

# Platform Workers in the Italian Legal System

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1. Who is the employee? 2. The Italian Foodora riders judgements. 3. Towards a third legal category of working in the Italian system?

## Abstract

The essay examines the impact of the Foodora riders case on the Italian qualification system, demanding a new legislative and contractual approach to digital workers.

**Keywords:** Platform workers, food delivery, legal qualification, third category.

## 1. Who is the employee?

In the Italian legal system, the matter of 'who is the employee' is becoming once again extremely important in connection with the new ways of working via *digital platforms*. Crowdfunding, working on demand or just in time, working for a collaborative economy, all foreshadow application scenarios that are difficult to trace back to the traditional role of the "employee" and undermine the historical dualism between employee and self-employed, recalling the need for a third intermediate qualifying category, such as the one adopted in the Anglo-Saxon system (i.e. worker). Such a third category, in the past experimented upon by the Italian legal system (project work) or still nowadays applied albeit marginally (voucher-based work), should be re-conceived and implemented, assuming the role of reference case for situations of economic dependence that don't match the definition of subordinate work but that anyway require a minimal standard of social protection. This case is frequently recurring in the work brokered by the digital platforms, where contractual freedom in the assumption of tasks and social protection needs coming from the broad availability of the services provided thanks to the unfinished supply basin available and the penetrating capacity for control and coordination the contractor has access to, which directs, monitors and solicits the activity carried out via the app and through text or voice messaging systems.

On the other hand, the non-applicability to platform workers of any minimum standard of treatment, neither in terms of relationship nor in terms of social security, is not compatible with the principle of "protection of work in all its forms and applications" set forth by art.

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35 of the Italian Constitution. Regardless of the way the relationship is qualified, it is clear that these workers must be guaranteed the application of a minimum standard of pay, the right to holidays granted by the Constitution and the EU, accident and pension insurance, and exemption from the antitrust regulations, therefore the right of association and strike. *"The point is, however, that we need to find ways to operate this extension of the protections - at least the constitutional, essential, minimum ones - without interfering with the typical flexibility that is an essential feature of this form of work organization, not only in the interest of the company, but also in the interest of the worker"*<sup>1</sup>.

The work of the Foodora and Deliveroo riders, as well as that of the Uber drivers and of the plumbers and electricians of Pimlico in the USA or in Great Britain, cannot be considered effectively autonomous and independent but at the same time it is not possible to regard it as subordinate work, unless one pays the price of forcing an interpretation, with the effect of generating differing and conflicting jurisprudential outcomes, fueling applicative uncertainty and unpredictable protection responses.

## 2. The Italian Foodora riders judgements.

An essential, emblematic case is the case of Foodora riders.

At the beginning of 2018, a group of Foodora riders filed a claim against the company before the Turin Labour Court<sup>2</sup> pleading for the recognition of the subordinated nature of the employment relationship between the parties and the subsequent provision of the minimum salary and contributions, and subsequently the dismissal was ruled illegal as it was unjustified and unfair. The Court, in reconstructing the case in question, found that the worker was free to apply or not to apply for a specific delivery run depending on his availability and life needs and therefore was free to either give or withdraw his willingness to cover the different time slots of each shift and therefore there was no obligation to perform work, just as, conversely, the employer was not obliged to accept it. Consequently, in the opinion of the Turin judge, *"if the employer cannot demand from the worker the performance of said work, he cannot consequently exercise the management and organisational power"*. Since the Court has not, in this case, found the core trait of the subordinate employment relationship, that is the being subject to the management and organisational power of the employer, the Court of Turin ruled that the work relationship could not be qualified as subordinate employment and therefore rejected every economic request of the applicants.

In truth the question was more complex since, without prejudice to the original act of freedom of the worker to offer to work during a certain shift (once the availability was made), the company carried out an incisive control and monitoring of the activity, and punished behaviour that does not comply with the instructions given. More specifically the workers, once the manager has confirmed their shift through a special smartphone application, had to reach, by the shift start time, one of the three default departure city zones, activate the application by entering their credentials to login and start the geo-localisation, receive an

<sup>1</sup> See Ichino P., *Subordinazione, autonomia e protezione del lavoro nella gig-economy*, in *Rivista Italiana di Diritto del lavoro*, 2018, II, 294.

