Essays

Antidiscrimination Law in the Italian Courts: New Frontiers on the Topic in the Age of Algorithms

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Abstract

In Italy, as in many other countries, the recent pandemic has enriched the debate regarding the problem of discrimination in the workplace. Social and economic restrictions introduced by the Government in order to slow the spread of Covid-19 have exacerbated existing inequalities, especially those relating to gender, and created new ones. The aim of this article is to examine what role anti-discrimination law can play in addressing these inequalities and consider how the law should respond to the new challenges. The article provides an analysis and critique of current judicial approaches to discrimination law. Particularly, it contains an in-depth examination of recent case law on discriminatory dismissal and discrimination on the ground of trade union membership, dealing with some conceptual and enforcement-related issues. First, it raises the difficulty in drawing a bright line distinction between direct and indirect discrimination (paras 3 and 3.1). As an example, the article analyzes the recent and relevant ruling of the Tribunal of Bologna on discrimination by algorithm. Finally, this topic will be taken into account with regard to other problems, such as those of burden of proof, statistical evidence (para 4), legal standing, and collective interest bodies entitled to bring enforcement proceedings (para 5).

I. Introduction

In Italy, as in many other countries, discrimination in the workplace has gained much attention during the pandemic. Social and economic restrictions introduced by the Government in order to slow the spread of Covid-19 have exacerbated existing inequalities, especially those relating to gender (for example, with the rise of remote working during lockdown, mothers have been spending more time on household responsibilities for childcare and domestic work), and created new ones.[1]

The pandemic has also compounded the inequalities and forms of discrimination that are often hidden from view, such as those related to the increasing use of algorithms[2] in employment decision-making.[3] Even before the

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[1] M. Campbell, S. Fredman and A. Reeves, 'Palliation or protection: How should the right to equality inform the government's response to Covid-19?' 20(4) *International Journal of Discrimination Law*, 183–202 (2020).

[2] An algorithm is a process or set of rules used in calculations or other problem operations. According to definition proposed by two American legal scholars it can be defined as 'a formally specified sequence of logical operations that provides step-by-step instructions for computers to

pandemic, some scholars[4] pointed out that the spread of algorithmic systems and artificial intelligence (AI) in work-related decisions, especially in recruitment and selection processes, may jeopardise the goals of antidiscrimination law, as the algorithm is a potential source of discrimination.[5] A human element, stemming from the programmers and users, is present in all algorithms, including those used to evaluate candidates for hire or to make employment decisions. This human element gives rise to the risk that the algorithms can

> 'reproduce existing patterns of discrimination, inherit the prejudice of prior decision makers, or simply reflect the widespread biases that persist in society'.[6]

A good example is platform work, where algorithms are used to determine platform

act on data and thus automate decision'. See S. Barocas and A.D. Selbst, 'Big Data's Disparate Impact' *California Law Review*, 671, 674 (2016). This word is of Latin origin ('*Algorismus*'). It originates from the Arabic word 'the man of Kwarizm' referring to a 9th century mathematician. On the the impact of AI and automation on 'professional' jobs see F. Pasquale, *New Laws of Robotics. Defending Human Expertise in the Age of AI* (Cambridge: Belknap Press, 2020) where the author argues that the choice to entrust algorithms to assume tasks can be functional to a neoliberal goal that prioritizes efficiency and productivity above any other human value.

[3] A.R. Givens, H. Schellmann and J. Stoyanovich, 'Tackle the Big Problem With Hiring Workers in 2021' *The New York Times*, 17 March 2021: 'People of color, women, those with disabilities and other marginalized groups experience unemployment or underemployment at disproportionately high rates, especially amid the economic fallout of the Covid-19 pandemic. Now the use of artificial intelligence technology for hiring may exacerbate those problems and further bake bias into the hiring process. (…) In most cases, vendors train these tools to analyze workers who are deemed successful by their employer and to measure whether job applicants have similar traits. This approach can worsen underrepresentation and social divides if, for example, Latino men or Black women are inadequately represented in the pool of employees'.

[4] I. Ajunwa, 'The Paradox of Automation as Anti-Bias Intervention' 41 *Cardozo Law Review*, 1671 (2020); P. Hacker, 'Teaching Fairness to Artificial Intelligence: Existing and Novel Strategies Against Algorithmic Discrimination Under EU Law' *Common Market Law Review*, 1146-1150 (2018); M. Kullmann, *Discriminating job applicants through algorithmic decision-making* (Deventer: Kluwer, 2019), 5. See also Id, 'Platform Work, Algorithmic Decision-Making, and EU Gender Equality Law' 34(1) *International Journal of Comparative Labour Law & Industrial Relations*, 1-21 (2018). The key question addressed in this article is to what extent EU equality law is fit to provide platform workers with sufficient legal means to address any discriminatory or biased automated decision taken by an employer.

[5] This has been also underlined by the European Commission in its European Commission Gender Equality Strategy 2020-2025, which recognised that '[w]hile AI can bring solutions to many societal challenges, it risks intensifying gender inequalities' and that '[a]lgorithms and related machine-learning, if not transparent and robust enough, risk repeating, amplifying or contributing to gender biases that programmers may not be aware of or that are the result of specific data selection'. European Commission (2020), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'A Union of Equality: Gender Equality Strategy 2020-2025' COM(2020) 152 final (Brussels 2020).

[6] S. Barocas and A.D. Selbst, 'Big Data's Disparate Impact' n 2 above. On the different types of algorithms and their functions and uses see J. Gerards and R. Xenidis, *Algorithmic discrimination in Europe: Challenges and opportunities for gender equality and non-discrimination law* (Luxembourg: Publications Office of the European Union, 2021), 43.

workers' pay, depending on supply and demand, quality ratings, and workers' availability; several factors taken into account by these algorithms can negatively affect gender equality in pay. In the well-known case of the multinational food delivery company *Deliveroo*, an algorithm was used to elaborate the reputational ranking (in other words a 'score') on which a rider's future job opportunities and remuneration were based, however, the company had significant discretion to choose selection (hiring) criteria which could disproportionately exclude a protected class (of riders) from work opportunities and hide this bias through automated hiring (see para 3.1).

The aim of this article is to examine what role antidiscrimination law can play in addressing these inequalities and consider how the law should respond to the new challenges. The article provides an analysis and critique of current judicial approaches to discrimination law. This leads to the question of whether or not there is a need to modify existing legal concepts of discrimination as a result of the emergence of algorithms.

