an exclusively procedural nature (except in the part where it provides a definition of anti-union conduct), and on the other, its scope is limited by the reference to the "employer". A consequence of the latter statement, the protection provided for in Article 28 would be an instrument of "typical guarantee of the subordinate employment relationship".[42] In the case in question, the judge has ruled out that an employment relationship could exist between the riders and the digital platform. Then, she has assumed that riders could be qualified as hetero-organised workers under Article 2 of *Legislative Decree No. 81/2015*, which provides for the application of the rules of the employment relationship to this category of workers.

On these bases, the judge has concluded to exclude the applicability of Article 28 of the Workers' Statute to the case at hand. Indeed, according to his interpretation of Article 2, this extends to hetero-organised workers only "the substantive rules relating to the economic and regulatory treatment of individual employment relationships"[43], whereas Article 28, as mentioned above, would be procedural in nature. Then, she has excluded that the basis of the applicants' active legitimacy can be found in Article 47-quinquies *of Legislative Decree No. 81/2015* because its literal wording would not allow the applicability of Title IV of the Workers' Statute, in which Article 28 is included, to be extended to them.

It emerges that in the context of industrial relations in platform work, where trade unions face difficulties in being recognised as the representative body of workers by the contractual counterpart, where their contractual role is questioned, there is also the uncertainty of the applicability of traditional protection instruments due to uncertainty about the legal status of workers. The protection offered by the anti-discrimination law could be the answer to reduce this uncertainty.

Therefore, a strategic use of anti-discrimination law in which the forms of mobilisation find their basis in the subjective characteristics of the person, seems to be back in vogue.

This is a form of application of so-called "strategic litigation", which was adopted from Anglo-American systems in Italy with the "Fiat case", that can be considered as the historical

[42] Trib. Firenze, 9 February 2021. Contra, *see* Trib. Milano, 28 March 2021. The Court of Milan issued an order on 28 March 2021 with a different outcome on the same point. The judge, as a preliminary step, addresses the question of the applicability of Article 28 of the Workers' Statute to the case brought to his attention. In his logical path, the judge pointed out that the text of article 28 refers to "employee" and "employer", while in the case brought to his attention the shoppers are occasional workers. As a consequence, the wording would exclude the application of the provision to workers who are not employees. However, the judge states that since 1970 (the year in which the Workers' Statute was enacted), there have been numerous legislative interventions, including Article 2 of Legislative Decree no. 81/2015. Specifically, this provision extends the applicability of the discipline of the subordinate employment relationship "*also to collaboration relationships which take the form of prevalently personal, continuous work and whose modalities of execution are organised by the client. The provisions of this paragraph shall also apply if the manner of performance is organised by means of platforms, including digital platforms*". Contrary to what was stated by the judge of the Court of Florence, Article 2 of the cited legislative decree refers to rules of the employment relationship which have both a substantive nature and a procedural nature. This second category would include Article 28 of the Workers' Statute which, therefore, would be applicable to the case in issue since according to the judge, the shoppers are hetero-organised workers pursuant to Article 2 of Legislative Decree no. 81/2015.

[43] Trib. Firenze, 9 February 2021.

background of the present judgement.[44] In this case, "inspiration" and "dissemination",[45] as the main functions of this strategy, pursue the objective of recognising the identity of the individual and ensuring his or her equal value.[46]

As the scholars had already observed about the "Fiat case"[47], this choice can be interpreted as a purely tactical one, in which anti-discrimination action becomes a new instrument of industrial conflict alongside protection against anti-union conduct. In the alternative, it can become a form of protection that moves to a different level. In this case, the individual would be protected not for what she/he does and, therefore, because of his greater or lesser weakness compared to the contracting party, but for what she/he is. The latter assumption allows giving importance to the value of the human person and his dignity.

Consequently, this form of "protection of difference"[48] translates into the possibility of offering a sufficient degree of certainty of protection to categories of workers which, under