<sup>2</sup> Trib. of Turin, 7 May 2018, judgment no. 778, in *Argomenti di Diritto del Lavoro*. 2018, n. 4-5, 1220, with case note of Biasi M., *Il Tribunale di Torino e la qualificazione dei riders di Foodora*.

order notification with the app indicating the restaurant address, go to the restaurant with their own bicycle, take the products, check the correspondence with the order and communicate via the appropriate command of the app that the check has been successfully carried out; then, after placing the food in the box, the rider had to deliver it to the customer, to the address provided to the rider via the app; finally, he had to confirm through the app that the order had been regularly delivered. The entire process had to be carried out within 30 minutes from the time provided for picking up the food, otherwise the rider would be charged a € 15 penalty. During the activity described above the riders were monitored remotely, receiving reminder calls in case of delays or deviations from optimal road routes. Furthermore the riders could revoke their availability only before the start of the shift through a special option of the application (swap), but in this case the system provided for a warning and the worker was immediately excluded from the possibility of opting for other shifts, was excluded from the corporate chat and was subject to penalties in the best workers ratings. The same sanctions (exclusion from corporate chat, exclusion from work shifts, penalties in merit scores) were also applied to other behaviours not liked by the company, even when in case of simple complaints or criticisms about management and distribution of orders by the riders. Therefore, while it is true that there are different subjective reasons that lead the workers to accept delivery assignments (that are paid € 5.60 including tax and social security contributions per hour), and if it is true that workers willingly accept those methods of organization and management of work, nevertheless it is clear that the organisation of work performance is almost completely in the hands of the company and reduces every space of organizational autonomy of the worker.

On the other hand, the Italian legislator, with art. 2 of Legislative Decree no. 81/2015 and art. 15 of law no. 81/2017, has extended the subordinate employment protection rules to the coordinated and continuous employment relationships based on an exclusively personal activity "*whose execution forms are organised by the client also for what concerns the time and place*" and therefore are not "*organized independently*" by the worker and said coordination is not the subject of an agreement between the parties but arises from a unilateral initiative by the client. The aforementioned provisions received an ambiguous interpretation from the courts, a part of which (including the aforementioned Tribunal of Turin) considered it to be apparent rules with no innovative value, since in any case the being subject to the directive and hierarchical power of the employer is unavoidable for the purpose of applying the protections on subordinate employment; other court decisions (including the judgment of the Court of Appeal of Turin<sup>3</sup> which amended the Court judgment on Foodora riders), considered that these rules identify a new type of employment relationship, different from both subordinate employment and autonomy (self-employment), to which the discipline of subordinate employment should apply with the sole exception, for unclear reasons, on unfair and unjustified dismissals; another part<sup>4</sup> has set aside the qualification problems, focusing on the recurrence or not, in the case of home deliveries based on online platforms (Foodinho), of another feature, that is the entrepreneur's ability to organise the timing and places of work, to the point of denying it by assuming that "*the fundamental choice in terms of work and rest time was left to the applicant's autonomy, which he exercised when he expressed his availability on certain days*

<sup>3</sup> Court of Appeal of Turin, 2 February 2019, judgment no. 26.

<sup>4</sup> Court of Milan, 10 September 2018, judgment no. 1853.

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*and times and not in others*" (here again the core concept is that "if I am free to accept or not to carry out the assignment I am therefore not organized by others", since they are not bound by enduring mandatory obligations<sup>5</sup>).

Now, it is evident that the intention of the legislator is to introduce anti-fraud provisions that facilitate the return to the protection of subordinate employment even in those case where demonstrating a full subjection to hetero-direction is problematic (think of the case of the secretary that has a VAT registration number like a professional or the *merchandiser* in the *retail sector*) but there is full integration in the production cycle, with stable inclusion of the work activity in the spectrum of the company's activities, with time constraint and compliance with the imposed deadlines. While the generalised extension of all the protections of subordinate employment appears to be unsuitable in areas that cannot be fully homologated or where there are no conditions for homologation, so much so that in the concrete application experience it is easy to identify tricks or unlikely argumentative steps to exclude protective cores incompatible with the real nature of the relationship (such as the management of dismissals).