The article starts with an analysis of the new judicial approach taken by the Italian *Corte di Cassazione* (Supreme Court) on discriminatory dismissal and explores the traditional reluctance of the courts of first and second instance to give up the regulatory model laid down in the general rules of civil law, ie Article 1345 of the Italian Civil Code (para 2). There follows an in-depth analysis of the case law on discrimination on the ground of trade union membership, touching on some conceptual and enforcement-related issues. These issues concern the dividing line between direct and indirect discrimination (paras 3 and 3.1), and range from the attribution of the burden of proof and the important role that the courts play with regard to statistical evidence (para 4), to implications for legal standing, and the relationship between the different enforcement proceedings which collective interest bodies are entitled to bring in the absence of an identifiable complainant (para 5). For each of these issues, the analysis will focus on the recent and relevant ruling of the Tribunal of Bologna regarding discrimination by algorithm and will take into account the more sophisticated techniques adopted by the new Law no 31/2019 on class action with regard to the question of legal standing.

II. Discrimination Law and Delays in Italian Case Law. The Example of Discriminatory Dismissal

Over the last few decades, Italian labour courts have played a fairly marginal role in antidiscrimination law and have failed to grasp the importance of the topic. Discrimination, and key concepts related to it, have been addressed mainly by labour law scholars. Questions relating to this topic have seldom reached the courts and employment tribunals for interpretation. However, the most recent reforms have marked a turning point and revitalised the debate in the courts as well. It is commonly known that the so-called 'Fornero reform' Act (92/2012) first,

and then the 'Jobs Act' (Decree 23/2015, implementing Act 183/2014), have made the law on dismissal increasingly flexible and, above all, have reduced the array of remedies available in cases of unfair dismissal (Art 18 of the Worker's Statute).

These reforms have not changed the conditions that dismissal must fulfil to be found discriminatory. But the former universalistic system, whereby courts could order the reinstatement of employees in all cases of unfair dismissal (Art 18 of the Workers' Statute) has been repealed and replaced by a new and more flexible system, where reinstatement is no longer the general rule, and this severe remedy can be applied in only very few cases, such as, for example, when dismissal is found to be discriminatory, or null and void for an unlawful and decisive reason (the so-called *licenziamento ritorsivo* or retaliatory measure).

The progressive dismantling of traditional employee safeguards against unfair dismissal resulting from these reforms has increased the importance of discriminatory dismissal (as well as null and void dismissal for breach of binding regulations); discriminatory dismissal – namely dismissal based on one of the prohibited grounds of discrimination (such as gender) – remains the main area of possible reinstatement of an employee. Therefore, the courts have been urged to focus on antidiscrimination law, and discriminatory dismissal has been conceived as the 'last bastion' of the protective employment legislation system.[7] For a long time, the Italian *Corte di Cassazione*[8] held the view that discriminatory dismissal could be considered similar to the different case of dismissal on unlawful grounds and could fall within the scope of application of general rules of civil law, ie, Art 1345 of the Italian Civil Code.[9]

The result of this approach was the complete blurring of the distinction between discriminatory and retaliatory dismissal, ie dismissal with the primary aim of deterring a worker from invoking the right to judicial protection (or as a reaction to a complaint within an undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment).

In other words, unlawful dismissal (so called *licenziamento per motivo illecito*) had been widely understood as including both discriminatory and retaliatory dismissal, and courts were reluctant to apply European discrimination law in both cases.

The application of Art 1345 of the Italian Civil Code has had two important consequences.

First, the courts did not focus on the reason for the perpetrator's action but

[7] See for example M.V. Ballestrero, 'Tra discriminazione e motivo illecito: il percorso accidentato della reintegrazione' *Giornale di diritto del lavoro e delle relazioni industriali*, 249-250 (2016).

[8] See Corte di Cassazione 8 August 2011 no 17087, *Rivista giuridica del lavoro e della previdenza sociale*, 326 (2012); Corte di Cassazione 18 March 2011 no 6282, available at www.dirittoegiustizia.it.

[9] According to this article, 'a contract is unlawful when the parties are led to conclude it solely by an unlawful motive common to both' ('*Il contratto è illecito quando le parti si sono determinate a concluderlo esclusivamente per un motivo illecito comune ad entrambe*').

on the perpetrator's subjective *motive* and in so doing had made the claimant's burden of proof more onerous.

This might be the case of unconscious discrimination stemming from stereotyping, which occurs when the employer treats the employee less favourably because of a protected characteristic without meaning to do so or realising that he or she is doing so.

Second, the courts held that the victim is required not only to establish that the treatment received is caused by a prohibited ground but also, under the aforementioned Art 1345, that the ground is the *only* and *determinant* one, so discrimination could never arise if there is any fair reason for dismissal.[10]

In other cases, the courts found that the overlap between discriminatory dismissal and retaliatory dismissal is justified by the fact that the list of grounds on which discrimination is prohibited must not be understood to be exhaustive.[11]

This approach has been questioned by Italian legal scholars. Some experts[12] have pointed out that this view is inconsistent with the concept of discrimination provided in EU antidiscrimination law, where the test for causation is an objective one. The courts must interpret Italian law consistently with the words 'on the ground of' (a particular characteristic) used in the EU Directives. It is a settled principle that persons can directly discriminate on particular grounds whether they do so consciously or unconsciously. The intention or motive of the defendant to discriminate ('subjective state of mind') is not required and is not a necessary condition of liability. Otherwise, as pointed out in some British judgments,

> 'it would be a good defence for an employer to show that he discriminated against women not because he intended to do so but (for example) because of customer preference, or to save money, or even to avoid controversy'.[13]

Furthermore, the implications of such an approach seem odd because the courts – through reference to the said Art 1345 – came to reject the view that the more favourable regulation on the burden of proof is applicable in the case in

[10] For example, in cases where the Supreme Court held that retaliatory dismissal is similar to discriminatory dismissal. See Corte di Cassazione 8 August 2011 no 17087, n 8 above; Corte di Cassazione 18 March 2011 no 6282, n 8 above.

[11] Corte di Cassazione 18 March 2011 no 6282, n 8 above, according to which 'the prohibition of discriminatory dismissal - provided for by Art 4 legge 15 July 1966 no 604, by art 15 legge 20 May 1970 no 300, and by art 3 legge 11 May 1990 no 108 - leaves room for extensive interpretation so that the area of individual prohibited reasons also includes retaliatory dismissal'; recently also Corte di Cassazione 3 December 2015 no 24648, *Giustizia Civile Massimario* (2015).

[12] See, among recent studies, M. Barbera, 'Il licenziamento alla luce del diritto antidiscriminatorio' *Rivista giuridica del lavoro e della previdenza sociale*, 151 (2003); A. Lassandari, 'Considerazioni sul licenziamento discriminatorio', in O. Bonardi ed, *Eguaglianza e divieti di discriminazione nell'era del diritto del lavoro derogabile* (Roma: Ediesse, 2017), 193-194, and further references. See also M. Biasi, 'Il licenziamento per motivo illecito: dialogando con la giurisprudenza' *Lavoro, Diritti, Europa*, available at www.lavorodirittieuropa.it.