[44] The "Fiat case" was referred to in the footnotes in the preceding paragraphs, as well as by the judge of the Court of Bologna in her judgment because it can be considered, in fact, the historical antecedent of the case under examination. Before the Court of First Instance, the national trade union organisation FIOM-CGIL brought an appeal pursuant to Article 28 of Legislative Decree No. 150/2011 in order to obtain the verification and sentence of the discriminatory conduct of Fabbrica Italia Pomigliano s.p.a. In application of the provisions of Article 5 of Legislative Decree 216/2003, trade union acted to protect both identifiable individuals (whom the FIOM represented pursuant to Article 5, paragraph 1 of Legislative Decree No. 216/2003) and all other workers registered with the FIOM-CGIL (whom it represented pursuant to Article 5, paragraph 2 of Legislative Decree No. 216/2003). Also in this case, the judge ruled on the discriminatory nature of the conduct of the company and, as a preliminary issue, resolved the same fundamental questions analysed by the Court of Bologna, such as the interpretation to be given to the term "belief", the active legal capacity of the trade union, as well as resolving doubts about the alternative application of Article 28 of Legislative Decree No. 150/2011 and Article 28 of the Workers' Statute (Law 20 May 1970, No. 300). Therefore, also in the "Fiat case", the applicant trade union organisation brought an action under Article 28 of Legislative Decree No. 151/2011, relying on anti-discrimination rules to protect the interests of an undetermined number of workers. Some scholars who have commented on the above-mentioned rulings have referred to it as an "Italian myth case" of strategic litigation because it was "the first case in which a new narrative of trade union conflict came to court". *See*, Barbera M., Protopapa V., *Il caso Fiat: come la tutela antidiscriminatoria riformula il conflitto sindacale*, in *Rivista Giuridica del Lavoro e della Previdenza Sociale*, 2, 2014, 182.

[45] Barbera M., Protopapa V., nt. (44), 179.

[46] In the context of the gig economy, "strategic litigation" has already been mentioned. In a ruling by the High Court of England and Wales in November 2020, the trade union organisation Independent Workers' Union of Great Britain brought an action to establish that the UK had not correctly implemented two occupational health-and-safety directives. Specifically, the High Court found a breach of EU law when the UK decided to apply health and safety legislation to narrower categories than the term "worker" which is used in EU law. *See*, Cefaliello A., Countouris N., *Gig workers' rights and their strategic litigation*, in *Social Europe*, 22 December 2020, https://www.socialeurope.eu/gig-workers-rights-and-their-strategic-litigation (last access 10 May 2021). The authors pointed out that such a ruling has the potential to be relevant well beyond national borders. Indeed, such an approach could be strategic for national trade unions, who could act in two directions in order to use the reference to European law on workers' health and safety to increase protections for gig economy self-employed workers. They suggest that national trade unions "On the one hand, they could ask national tribunals to read domestic legislation in line with the broad concepts of 'worker' and 'employer' which visibly emerge from the purpose and letter of the Framework Directive. Alternatively, where this duty of consistent interpretation was likely to fall short of the mark, they could raise the question of the adequate implementation of article 3 of the Framework Directive, to encourage a preliminary reference before the ECJ. If the ECJ followed a similar purposive approach, the provisions of the directive would invariably be extended to gig workers".

[47] Barbera M., Protopapa V., nt. (44).

[48] Militello M., *Dal conflitto di classe al conflitto tra gruppi. Il caso Fiat e le nuove frontiere del diritto antidiscriminatorio*, in *Rivista italiana di diritto del lavoro*, 1, 2013, 229.

normal conditions, would lack it or whose recognition would be exposed to much more uncertainty.

This second approach implies the recognition and the protection of the individual for whom she/he is and not for what she/he does, "for [her]/his position in the productive structure and for [her/]his class membership, as well as for [her/]his bargaining power".[49]

In this context, as mentioned above, trade unions act as proxies for the protection of workers' interests and not to guarantee their own interests. As consequence, that in circumstances where a different discrimination was perpetrated other associations could act to protect other interests and rights at stake.

Indeed, in the case in issue, as stated in section 3.3, the trade unions are legitimately entitled to act since, according to the judge's assessment, they satisfy the requirements set out in Article 5 of *Legislative Decree No. 216/2003*.

As clarified by the Court itself, also through reference to the case law of the Court of Justice[50], if associations, organisations and other legal persons have an interest in ensuring that the provisions of *Directive 78/2000/EC* are complied with, then they have standing to bring proceedings.

In the case in question, as observed by the Court itself, the legitimate interest would be *in re ipsa* since the trade unions certainly have an interest in taking legal action to protect the exercise of the right to strike. As a consequence, trade unions represent one of those entities entitled to bring legal proceedings to protect the principle of non-discrimination in cases where the source of risk is trade union affiliation.

The considerations formulated so far lead to the conclusion that, once an interpretation of the term "belief" has been confirmed to further include discrimination for trade union reasons, discriminatory protection may prove to be an important strategic tool for some categories of workers, such as riders. The discriminatory protection in the path to the recognition of protections, is not so much important at the individual level, but more at the "group" level, thanks to the intervention of trade unions. In this way, this intervention can give a more effective voice to the protection requests of workers.