### 3. Towards a third legal category of working in the Italian system?

To avoid delegating to the judge the improper functions of actually making laws, it would therefore be better to introduce in the Italian legal system a special type of economically dependent self-employed work, with its own specific discipline capable of providing actual answers to social needs (minimum wage, accident prevention and insurance, social security benefits, time limits, recognition of holidays and rest periods, freedom of trade union association, anti-discrimination measures) but at the same time capable of creating a rift with ordinary subordinated employment so as to avoid instrumental uses of remedial tools unsuitable for the regulatory purpose of a work that remains deeply tied to the requirement of voluntariness and temporariness of engagement<sup>6</sup>. By doing so the work through digital platforms would be no longer hostage to endless judicial battles, which in themselves necessarily lead to an uncertain and unfair outcome (to be borne by the company if the subordination is admitted, against the worker if the autonomy), but would acquire an appropriate systematic placement and guarantee respect for fundamental social rights even in areas of business characterized by an intensive exploitation of the workforce.

It is true beyond doubt that carrying out *control test* or *mutuality of obligation test*<sup>7</sup> or any other test aimed at verifying that the management and hierarchical power of the employer over the workers of digital platforms is difficult and also inappropriate, and that it would be more

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<sup>5</sup> It is clear, in our opinion, that this is an error of perspective since it is not true that the worker is actually free to renounce or cancel an assignment, given that such refusal results in concrete and very heavy penalties in terms of exclusion from the professional community and ultimately will lead to be banned from the digital system, losing all the professional opportunities coming from that social network.

<sup>6</sup> See Pizzoferrato A., *Organisation, productivity and well-being at work*, in Casale G., Treu T. (eds.), *Transformations of work: challenges for the national systems of labour law and social security*, Giappichelli, 2018, 1113.

<sup>7</sup> On the use of these criteria in the British and Australian legal systems, see Biasi M., *Uno sguardo oltre confine: i "nuovi lavori" della gig economy. Potenzialità e limiti della comparazione*, in *Labour & Law Issues*, 2018, n. 2, 11.

profitable to define a new category of "dependent contractor" or "worker"<sup>8</sup> in which these professional figures can find a position and protection<sup>9</sup>; this direction is desired and supported by several national initiatives focusing on a variety of issues from territorial agreements<sup>10</sup> to legislation<sup>11</sup>. All of this without prejudice to the fact that the global dimension of the digital platform work and the subsequent standardization of the methods of implementation would require a uniform regulatory approach, at least for large geographical areas. Unfortunately, the European Union does not seem to be interested in taking action (as it did not take any further steps after the adoption, in 2016, of the European Agenda for Collaborative Economy (COM (2016) 356), except for the issues related to the law of competition and therefore to the implications on the exercise of the business activity coming from the rise of the Internet Giants on the internal markets<sup>12</sup>. In the absence of a European regulatory model of reference, the Italian legislator and the other stakeholders should therefore take action to guarantee minimal protection measures that currently digital platform workers lack (considering also the restrictive jurisprudence that we have referred to), to avoid the paradox that sees low-skilled and fully fungible workers are considered self-employed, and thus become *services* or, even worse, *commodities*.

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<sup>8</sup> See Davidov G., *Who is a worker*, in *Industrial Law Journal*, 2005, 1, 57 and following; Freedland M., Prassl J., *Employees, workers and the 'sharing economy'. Changing practices and changing concepts in the United Kingdom*, in *Spanish Labour Law Journal*, 2017, 6(1-2), 16.

<sup>9</sup> See Lunardon F., *Le reti d'impresa e le piattaforme digitali della sharing economy*, in *Argomenti di Diritto del Lavoro*, 2018, 2, 379; Perulli A., *Lavoro e tecnica al tempo di Uber*, in *Rivista Giuridica del Lavoro e della Previdenza Sociale*, 2017, 2, 212.

<sup>10</sup> See the Charter of Fundamental Rights of Digital Work signed by the Municipality of Bologna and some food delivery chains (Sgnam and Mymenu) in May 2018.

<sup>11</sup> See bill no. S-2934/2017 submitted by a group of senators including Pietro Ichino at the end of the XVII legislature, which has now however expire and was not re-submitted, which aimed to facilitate the activity of «umbrella companies», relieving them from the need to simulate a subordinate employment contract, by expressly recognizing the economic and social function of the mutual assistance and protection contract stipulated by them with the workers they employed.

<sup>12</sup> CJEU - Case C-320/16, *Nabil Bensalem and Uber France SAS*, ECLI:EU:C:2018:221, assimilates Uber to a transport company since the intermediation service carried out is only a (subsidiary) part of a total service of which the main element is represented by the transport activity.

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