[13] See *L. Goff in R* v *Birmingham City Council*, ex parte EOC [1989] AC 1155.

which discrimination reaches its peak, namely where the loss of a job is at stake; in this case, the employee should be required to prove that the discriminatory reason is the only and determinant one when the decision was made, so that the existence of another reason for dismissal could avoid the test of whether dismissal is discriminatory even though there is a ground of discrimination.

However, this argument too is not fully convincing: in fact, antidiscrimination law requires the respondent to rebut the presumption of discrimination by showing that its decision is not justified by extraneous objective elements irrelevant to any discrimination.

All forms of employer decisions are covered by EU and Italian antidiscrimination law: hiring, training, disciplinary measures, dismissal and so on; if the discriminatory measure is a dismissal, the applicable principle should be the same.

Therefore, discriminatory dismissal may not be confused with retaliatory dismissal and cannot come under the scope of application of Art 1345 because European and Italian antidiscrimination law do not require the protected characteristic to be the whole or main reason.

Only recently the Italian Supreme Court has appropriately started to modify its stance and acknowledge full autonomy in the case of discriminatory dismissal with respect to null dismissal for violation of mandatory norms and retaliatory dismissal.[14]

In the case in point, a female worker (employed by a professional firm) had been dismissed for objective reasons because she had announced her intention to take time off work for medical procedures related to assisted reproduction.

The ruling is important for at least two reasons.

First, the Court made it clear that the dismissal can be classified in terms of direct gender discrimination because there is a causal connection between the dismissal and maternity, even if in the specific case it is only potential (her intention to take time off work had only been announced, but not yet realised).

Second, the Court, adjusting its long-standing position, explicitly held that there is a clear distinction between discrimination and unlawful motive (*unico e determinante: nozione di carattere soggettivo*).

The ruling represents an important step forward because the Supreme Court helps to overcome the misunderstanding of the overlap between two different

[14] Corte di Cassazione 5 April 2016 no 6575, *Argomenti di diritto del lavoro*, 1221 (2016); M.T. Carinci, 'Il licenziamento discriminatorio alla luce della disciplina nazionale: nozioni e distinzioni' *Rivista italiana di diritto del lavoro*, 721-722 (2016); D. Izzi, 'Il licenziamento discriminatorio secondo la più virtuosa giurisprudenza nazionale' *Il lavoro nella giurisprudenza*, 748 (2016). L. Lazzeroni, 'Licenziamento discriminatorio, motivo illecito determinante e procreazione assistita: cronaca di un diritto in evoluzione' *Diritti lavori mercati*, 303-326 (2016); S. Scarponi, 'Licenziamento discriminatorio: una svolta della Cassazione in un caso riguardante la procreazione medicalmente assistita' *Rivista giuridica del lavoro e della previdenza sociale*, 459 (2016); A. Vallebona, 'Licenziamento discriminatorio e per motivo illecito: l'orientamento della Cassazione è condivisibile' *Massimario di Giurisprudenza del lavoro*, 854 (2016).

kind of dismissals: discriminatory dismissal and retaliatory dismissal on unlawful grounds.

This approach has been confirmed in a recent ruling where the *Corte di Cassazione* draws a neat distinction between discriminatory dismissal and retaliatory dismissal:[15] as a consequence, in the latter case the Court requires the claimant to establish that the employer was motivated only by an unlawful intent when making the decision. The employer may rebut the inference by showing that the dismissal is supported by a just cause (as defined in Art 2119, Civil Code) or by justifiable reasons.

In cases of discriminatory dismissal, on the contrary, matters are quite different.

Following the established jurisprudence of the CJEU, the respondent may not rebut the presumption of discrimination by merely showing that there is a justifiable reason for the dismissal according to the Act on protection against dismissals: thus, the employer must prove that the dismissal is *exclusively* based on objective facts unrelated to any discrimination on prohibited grounds.[16]

As Sandra Fredman has pointed out,

> 'the process of determining whether the discrimination is on (prohibited) grounds (…) is not one of determining motive or intention. Instead, it is to establish facts from which a presumption of discrimination can be inferred. Notably too, the process of rebutting the presumption is very similar to that of justification in indirect discrimination'.[17]

However, differences of opinion exist within the labour courts of first and second instance: while some judgments are in accordance with the more recent approach of the *Corte di Cassazione*,[18] some others seem to disengage from these

[15] Corte di Cassazione 7 November 2018 no 28453. According to the Court in case of retaliatory dismissal the employee has to prove that the unlawful reason was the only and determinant one when the decision was made. However, the court allowed the employer to discharge the burden of proof by showing that the dismissal is supported by just cause (as defined in Art 2119, Civil Code) or by justifiable reasons. In case of discriminatory dismissal, on the contrary, the fact that the employer was motivated *only* by the discriminatory intent is irrelevant; the dismissal could also be based on objective facts unrelated to any discrimination on prohibited grounds (*L'allegazione del carattere ritorsivo del licenziamento impugnato comporta a carico del lavoratore l'onere di dimostrare l'illiceità del motivo unico e determinante del recesso, sempre che il datore di lavoro abbia almeno apparentemente fornito la prova dell'esistenza della giusta causa o del giustificato motivo del recesso, ai sensi dell'art 5 della l. n. 604 del 1966. La prova della unicità e determinatezza del motivo non rileva, invece, nel caso di licenziamento discriminatorio, che ben può accompagnarsi ad altro motivo legittimo ed essere comunque nullo*).

[16] C-427/16, *CHEZ Elektro Bulgaria*, ECLI:*EU*:C:2017:890, see, by analogy, judgments in *Coleman*, C-303/06, EU:C:2008:415, para 55, and *Asociația Accept*, C-81/12, EU:C:2013:275, para 56.

[17] S. Fredman, 'Direct and Indirect Discrimination: Is There Still a Divide?', in H. Collins and T. Khaitaned ed, *Foundations of indirect discrimination law* (Oxford: Hart, 2018), 31.

[18] Corte d'Appello di Roma 15 May 2020 no 1081. The Court held that in case of discriminatory dismissal it is for the claimant to prove that the protected characteristic (ground) is the reason

views. In fact, although discriminatory dismissal is not the same as retaliatory dismissal, courts sometimes still seem to use these categories interchangeably.

This approach can be seen in some recent rulings. One example is a case decided by the Court of Cagliari where the employee was dismissed for poor performance because he was frequently absent from work due to short periods of sickness. It is significant that the court[19] did not consider null and void the dismissal as discriminating against the employee due to disability, arguing that the intention to discriminate

> 'should be the determining and exclusive motive of the employer; and this must be evaluated at the moment of the formation of the will rather than its externalisation (which as a rule has formally lawful features)'.