A way of acting, that of activating anti-discrimination protection, which is almost inevitable for these workers if one considers the direct value attributed to the legal status of the worker to be protected, which would mean going through a prior judgement with an uncertain outcome for the riders.

4. The second question: the discriminatory effects of algorithmic decisions.

Having analysed the issues described above on a preliminary basis, the judge comes to a decision on the merits of the legal action brought to his attention by the trade unions.

Following a detailed description of the operating mechanisms of the work schedule booking system used by the "Deliveroo" digital platform that was drawn up based on the elements provided by the parties in the proceedings, the Court of First Instance has declared

[49] Barbera M., Protopapa V., nt. (44), 182.
[50] ECJ, NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford, 23 April 2020, C- 507/18.

that the "self-service booking" system has discriminatory nature in accordance to Article 2 of *Legislative Decree No. 216/2003*.[51]

As argued in details by the Court, this mechanism requires the cancellation of the work shifts that were booked in advance, and it supposedly constitutes in itself a neutral behaviour. However, in practice, it places workers participating in collective abstentions from work (strike) – as a concrete expression of their personal belief – in a situation of disadvantage.

In fact, as found by the Court, the "self-service booking" system becomes discriminatory in two cases, respectively in the hypothesis of non-participation in a booked work shift, but not cancelled, and of "late cancellation". Indeed, in these instances algorithm produces a reduction in the rider's personal score. Consequently, this action affects the rider's future chances of receiving work opportunities without making any assessment of the reasons proving the employee's behaviour.

In more explicit terms, the algorithm does not distinguish situations of a worker cancelling her/his booking late or one who does not carry out her/his activity without having previously cancelled for futile reasons from those which her/his abstention is founded on legally relevant and legitimate reasons.[52]

For the judge, this conduct is framed in the case of indirect discrimination under Article 2 para. 1 lett. B) of *Legislative Decree No. 216/2003* which duly reproduces the words of Directive No. 78 of 2000, which it implements in the Italian legal system.

In fact, according to these provisions, one speaks of "*indirect discrimination when a presumed neutral provision, criterion, practice, act, pact, or conduct may place at a particular disadvantage people*

[51] Article 2 para. 1 of the *Legislative Decree No. 216/2003*: "*For the purposes of this decree and without prejudice to the provisions of article 3, paragraphs 3 to 6, the principle of equal treatment means the absence of any direct or indirect discrimination because of religion or belief, disability, age or sexual orientation. This principle implies that there shall be no direct or indirect discrimination as defined below:*
(a) direct discrimination where one person is treated less favourably, on grounds of religion or belief, disability, age or sexual orientation, than another is, has been or would be treated in a comparable situation;
(b) indirect discrimination where an apparently neutral provision, criterion, practice, act, pact or behaviour would put persons of a particular religion or belief, a handicapped person, a person of a particular age or sexual orientation at a particular disadvantage compared with other persons".

[52] A statement made by one of the witnesses indirectly confirmed this conclusion. According to the witness, the Deliveroo's behaviour could be defined as "malicious" because there were two hypotheses (accident in case of consecutive shifts and malfunction of the system) in the occurrence of which the digital platform could act to prevent the worker from suffering a score reduction. In order to obtain a decision to the opposite sign, "Deliveroo" could have provided the functioning mechanism of the algorithmic system as evidence, but the company did not do so. It merely claimed that the rider could cancel the booked session until the moment it began and "could not log in until 14 minutes 59 seconds after the session started" without any negative impact on her/his statistics. However, these statements are contradicted both by the text of the contract and by what the company says on its website. In fact, it is clear from these that a late cancellation can "cause a drop in ... statistics". In addition, the judge considers irrelevant the assumption made by the company Deliveroo that the rider who for legitimate reasons, such as a strike, wants to abstain from work can log on and not make deliveries. In any case, the rider would have to go to the place of reference of the booking area of the session in order to log on and this would be incompatible with the exercise of those rights that the trade unions want to protect. In fact, going to the workplace would deny the rider the concrete exercise of rights protected by the Italian constitution, including not only the right to strike (Article 40 of the *Italian Constitution*) but also the right to health (Article 32 of the *Italian Constitution*), for example. As the judge rightly observed, in the case in question, going to the workplace would be incompatible with the exercise of the right to strike, which consists in abstaining from work, whereas going to the workplace obviously represents the beginning of its exercise.

professing a particular religion or other ideology, people with disabilities, people of a particular age or sexual orientation compared with other people".[53]

Deliveroo's failure to discharge its burden of proof contributed to the judge's conclusion, since it did not provide any allegations or evidence as to the actual operation of the system at issue.