The claimant failed to meet the burden of proof. On the contrary, the elements of proof that the employer produced to justify the dismissal were considered sufficient to exclude that the employer's decision was determined by the intention to eliminate an inconvenient sick employee whose illness forced him to take time off work.

It is also interesting to note that the Rome Court of Appeal[20] looked at the issue again. It made a reference to Supreme Court decisions taken prior to 2016 and clarified that retaliatory dismissal could be classified in the same category as discriminatory dismissal, given that the two acts have strong similarities with regard to the structure.

In both cases, inconsistencies between some statements can result in misconceptions and misunderstandings. Though the first judgment seems convincing at first sight, it becomes far less so upon closer inspection: first of all, if the case is within the scope of application of prohibition on discrimination on the ground of disability[21] – and according to the Court this is in no doubt[22] – the

for the less favourable treatment; at the same time, it added that such a *prima facie* case might be made out when there is a significant and strong causal link between the protected ground and the (less favourable) treatment. If such facts are proved, the employer must then prove that the reason for the treatment was not because of claimant's protected ground; but the court requires a body of consistent evidence to discharge that burden of proof (*In tema di licenziamento discriminatorio, in forza della attenuazione del regime probatorio ordinario, incombe sul lavoratore l'onere di allegare e dimostrare il fattore di rischio e il trattamento che si assume come meno favorevole rispetto a quello riservato a soggetti in condizioni analoghe, deducendo al contempo una correlazione significativa tra questi elementi, mentre il datore di lavoro deve dedurre e provare circostanze inequivoche, idonee ad escludere, per precisione, gravità e concordanza di significato, la natura discriminatoria del recesso*). See also Corte d'Appello di Ancona 22 November 2019 no 369.

[19] Tribunale di Cagliari, 6 July 2020, no 511, available at www.dejure.it.

[20] Corte d'Appello di Roma 30 September 2020 no 1898, available at www.dejure.it; see also Tribunale di Brescia 14 August 2020 no 302, Tribunale di Venezia 23 September 2019 no 550, where there threatened dismissal cannot be shown to be due to trade union activity.

[21] On the notion of disability in Italy, see S. Giubboni, 'Disabilità, sopravvenuta inidoneità, licenziamento' *Rivista giuridica del lavoro e della previdenza sociale*, 621 (2016); M. Peruzzi,

burden of proof should be reversed once a *prima facie* case of discrimination has been made out, and a *prima facie* case of this kind might be made out also where the prohibited ground is not the only ground on which the dismissal is based. Indeed, it is relevant only that there is a causal connection between dismissal and disability.

Second, it should not be sufficient for the respondent to prove that the dismissal may be justified where the absence (and the impossibility to perform) of the employee objectively affects the organisation of the company and its good functioning.[23] In such a case it is also necessary for the employer to prove that the causal connection between dismissal and objective facts (unrelated to any discrimination on disability) is exclusive.

Third, in the field of disability law, the issue of the burden of proof is particularly relevant: in order to rebut the presumption of discrimination the employer could prove that there is no causal connection between dismissal and the claimant's protected characteristic (disability); it is not sufficient to prove that he or she has no possibility of recovering the employee(s) for production purposes, even by resorting to professional retraining, transfers, lay-offs or short-time leave. The respondent has to prove that it has complied with the duty of reasonable accommodation or adjustment. The duty to provide reasonable accommodation under Directive 2000/78 arises 'in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training'. In such circumstances, the accommodation measures required by the employer include 'adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources'.[24]

III. Discrimination on the Ground of Trade Union Membership

Recent developments in the case law of the courts in Italy show that national legislation prohibiting discrimination in employment has often been applied to other important work-related fields, such as discrimination on the ground of trade union membership.[25]

La prova del licenziamento ingiustificato e discriminatorio (Torino: Giappichelli, 2017) 81, 196.

[22] According to the Court of Justice of the European Union, disabilities caused by an illness – if they entail long-term effects – should be covered by the provisions of the framework Equality Directive. The CJEU holds that 'the concept of "disability" must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life': Case C-13/05 *Sonia Chacón Nava*, Judgment of 11 July 2006, available at www.eurlex.europa.eu.

[23] However, the established case law of the Supreme Court upheld this view. Corte di Cassazione 4 October 2016 no 19775; Corte di Cassazione 6 October 2015 no 19923

[24] Recital 20 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

[25] In 2018, an interesting case was decided by the Tribunal of Bergamo after a legal action that had been brought by a trade union challenging the discriminatory nature of an extinction

In Italy the right not to be discriminated against for trade union membership finds a basic source of protection in Title 2 of the Workers' Statute (Act no 300 of 1970). This Act not only reaffirms for all employees the so-called 'positive trade union freedom', ie 'the right to form trade unions, to join them, to remain and be active in union activity' (art 14), but also protects employees against any kind of discrimination resulting from the use of trade union freedom.

Accordingly, Art 15 – which can be considered the 'prototype' or 'the forerunner' of antidiscrimination legislation – declares null and void any act or agreement in any way discriminating against employees because of union affiliation or non-affiliation,[26] religious, or political beliefs.[27]

For many years these provisions have rarely been used in practice, perhaps largely because, under closer scrutiny, the widespread presence of imperative rules made it easy to hold up unilateral decision-making by the employer.

It is worth noting that the employer's discretionary powers are limited by the employees' fundamental rights derived from the Constitution, and the general clauses played an important role in specifying these rights and subjecting employer's decisions to judicial control.[28] In particular, it should be pointed out that general clauses have in fact made up for the lack of antidiscrimination legislation in order to grant protection against evident and excessive abuses of the employer's powers. For many years the ordinary action of nullity provided for by Article 15 of the Workers' Statute therefore assumed limited importance in Italian case law.[29]

A good example was the case decided in 1981 by the Italian Supreme Court, dealing with an anti-union collective discrimination which arose because the

clause included by Ryanair in contracts signed with pilots and flight attendants. The Tribunal condemned Ryanair for breaching anti-discrimination legislation, with wide reference to EU law and CJEU case law.

[26] Particularly, the Statute refers to acts intended (a) to subordinate the employment of a worker to the condition that he belongs or does not belong to a trade union or that he ceases to belong to it; (b) to dismiss a worker, discriminate against him in the assignment of (jobs or in job classifications, in transfers, in disciplinary sanctions, or to otherwise prejudice him because of his union affiliation or activity or his participation in a strike).

[27] According to case law (see above the famous Fiat case) the notion of 'belief' to which the national non-discrimination rules on the ground of belief implementing European law (leg. Decree 216/2003) refer must be interpreted in a broad sense so as to also include the philosophical belief. In Italy crieteria for determining what is a philosophical belief have not been provided. However, the concept expressed by the expression '*convinzioni personali*' is different from the formulae used in other jurisdictions, such as the German '*Weltanschauung*'. This could mean that within this term it must not be necessarily included only those philosophical (or spiritual) convictions wich in some way have to do with the fundamental problemsof existence and also touch upon the religious sphere.

[28] G. Fontana, 'Statuto e tutela antidiscriminatoria (1970-2020)', in M. Rusciano, L. Gaeta and L. Zoppoli eds, *Mezzo secolo dallo statuto dei lavoratori. Politiche del diritto e cultura giuridica* (Napoli: Editoriale Scientifica, 2020), 209.

[29] Most frequently, the discriminatory acts have been sanctioned and removed using the special emergency procedure as set out in Art 28 of Act no 300, which gives the tribunal the power to issue, cease and desist orders in any case of anti-union activity on the part of the employer. See T. Treu, *Condotta antisindacale e atti discriminatori* (Milano: Franco Angeli, 1974).

employer granted collective economic benefit (the so-called 'anti-strike bonuses') in addition to regular wages to workers who did not take part in strike action. This discriminatory practice violated Art 16 of the Workers' Statute, which prohibits the employer from granting any collective economic benefit that is discriminatory due to the motives indicated in Art 15. The Court argued that

> 'the acts with which the employer has granted economic benefit (…) to a small number of employees are not null and void as such […] unless the employee can prove that those acts are due *to an unlawful ground*'.

At that time, this was the prevalent view not only with reference to conditions and benefit, but at every stage, including hiring, transfers, promotions,[30] job classifications[31] and so on. Furthermore, as noted above, until some years ago it was also applied to dismissals.[32]

This view has long hindered the expansion of antidiscrimination protection: since every discriminatory act needs to follow the regulatory model laid down in general rules of civil law, ie Art 1345 of the Italian Civil Code, the act should fulfil stringent conditions to be found to be discriminatory.

In particular, as mentioned above, the courts held that under Art 1345 the victim is required to prove that the prohibited ground is the only and determinant ground, so that the effectiveness of the prohibition laid down in Art 15 of the Worker's Statute is rather problematic because, as explained above, there is no discrimination if the employer's act is justified by any fair reason.

Only after European Directives 2000/43 and 2000/78 came into force did the non-discrimination legislation – affirmed in Decree 215 and 216/2003 implementing them – start to play a more decisive role.

In the case discussed in the previous paragraph, the Supreme Court adopted a new approach more consistent with EU antidiscrimination law.

This position did not change when, in January 2020 (see ruling no 1/2020 published on 2 January 2020) the Italian Supreme Court had to decide on the lawfulness of an automobile company's behaviour, which, on the occasion of a collective transfer, had moved 316 workers from one place of work to another, 77 of whom belonged to the trade union which had taken legal action.

The court of appeal had adopted a very questionable approach apparently based on the (implicit) assumption that the objective reasons given by the company in support of the collective transfer and, therefore, the criteria applied for selecting the employees are, in themselves, able to justify the employer's act thus excluding the existence of unlawful discrimination in all cases in which the transfer is justified.[33]

[30] Corte di Cassazione 17 October 1983 no 6086.

[31] Corte di Cassazione 2 December 1996 no 10378.

[32] *Ex plurimis* Corte di Cassazione 13 June 1984 no 3521.

[33] The Court seems to lean in this direction when it states that 'le ragioni del disposto trasferimento collettivo, lungi dal costituire il frutto di un intento antisindacale, corrispondevano ad una

This approach – which seems to require proof of an unlawful intention to discriminate – was rejected by the Supreme Court because it was understood to be incompatible with the usual approach to the definition of (direct) discrimination adopted in EU law. The judicial doctrine of intent applied in the USA – where the intention to discriminate is usually understood as a criterion for distinguishing between direct and indirect discrimination[34] – has not been favoured in EU antidiscrimination law. The EU approach – like that of the UK– looks at the effects rather than intentions: the focus is on the adverse effects of a rule or a practice for both direct and indirect discrimination, with the surprising result that where, in the absence of any discriminatory intention or motive, a rule or a practice which has an adverse impact on 100 per cent of the protected group must be classified as direct discrimination.

This explains why the Supreme Court does not consider the possibility of justifying practices that tend to have a discriminatory effect. The ruling of the Court is in accordance with both EU and Italian law because, unlikely indirect discrimination, leaving aside some specific exceptions mentioned in legislation such as necessary occupational qualification for a job, justification for direct discrimination is not generally permitted by the law.

1. D*iscrimination* by *Algorithm:* Can Facts Be Classified as Direct Discrimination?

The same conclusion could be drawn with reference to another interesting case of anti-union discrimination, where the Bologna Tribunal has, indeed, considered (but refused) the availability of a justification for a rule.

A legal action was brought before the Court by a trade union (according to Art 5 Decreto legislativo no 216 of 2003) challenging the discriminatory nature of an algorithm-driven practice whereby the company *Deliveroo* placed its riders at a disadvantage in terms of their reputational ranking (in other words their 'score') in cases of cancellation or cancellation of the booking of a work session (slot) with less than 24 hours' notice (so-called late cancellation), regardless of what the reason for the cancellation of the booked session might be.[35] The Court found that the system of access to bookings determined by the defendant's algorithm placed at a particular disadvantage any rider who joined a strike and therefore did not cancel the booked session at least 24 hours before it started. These riders had been treated less favourably than other employees with respect to conditions

esigenza comprovata di razionalizzazione del processo industriale e di ottimizzazione dell'organizzazione aziendale'.

[34] H. Collins and T. Khaitan, 'Indirect Discrimination Law: Controversies and Critical questions', in H. Collins and T. Khaitan eds, *Foundations* n 17 above, 20.

[35] Tribunale di Bologna 31 December 2020. On this ruling see M.V. Ballestrero, 'Ancora sui rider. La cecità discriminatoria della piattaforma' *Labor*, 19 January 2021; A. Perulli, 'La discriminazione algoritmica: brevi note introduttive a margine dell'ordinanza del Tribunale di Bologna', available at www.tinyurl.com/4nssasx8 (last visited 31 December 2021).

for access to employment since their score worsened, and they therefore lost their position in the priority group and the advantages associated with it.

The Court held that there had been no direct discrimination (on the basis of union activity) but there had been an indirect one: in the Court's view the provision adopted by Deliveroo (and in particular the contractual rules on the early cancellation of booked sessions) is to all appearances neutral because it is applied to all riders (and so-called late cancellation has the same consequences for everyone) but has a disparate negative impact upon those who participate in strikes.

For the court, the employer who treats riders who do not participate in a booked work session for unimportant reasons in the same way as those who do not participate because they join a strike (or because they are sick, have a disability, or assist a disabled person or a sick minor, and so on) in practice discriminates against the latter, who will have a low score priority and thus little chance of choosing and booking work sessions.[36]

Another question that arises is whether this provision serves a legitimate aim in a proportionate way.