Indeed, as argued by the Court about discrimination, both the relevant directives and the internal legislative decrees implementing them, as well as the consolidated case law at European and national level, provide for a partial reversal of the burden of proof.

More specifically, Article 4, para. 4 of *Legislative Decree No. 216/2003* states that a person who takes legal action to have the existence of discriminatory conduct to his detriment ascertained may provide factual elements, which may also be inferred from statistical data, capable of suggesting the existence of such discrimination.[54] In this system of proof, it is therefore up to the defendant proves that such conduct is not discriminatory but, on the contrary, is justified by objective reasons.

Having established the discriminatory nature of Deliveroo's conduct, the judge has ruled on the consequential issues.

In order to remove the effects of the unlawful conduct, firstly, the judge has ordered to publish the text of the decision on the website of the food delivery platform. Secondly, she has ordered the publication of its extract in a national newspaper, pursuant to the provisions of Article 28, paragraph 7 of *Legislative Decree No. 150/2011*.[55]

Finally, the Court has granted the trade unions' claim for damages.

As a consequence, the Court has ordered the compensation of non-pecuniary damage to the exponential body (*i.e.,* the trade unions). Specifically, the judge calculated the amount to be compensated on an equitable basis at EUR 50,000 because of the widespread conduct of the "Deliveroo" platform throughout the country, the systematic way in which it is carried out and its publicity.

The grounds followed by the judge are in line with the case law which has recognised the multifunctional nature of damages.[56] In other words, alongside its compensatory function (typical of the Italian civil liability system) it has both a preventive (deterrent or dissuasive) and punitive function.

Always referring to previous case law,[57] the judge defined the damage referred to in Article 28 of *Legislative Decree No. 150/2011* as an EU damage and, therefore, "the compensation must be determined in accordance with the canons of adequacy, effectiveness, proportionality and dissuasiveness".[58] Article 17 of *Directive 78/2000/EC* provides that

[53] Article 2 para. 1 lett. B) of *Legislative Decree No. 216/2003*.
[54] Article 4 para. 4 of the *Legislative Decree No. 216/2003*: "*In order to prove the existence of discriminatory conduct to his detriment, the plaintiff may submit in court, also on the basis of statistical data, facts in serious, precise and concordant terms, which the judge shall assess pursuant to Article 2729, first paragraph, of the Civil Code*".
[55] The Article 28 para. 7 of the *Legislative Decree No. 150/2011* states that "*when the judge grants the request, he may order the publication of the order, once only and at the expense of the defendant, in a national newspaper. Notice of the order shall be given in the cases provided for by Article 44 para. 11 of Legislative Decree no. 286 of 25 July 1998, Article 4 para. 1 of Legislative Decree no. 215 of 9 July 2003, Article 4 para. 2 of Legislative Decree no. 216 of 9 July 2003 and Article 55-quinquies para. 8 of Legislative Decree no. 198 of 11 April 2006*".
[56] Cass. S.U., 05 July 2017, No. 16601.
[57] Trib. Firenze of 26 June 2018.
[58] Cass. Sez. Lav. No. 27481/2014; Cass. Sez Lav. No. 13655/2015.

Member States shall lay down in their national legislation sanctions to be imposed in case of infringements of the rules of domestic law that have implemented the EU directive.[59]

As explained by the Court of Justice of the European Union, in applying the same Article 17, "a merely symbolic sanction cannot be considered compatible with the correct and effective implementation of Directive 2000/78".[60] However, at the same time, it specifies that "the strictness of the penalties must be appropriate to the seriousness of the infringements which they punish and must, in particular, have a genuinely deterrent effect", while respecting, in any event, the principle of proportionality.[61]

As stated by the Strasbourg Court, this is also true if there are no "identifiable victims",[62] as is the case at issue.

Moreover, the Court of Bologna, in a part of the ground has stated that "it should be noted that the possibility for the national legislature to configure 'punitive damages' as a measure to counter the violation of EU law is mentioned by Supreme Court, 15 March 2016, No. 5072".

Although this is not the place to examine in depth the non-peaceful issue regarding the admissibility of punitive damages in our civil legal system,[63] it is necessary to observe that, as stated by the Court of Justice of the European Union,[64] EU law does not require Member States to award punitive damages to victims of discrimination.