It is generally understood that justification defences should be subject to a high level of scrutiny before being accepted.[37] The employer should therefore have been required to demonstrate that the practice based on algorithms is justified by the needs of the job in question and consistent with business necessity, and that there exist no other less discriminatory alternative practices with less disparate impact but able to serve the employer's legitimate needs.

However, this did not happen in the case at hand.

Deliveroo argued that the 'tracking' system of cancellations developed by the company is to be considered legitimate, 'since there is a relationship between the client and self-employed workers'. But according to the Court, this argument is not convincing and cannot justify the discrimination stemming from the fact that the algorithm does not differentiate between reasons for riders making late cancelations. In conclusion, the Court had no doubts that the provision cannot be objectively justified by a legitimate aim.

The ruling is interesting to the extent that the Court found an indirect form of discrimination.[38] This conclusion raises the thorny question of what exactly

[36] 'Trattare nello stesso modo chi non partecipa alla sessione prenotata per futili motivi e chi non partecipa perché sta scioperando (o perché è malato, è portatore di un handicap, o assiste un soggetto portatore di handicap o un minore malato, ecc.) in concreto discrimina quest'ultimo, eventualmente emarginandolo dal gruppo prioritario e dunque riducendo significativamente le sue future occasioni di accesso al lavoro'.

[37] S. Fredman, *Discrimination Law* (Oxford: Oxford University Press, 2011), 191.

[38] Generally speaking, it could happen that, as some scholars pointed out, the courts, in light of the difficulties in tracking differential treatment based on protected grounds in 'black box' algorithms, might use the notion of indirect discrimination as 'a conceptual 'refuge' to capture the discriminatory wrongs of algorithms'. See J. Gerards and R. Xenidis, *Algorithmic discrimination* n 6 above, 11, where the authors hold that 'this development might reduce legal certainty if it leads, by default, to the generalisation of the open-ended objective justification test

the difference may be between direct and indirect discrimination. Clearly, this distinction is hard to draw on a conceptual level.[39] EU law does not provide a consistent and precise division between the two legal categories, which explains why there have been different opinions on classifying the facts in this particular case: some labour scholars uphold the Court's view,[40] while some others argue that the facts could be classified as direct discrimination.[41]

According to the first approach direct discrimination could occur only if the platform expressly uses membership in a protected group as a reason for the differential treatment, such as the assignment of lower scores. But this is not the case.

These scholars argue that the algorithmic score itself, or the criteria that drive it, can be considered as the neutral criterion that, under European antidiscrimination directives, may put a protected group at a particular disadvantage.

Accordingly, they assume that disparate impact on a protected group can be linked to a specific neutral factor and conclude that, in that case, it is the algorithm that caused it, regardless of whether or not the decision maker knows that. As a matter of fact it has been held that such knowledge is irrelevant and does not generally change the formal neutrality of the practice.[42]

In my opinion it is necessary to view the situation from a different perspective, because there are strong arguments in favour of direct discrimination.

Even though the protected characteristic is not an explicit reason for *Deliveroo*'s labeling decisions, it is important to consider whether these decisions are affected by implicit bias, stereotypes or prejudices: in fact, these subjective components could be not entirely irrelevant in defining the demarcation between direct and indirect discrimination.

Generally speaking, while indirect discrimination concerns a disproportionate disadvantage imposed on a protected group by an action (or rule or practice) and focuses on its impact, direct discrimination has to do with an individual disadvantage,[43] and its focus is on a perpetrator's actions and the reason for treatment. There is no doubt that a link between the less favourable treatment and the reason for it is necessary and sufficient. Because of the absence of a requirement of intent the concept of direct discrimination potentially covers situations where the perpetrator was not conscious of the discrimination.

applicable in indirect discrimination cases as opposed to the narrower pool of justifications available in direct discrimination cases'.

[39] H. Collins and T. Khaitaned, *Indirect Discrimination Law* n 34 above, 18.

[40] M.V. Ballestrero, n 35 above.

[41] See now M. Barbera, 'Discriminazioni algoritmiche e forme di discriminazione', available at https://Labourlaw.unibo.it/article/view/13127 (last visited 31 December 2021).

[42] See P. Hacker, n 4 above where the a. holds that situation 'would only be different if the intent to discriminate was shown to be a guiding motive of the decision maker; the neutral practice would then only be a pretext for a decision directly related to the sensitive criterion – but that is unlikely to be proven in court'. See also M. Kullmann n 4 above, 5.

[43] H. Collins and T. Khaitaned, *Indirect Discrimination Law* n 34 above, 18.

However, the boundary between direct and indirect discrimination should not be considered a rigid one.

If the treatment is not explicitly related to a protected characteristic but to a different reason that is closely connected to one of the protected characteristics mentioned in the discrimination law, then it should also fall under the direct discrimination provisions. In such situations the criterion used is somehow intrinsically discriminatory. This can be seen, for example, in the case of sex discrimination in relation to pregnancy: the CJEU has established the rule that discrimination is grounded on sex where it is attributable to an attribute (pregnancy) which can be demonstrated only by women.[44]

In *Chez* the CJEU also went further: it found that the same facts could give rise to both direct and indirect discrimination. Although 'the process of determining whether the discrimination is on the ground protected is not one of determining motive or intention',[45] the CJEU gave the national Court some hints indicating that the facts are deemed to point towards a *prima facie* case of direct discrimination, such as indications that measures are based on stereotypes or prejudices instead of actual facts.

It is interesting to note that the Italian court takes into account the intentions of the employer and underlines the degree of 'heinousness' of the platform: for the court

> 'the platform can choose to remove the blindfold that makes it 'blind' or 'unconscious' with respect to the reasons for the rider's failure to work and, if it does not it, it means that the decision maker has *deliberately* chosen to treat alike all reasons apart from an accident at work or cases attributable to the employer (such as a malfunction of the app, which prevents log-in),

[44] This is what some legal scholars called 'proxy'. See E. Ellis and P. Watson, *EU antidiscrimination Law*, 164 (Oxford: EU Law library, 2012), 164; J. Gerards and R. Xenidis, *Algorithmic discrimination in Europe* n 6 above, 64, where the a. notice that 'usually there is an almost 100% overlap here between the 'actual' protected ground and its proxies, meaning that the use of the proxy covers almost exactly the same group of persons as using the actual ground would do. Similarly, when there is a close connection between individual preferences and affinities, and protected grounds, belonging to a group with a certain 'affinity' (eg having an interest in particular religious matters) might be nearly the same as belonging to a group characterised by a particular personal trait (eg adhering to a certain religion)'. It is also noteworthy that the concept of direct discrimination extends to situations where a person is treated unfavourably because he or she is associated with a protected group, without sharing the protected characteristic himself or herself. This has become known as discrimination by association and has been confirmed by CJEU in Coleman, where an employee was subjected to detrimental treatment by her employer because she had to care for her disabled child. This finding is important because it also means that a person should not need to share a protected characteristic to be recognised as a victim of direct discrimination based on that ground. On the problematic application of the concept of direct discrimination in cases where protected grounds are ascribed, perceived or assumed, especially in the context of algorithmic discrimination see, recently, J. Gerards and R. Xenidis, *Algorithmic discrimination in Europe* n 6 above, 70-72.