According to this Court, in order for the damage to be regarded as effectively repaired or compensated in a way which is dissuasive and proportionate, the Member States must introduce rules which "provide for the payment to the injured party of compensation covering the entirety of the damage suffered, in accordance with the procedures laid down by those States, but not for the payment of punitive damages".

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[59] Article 17 of the *Directive 78/2000/CE*: "*Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate, and dissuasive. Member States shall notify those provisions to the Commission by 2 December 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them*".

[60] ECJ, *Asociația Accept v. Consiliul Național pentru Combaterea Discriminării*, 25 April 2013, C-81/12, ECLI:EU:C:2013:275.

[61] *Ibidem*. In addition, *see*, ECJ, *Nils Draehmpaehl*, 22 April 1997, C-180/95. In matter of proportionality of the sanction, ECJ, *Bodil Lindqvist*, 6 November 2003, C-101/01.

[62] ECJ, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, 10 July 2008, C-54/07, ECLI:EU:C:2008:397.

[63] *See* Biasi M., *Danni punitivi – Il caso Ryanair e l'ingresso del "danno punitivo" nel diritto del lavoro italiano*, in *Giurisprudenza Italiana*, 2018, 10. The Author points out that EU damages have a sanctions and dissuasive function, this does not coincide with the afflictive function typical of US punitive damages. *See* also, Alvino I., *Sulla questione della risarcibilità dei c.d. "danni punitivi" alla vittima di una discriminazione fondata sul sesso* (nota a Corte Giust. Ue, Sez. Prima, 17 dicembre 2015), in *Argomenti di Diritto del Lavoro*, 3, 2016, 573-596; Benatti F., *Note sui danni punitivi in Italia: problemi e prospettive*, in *Contratto e impresa*, 4, 2017, 1129-1141; D'Andrea L., *Principio di ragionevolezza e danni punitivi: la prospettiva costituzionale*, in *Giurisprudenza italiana*, 10, 2018, 2288-2292; Monateri P.G., *I danni punitivi al vaglio delle sezioni unite* (Nota a Cass. 5 luglio 2017, n. 16601), in *Il Foro italiano*, 9, 2017, 2648-2654; Palmieri A., *I danni punitivi e le molte anime della responsabilità civile* (Nota a Cass. 5 luglio 2017, n. 16601), in *Il Foro italiano*, 9, 2017, 2630-2639; Pardolesi P., *La Cassazione, i danni punitivi e la natura polifunzionale della responsabilità civile: il triangolo no! Cassazione civile, sez. I, 8 febbraio 2012, n.1781*, in *Corriere giuridico*, 8/9, 2012, 1068-1075; Petrelli P., *Verso i "danni puntivi"?,* in *Contratto e impresa*, 4, 2017, 1187-1229; Ponzanelli G., *Sezioni Unite e danni punitivi*, in *Contratto e impresa*, 4, 2017, 1122-1128.

[64] ECJ, María *Auxiliadora Arjona Camacho v. Securitas Seguridad España SA*, 17 dicembre 2015, C-407/14, ECLI:EU:C:2015:831.

5. The opacity of Artificial Intelligence systems: European Union towards regulation of these mechanisms.

This ruling is appreciable for several reasons. Firstly, for the content of its decision, which constitutes a further step towards increasing protection for digital platform workers (even if, up to now, it refers only to riders). Secondly, because it constitutes the first effort to uncover the Pandora's box containing the criticalities of algorithmic programming, characterised by a lack of transparency and embedded in the workspace.

It is precisely this second point that allows to begin a brief reflection on the role and characteristics of AI and algorithms in the world of digital platforms.

It is clear that AI systems have the potential to play a decisive role in the architecture of digital work platforms. Indeed, they can be entrusted with decision-making powers at various stages of the organisational and managerial process and, can therefore, induce their own impacts on workers.

Thanks to the adoption of descriptive, prescriptive and even predictive analysis models, huge amounts of data are collected, studied, interpreted and transformed into outputs, essentially into decisions.[65]

In other words, it is algorithmic codes that determine the way work organisation and management processes function and, consequently, take decisions usually taken by managers and staff in charge in non-digital contexts.

This fact is significant since transposing typically human functions onto the digital level is not the same as eradicating the implications that practices may entail. At the same time, reliance on such mathematical systems must not lead to an "automation bias".[66]

Regarding the features of algorithmic systems, what has emerged at the outcome of the ruling issued by the judge in Bologna, confirmed what has already been expressed by the scholars on the subject.[67] In fact, one of the main features is the opacity of action of these mathematical systems when used by digital work platforms, to which is juxtaposed, among others, its neutrality. This latter feature is clearly called into question by the defendant in the reference context, which the judge ends up denying (again, exclusively in the case in point).