[45] S. Fredman, n 17 above, 54.

regardless of whether or not they are protected by the law'.[46]

According to the court, there is clear evidence of the intention to put riders at a disadvantage on the ground of union activity: Italian law does not require proof of intention, but there is no doubt that this element reflects the strength of the causal link between the treatment and the reason for it.

Following established EU case law, measures such as the one at issue in this case could constitute direct discrimination: even though the protected characteristic (belief) is not the explicit reason of the labeling decisions, the decision not to differentiate the reasons for the rider's failure to work may have been influenced by implicit stereotypes. The algorithm seems to be designed – intentionally or not – in such a way that the selection criterion used is somehow intrinsically discriminatory. There is no intermediate neutral practice between the negative labeling and the result. Riders who participate in strikes are forced to cancel their reservation too late and therefore they are directly discriminated against on the ground of union activity. The less favourable treatment is a direct consequence of the biased labeling and should fall under the 'disparate treatment'; this can be demonstrated by finding a similarly situated person who does not participate in strikes and who has been treated more favourably than the complainants.

Moreover, direct discrimination is established if it is proved that Deliveroo's adoption of the contractual rules on the early cancellation of booked sessions has the effect of excluding 100 per cent of the riders who strike but none of the comparative group. This means that on the contrary, those rules must be classified as indirect discrimination only where their exclusionary effect is less than 100 per cent but is disproportionate.

IV. The Burden of Proof. Inconsistencies Within Italian Antidiscrimination Law

In Italy the expansion and effectiveness of antidiscrimination protection has been hindered not only by the case law of the Supreme Court, which, as noted above, long applied the regulatory model laid down in general rules of civil law, especially with regard to discriminatory dismissals (see paras 1 and 2), but also by the flaws in the formulation of some of the procedural provisions of antidiscrimination law.

EU and Italian law provide for a number of important procedural guarantees aiming to facilitate individual litigation and improve the effectiveness of access to

[46] 'Quando vuole la piattaforma può togliersi la benda che la rende 'cieca' o 'incosciente' rispetto ai motivi della mancata prestazione lavorativa da parte del rider e, se non lo fa, è perché ha deliberatamente scelto di porre sullo stesso piano tutte le motivazioni – a prescindere dal fatto che siano o meno tutelate dall'ordinamento – diverse dall'infortunio sul lavoro e dalla causa imputabile ad essa datrice di lavoro (quale evidentemente è il malfunzionamento della app, che impedisce il log-in)'.

justice for victims of discrimination. In particular, Italian law establishes a special allocation of the burden of proof in discrimination cases. The burden of proof is essentially reversed in view of the fact that with regard to discrimination in employment, the existence of unlawful discrimination is often extremely difficult to prove,[47] as the power relations between the employer and each employee are unequal[48] and 'obtaining evidence in discrimination cases, where the relevant information is often in the hands of the defendant,[49] can be very problematic'.[50]

In other words, this shifting of the burden *ensures that complainants are not required to prove facts which are beyond their capacity of proof*. Workers who appear to be the victims of discrimination on the grounds of, in particular, sex, age, or origin, could lack any effective means of enforcing the principle of equal treatment.

In Europe, the CJEU developed a gradual line of case law in relation to equal pay, from *Danfoss* (1989) onwards, and this case law has been confirmed on other aspects of discrimination in all non-discrimination directives.

According to EU law, contrary to the general allocation of the burden of proof, the claimant has only to make out a *prima facie* case of discrimination or, in the words of the EU legislator, has to prove 'facts from which it may be presumed that there has been direct or indirect discrimination'. If such facts are proved, then the burden of proof shifts to the respondent, who must prove that no discrimination has occurred (for example see Art 8, 1 RED).

Since the wording of the provision on the special allocation of the burden of proof is similar across the protected grounds, the national case law has to develop parallel lines of jurisprudence.

However, despite this, as in the EU in general, there is not yet a clear understanding of what would amount to a presumption of discrimination in Italy. Indeed, the issue of what the exact requirements are for establishing a *prima facie* case of discrimination is still highly controversial.

Some of these uncertainties are due to the fact that the various Italian legal

[47] In this respect N. Cunningham, 'Discrimination Through the Looking-Glass: Judicial Guidelines on the Burden of Proof' (35)3 *Industrial Law Journal*, 279 (2006) pointed out that 'employers make innumerable decisions in relation to which it is simply impossible for a tribunal to say with any reasonable degree of confidence whether they were or were not influenced, consciously or unconsciously, by unlawful discrimination'. The difficulty of proving reasons for acting is such that 'if the burden is on complainants, significant numbers of those who have in fact suffered unlawful discrimination will be unable to prove their claims and will fail to secure any redress ('false negatives')'.

[48] K. Henrard, 'The First Substantive ECJ Judgment on the Racial Equality Directive: A Strong Message in a Conceptually Flawed and Responsively Weak Bottle' *Jean Monnet Working Paper Series*, 19 (2009). More recently, Ead, *The Effective Protection against Racial Discrimination and the Burden of Proof: Making up the Balance of the Court of Justice's Guidance* (Uladzislau Belavusau: Hart publishing, 2019), 95.

[49] K. Duffy, 'Anti-discrimination Law: Shifting the Burden of Proof', paper presented at ERA Seminar: The EC Anti-Discrimination Directives 2000/43 and 2000/78, 5.

[50] See, for example, the Explanatory Memorandum of the Race Directive, COM (1999) 566.

provisions regarding the various fields of discrimination (sex, age, religion, and so on) define in very different ways the kind and weight of evidence from which a court should infer discrimination.

Particularly, there are differences concerning the allocation of the burden of proof between claims of race and ethnic origin discrimination (Art 4, Legislative Decree 215/2003), and religion or belief, disability, age and sexual orientation discrimination claims (Art 4, Legislative Decree 216/2003).

As for the latter category, the facts the claimant needs to establish have to satisfy more stringent presumptions: in particular they have to be '*gravi, precise e concordanti*'.

As regards the first category, the criteria to evaluate the facts are more flexible because the law requires the 'precision' and the 'concordance' of the presumptions, but not the 'gravity'.

It should be stressed that these differences have now disappeared to some extent. In 2011, common rules on the burden of proof were codified into a single comprehensive regulation, whereby the burden of proof is essentially shifted to the respondent if the complainant proves facts, including statistics, from which it may be presumed that there has been discrimination. This was achieved through Art 28(4) of Legislative Decree 150/2011.