This means that the supposed neutrality of the system is lost in the meanders of the algorithmic codes and the output obtained may be the cause of discrimination. Indeed, the programming codes may be infiltrated by the prejudices and preconceptions of the programmers.[68] Therefore, the neutrality and objectivity that are normally considered to be

[65] *See*, Aloisi A., De Stefano V., *Il tuo capo è un algoritmo. Contro il lavoro disumano*, Editori Laterza, Bari, 2020; Dagnino E., *Dalla fisica all'algoritmo: una prospettiva di analisi giuslavoristica*, Adapt University Press, 2019.

[66] Manzey D., Reichenbach J., Onnasch L., *Human Performance Consequences of Automated Decision Aid: The Impact of Degree of Automation and System Experience*, in *Journal of Cognitive Engineering and Decision Making*, 6, 1, March 2012, 59. The Authors show two types of "autonomation bias". The first one refers to "the availability of automated aids can lead the user to make decisions that are not based on a thorough analysis of all available information but are strongly biased by the automatically generated advice"; the second one refers to errors "which occur when operators follow a recommendation of an automated aid even though it is wrong".

[67] Zuiderveen Borgesius F.J., *Strengthening legal protection against discrimination by algorithms and artificial intelligence*, in *The International Journal Of Human Rights,* 24, 2020, 1572-1593.
https://doi.org/10.1080/13642987.2020.1743976.

[68] De Petris P., *La tutela contro le discriminazioni dei lavoratori tramite piattaforma digitale*, in *dirittifondamentali.it*, 2, 2020.

intrinsic characteristics of mathematical systems are, in this case, exposed to human contamination.

One cannot, in fact, forget that behind kilometres of programming strings there is a human input, which, intentionally or unintentionally, can transfer social convictions into the DNA of the algorithm.[69] However, because of the virtuality and inscrutability of the system, forms of discrimination, which may be the result of prejudices and preconceptions, risk going unpunished despite their effects on human beings.

Certainly, the ruling in question represents an important first step in a process aimed at preventing the perpetuation of such practices. However, it is clear that there is a need to intervene at the legislative level, primarily by requiring greater transparency from operators on the AI systems adopted, in order to curb such behaviour.

The European Union seems to have arrived at this point, inaugurating a season of interventions aimed at deepening and regulating the themes connected to "digital" work.

The recent *Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain union legislative acts* is of interest with regard to the above-mentioned theme of transparency.[70]

From the text of Recital 36[71], it is clear that the institutions of European Union are aware of the replication by these systems of the most complexed forms of discrimination. The EU

[69] Hacker P., *Teaching Fairness To Artificial Intelligence*: *Existing And Novel Strategies Against Algorithmic Discrimination* in *Common Market Law Review*, 55, 2018, 1143–1186. According to the A., in the definition phase of the model's architecture (training data or the basic truths) a distortion at algorithmic level can be voluntarily or involuntarily introduced by its programmer and can be the outcome of his prejudices and preconceptions.

[70] The issue of Artificial Intelligence and the need for transparency related to its mechanisms of action is also intertwined with the legislation introduced by the *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)* and the guidelines that have explained more precisely what the Regulation provides on the subject. In fact, automated decisions that make use of individual personal data are at the basis of the functioning of such mechanisms. In addition to the more general rules laying down obligations of transparency and lawfulness of processing (think, for instance, of Articles 5 and 6 of the GDPR), there are more specific provisions. Firstly, significant is the provision of Article 22 of the aforementioned Regulation, which provides that a person may not suffer the effects of a decision based on exclusively automated processing, except for certain derogations expressly provided for by the article. If one of the scenarios laid down in the provision were to occur, automated processing would become feasible; however, the individual's rights, freedoms and legitimate interests must be guaranteed through the provision of certain rights, such as "*right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision*". Moreover, Article 13 para. 2 lett. f) provides specific safeguards for the individual in case of automated decisions in addition to the general provisions on the right to information. This article provides that the individual must be informed about "the existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject". *See*, for example, Ingrao A., *Assessment by Feedback in the On-demand Era*, in Ales E., Curzi Y., Fabbri E., Rymkevich O., Senatori I., Solinas G. (eds), *Working in digital and smart organizations. Legal, Economic and Organizational Perspectives on the Digitalization of Labour Relations*, Palgrave Macmillian, London, 2018, 93 ff.

[71] "*AI systems used in employment, workers management and access to self-employment, notably for the recruitment and selection of persons, for making decisions on promotion and termination and for task allocation, monitoring or evaluation of persons in work-related contractual relationships, should also be classified as high-risk, since those systems may appreciably impact future career prospects and livelihoods of these persons. Relevant work-related contractual relationships should involve employees and persons providing services through platforms as referred to in the Commission Work Programme 2021. Such persons should theoretically not be considered users within the meaning of this Regulation. Throughout the recruitment process and in the evaluation, promotion, or retention of persons in work-related contractual relationships, such systems may perpetuate historical patterns of discrimination, for example against women, certain age groups, persons with disabilities, or persons of certain racial or ethnic origins or sexual*

also specifies that the articles of the proposed regulation must be applied without distinction towards employed and self-employed workers, while also targeting digital platforms workers.

The cited Proposal, after defining its own notion of AI[72], identifies which type of AI systems are to be considered "high risk" considering that it can negatively impact the health and safety of individuals as well as the enjoyment of some fundamental rights.

It explicitly includes fundamentals rights regarding employment, management of workers and access to self-employment, such as:

"(a)AI systems intended to be used for recruitment or selection of natural persons, notably for advertising vacancies, screening or filtering applications, evaluating candidates in the course of interviews or tests;

(b) AI intended to be used for making decisions on promotion and termination of work-related contractual relationships, for task allocation and for monitoring and evaluating performance and behavior of persons in such relationships".[73]

Because of the high risk involved, the Regulation lays down some form of control, including Article 13, entitled "*Transparency and Provision of Information to Users*", which states in paragraph 1 that "*high-risk AI systems shall be designed and developed in such a way to ensure that their operation is sufficiently transparent to enable users to interpret the system's output and use it appropriately*". Furthermore, paragraph 2 requires that "*high-risk AI systems shall be accompanied by instructions for use in an appropriate digital format or otherwise that include concise, complete, correct and clear information that is relevant, accessible and comprehensible to users*".

As stated by the European Commission in the Proposal for a Regulation, the concept of AI is deliberately broad so as not to be overly technical and to adapt to rapidly evolving technology; however, the technologies that fall within the AI macro-area are expressly listed. This list does not seem to take into account the deterministic algorithm[74] that digital work platforms might use to build their work opportunity allocation systems, and which carries the same problems in terms of opacity and relative transparency to fight it.

In fact, it might be possible that the digital platform makes use of several mathematical systems that cannot necessarily be brought under the notion of AI as provided by the EU.

On the basis of the theoretical construction presented, the case at issue could be considered to fall within the scope of the Regulation (once approved) by virtue of the reference to the hypothesis of the "task allocation" in Annex III point 4 of the Proposal for Regulation.[75] However, such applicability could be called into question by the concrete

orientation. AI systems used to monitor the performance and behaviour of these persons may also impact their rights to data protection and privacy".

[72] Article 3 defines AI as "*software that is developed with one or more of the techniques and approaches listed in Annex I and can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with*".

[73] Annex III point 4 in *Annexes to the Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union legislative acts*.

[74] "In computer science, a deterministic algorithm is an algorithm which, given a particular input, will always produce the same output" https://computersciencewiki.org/index.php/Determinism, (last access 30 April 2021). In the case in point the input could be "no rider at work" and "late cancellation" and the output could be "reduction of the rider's personal score).

[75] *See* nt. (73).

technologies used by the "Deliveroo" platform to implement the distribution of work opportunities.

Indeed, this platform could appear to make use of AI systems to predict the weekly workflow required, while could seem to use "simple" deterministic algorithms in order to calculate the score of riders who do not work for the booked session. As above explained, this algorithm does not consider the riders' reasons of abstention from work, it reduces their ranking and, consequently, their work opportunities.

However, this remains a mere hypothesis insofar as the programming of these platforms is a black box.[76]

Notwithstanding the considerations recorded in literature regarding the absence of any reference to social partners,[77] the role of trade unions may be crucial in preventing the digital platform-worker relationship from becoming pathological due to the Artificial Intelligence mechanisms used. In this sense, from the point of view of a policy proposal to the European legislator, one could think of guaranteeing an active role for trade unions on two levels. First, at national and supranational level, by increasing trade union participation in initiatives and work programmes on the matter;[78] then, at company and sectoral level, by encouraging participatory practices, not only in the form of information, but also consultation.[79]

Then, on a strictly collective level, it should be pointed out that if it is not possible for workers' representatives to bargain the algorithm at the design stage, then workers' interests can be protected through collective bargaining, which is called upon to place limits on the interference of algorithms and to demand greater transparency.

Moreover, from a policy perspective, it would be advisable for the European legislator to intervene to clarify the subjective scope of application of the regulation or extend it in order to include mechanisms such as deterministic algorithms that could be used the development

[76] Pasquale F., *The Black Box Society: The Secret Algorithms That Control Money and Information*, Harvard University Press, Cambridge (US), 2016.

[77] De Stefano V., *The EU Proposed Regulation on AI: a threat to labour protection?*, in *Regulating for Globalization*, 25 April 2021, http://regulatingforglobalization.com/2021/04/16/the-eu-proposed-regulation-on-ai-a-threat-to-labour-protection/ Under Eu Law" (last access 30 April 2021). Although there is no reference to the social partners in the proposed regulation, the European Trade Union Confederation (representing workers), Businesseurope, Ceep, Sme United (representing employers), have signed the European Framework Agreement on Digitalisation on 22 June 2020 (the text of this agreement is available at the following link, https://www.etuc.org/system/files/document/file2020-06/Final%2022%2006%2020_Agreement%20on%20Digitalisation%202020.pdf). In brief, it is an autonomous agreement which is the result of negotiations between the European social partners conducted in the framework of their sixth multiannual work programme for 2019-2021. The social partners express their awareness of the challenges posed by the digital transformation to the labour market, the world of work and society, and propose to guide employers, workers and their representatives through this process of technological transaction, which is full of favourable opportunities but also risks. As far as concerns the case in question, the scope of application of the framework agreement also includes those "using online platforms" under the condition that there is an employment relationship "as defined nationally". Moreover, the four macro-questions covered also include the "AI and guaranteeing the human in control principle". *See*, Senatori I., *The European Framework Agreement on Digitalisation: a Whiter Shade of Pale*?, in *Italian Labour Law e-Journal*, 13, 2, 2020, 159-175; Rota A., *Sull'Accordo quadro europeo in tema di digitalizzazione del lavoro*, in *Labour and Law Issues*, 6, 2, 2020, 25-48.

[78] https://www.etuc.org/sites/default/files/publication/file/2018-09/Voss%20Report%20IT1.pdf shows that, at European level, there is this deficit in some countries more than in others.

[79] *Ibid.*

of such digital platforms. Otherwise, the absence of specific regulation could allow them, once again, to slip through the cracks of the existing legislation.

6. Conclusion.

Based on what has been said in the previous paragraphs, it can be concluded that the judgment issued by the Court of Bologna certainly represents an important novelty in labour law, not only at the domestic level but also supranational level. Indeed, the judgment is original for the object (an algorithmic system) on which the judge was called to rule, as well as for the solution reached (discriminatory nature of the system) through the adoption of a motivational procedure not entirely new, but certainly adapted to the innovative nature of the case.

This ruling enriches the set of rights of digital platform workers and, at the same time, sends a message to the owners of digital work platforms. The opacity and lack of transparency that characterise the algorithms, behind which they hide in order to circumvent the rules of our legal system and EU law, can be the subject of litigation and perish at the behest of the judge.

The ruling of the judge of Bologna should be even less reassuring for digital platforms in the part where it seems to inaugurate a path aimed at the recognition of a set of protections in a universalistic way and, therefore, regardless of the classification of the worker. Anti-discrimination protection is clearly one of these. In fact, the reference to *Legislative Decree No. 216/2003*, which implements the European legislation, makes it possible to apply the protections regardless of the dispute on the classification issue through its express reference also to self-employed workers.

These are timely warnings as they come at a time when the European Union has inaugurated a series of legislative interventions aimed at regulating the most significant legal implications imported by digital innovation.[80]

In the field of employment, these interventions translates into an initial interest in intrinsic characteristics of AI systems, as they are capable of damaging the health and safety of individuals, as well as violating their fundamental rights.

The European Union's current and planned interventions certainly represent a significant boost for the regulation of technological innovation.

However, in order to avoid the risk of seeing their protective intentions thwarted, the European institutions should involve trade unions in the debate in the matter. Furthermore, they must avoid resorting to stringent and, at the same time, unclear formulations, since the risk could be that they fail to capture the variegated, and constantly evolving, world of technologies to which digital platforms (for what concerns here) can resort for their organisation and thus continue to escape from legality.

[80] The reference is to the "*Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services*", also known as "*Digital Services Act*", the "*Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector*", also known as "*Digital Markets Act*" and the "*Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts*".

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