In any case, despite the more stringent rules laid down in Art 4 of Legislative Decree 216/2003, the general tendency of the Italian courts is to extend the employee's right to use statistics to show a *prima facie* case or a disparate impact.

This view was held by the Court of Appeal of Rome in an interesting case (the *Fiat, Fabbrica Italia* case) decided in 2012, when, for the first time, the ground of trade union membership was understood to be included in the wider ground of belief, so that anti-union discrimination, banned in Italy since 1970, is also prohibited by the rules on discrimination on the ground of belief implementing European law. The case had been brought before the court by the trade union Fiom, using the special procedure provided for in Legislative Decree 150/2011 and contesting anti-union discrimination in hiring against one hundred and forty-five workers that were members of the trade union. The employer – who refused to hire them because of their being union members – argued that the selection criteria adopted were objective and impartial and could not be judged as unlawful. The Court of Appeal replied that the proof was based on statistical evidence of discriminatory hiring: statistics could be helpful in establishing evidence of a *prima facie* case because they showed that the chances of hiring workers belonging to the FIOM were only one in 10 million.

This approach has also been adopted by the Supreme Court. In the aforementioned ruling no 1/2020, for instance, the Court clarified that reference to statistics should be understood in the broader and more common sense of probability, regardless of precise scientific rigour. Statistical techniques do not necessarily need to use scientific methods to be able to become autonomous sources

of evidence. Their use is necessary to determine appropriate comparator groups. It should be sufficient to prove that the difference in treatment between the groups is statistically significant for the burden of proof to shift on the respondent.

The result is that the Courts play an important role in Italy because it is up to them to determine whether the data are statistically significant.

But this seems to be in accordance with the ECJ case law according to which statistics can establish a presumption of discrimination,[51] and this presumption can be established with the help of comparisons.[52]

In any case, it is important to note that difficulties in demonstrating disparate treatment or obtaining the means to show the statistical proof of disparate impact could increase in view of the rising use of algorithms in employment decision-making.[53]

These systems operate with no built-in transparency or accountability to check that the criteria are fair to all job applicants. The opacity of machine learning, referred to as a black box,

> 'mak(es) it all but impossible for disadvantaged parties to prove their claim, irrespective of whether the bias is the result of intentional masking or unintentional processes'.[54]

Victims of algorithmic discrimination are therefore in a very difficult legal position. In cases of indirect discrimination, it is up to the plaintiff to show that the algorithmic process produced a disparate impact on the protected group (and therefore there is a statistical disparity between the two groups of workers), but he will often not even be in a position to know the data and the algorithmic output.

Therefore, in the United States, some legal scholars have proposed passing laws to help plaintiffs overcome difficulties in satisfying the burden of proof in establishing a claim when they have experienced bias through an automated hiring system.

In the United States the key difference between direct and indirect discrimination regards intent: while disparate impact looks at the effect, disparate

[51] Case C-127/92, *Dr Pamela Mary Enderby* v *Frenchay Health Authority and Secretary of State for Health*, [1993] ECR I-5535; Case C-237/94, John O'Flynn v Adjudication Officer, [1996] ECR I-2617.

[52] See, for instance, Case C-226/98, *Birgitte Jørgensen* v *Foreningen af Speciallæger and Sygesikringens Forhandlingsudvalg*, [2000] ECR I-02447, para 29.

[53] I. Ajunwa, 'The Paradox of Automation as Anti-Bias Intervention' 41 *Cardozo Law Review*, 1672, (2020). See also Id, 'The Auditing Imperative for Automated Hiring' 34 *Harvard Journal of Law & Technology*, (forthcoming 2021) where Ajunwa argues that USA needs a federal law that would mandate data retention for all applications (including applications that were not completed) on hiring platforms and that would require employers to conduct internal and external audits so that no groups of applicants are disproportionately excluded. The audits would also ensure that the criteria being used is actually related to job tasks.

[54] P. Hacker, 'Teaching fairness to artificial intelligence: existing and novel strategies against algorithmic discrimination under EU law' 55 *Common Market Law Review*, 1146-1150 (2018).

treatment is intentional: in other words, 'proving clear intent is necessary when attempting to make a disparate treatment case under Title VII' of the Civil Rights Act of 1964;[55] in the absence of intent, Title VII requires a clear demonstration of disparate impact with no possibility of arguing business necessity for the disparity.[56]

In the Italian legal system things are very different, but the problem that arises is the same: the power imbalance and the information asymmetry that exists between the employer and the employee in the context of automated hiring would seem to upset the balance between the freedom of employers to recruit the people of their choice and the rights of job applicants.[57]

Some years ago, a similar and thorny question came before the CJEU: how can a job applicant enforce observance of the principle of equal treatment when his application for a job has been rejected by an employer who failed to provide any information whatsoever as to the recruitment procedure and its outcome or why was the application unsuccessful?

The Court was in no doubt: EU antidiscrimination law (Directives 2000/43, 2000/78 and 2006/54) must be interpreted as not entitling a worker with a plausible claim that he meets the requirements listed in a job advertisement and whose application has been rejected to have access to information indicating whether the employer engaged another applicant at the end of the recruitment process.[58]

[55] I. Ajunwa, 'The Paradox of Automation as Anti-Bias Intervention' n 53 above, 1727.

[56] Title VII of the Civil Rights Act protects the job applicant against discrimination on the basis of sex, race, colour, national origin, and religion. See Civil Rights Act of 1964 para 7, 42 USC para 2000e2 (2018). Plaintiffs must establish that 'a respondent uses a particular employment practice that causes a disparate impact on the basis of [a protected characteristic] and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.' 42 USC para 2000e-2(k)(1)(A)(i).

In USA the New York City Council is debating a proposed new law that would regulate automated tools used to evaluate job candidates and employees. The bill 'would require vendors that sell automated assessment tools to audit them for bias and discrimination, checking whether, for example, a tool selects male candidates at a higher rate than female candidates. It would also require vendors to tell job applicants the characteristics the test claims to measure. This approach could be helpful: It would shed light on how job applicants are screened and force vendors to think critically about potential discriminatory effects. But for the law to have teeth, we recommend several important additional protections' A. Reeve Givens, H. Schellmann, J. Stoyanovich, 'Tackle the Big Problem With Hiring Workers in 2021' *The New York Times*, 17 March 2021.

[57] A possible problem that may arise with proving discrimination is that an employer qualifies its algorithms as business secrets. According to M. Kullmann, n 4 above, 11, it 'could be argued that it is the employer who should justify why he prefers hiring a particular candidate over another, this should also apply to an employer who uses an algorithm that prefers the one over the other. The rejected job candidate should be given access to the algorithmic model and data model based on which the algorithm has decided, or the employer should at least provide insight into why that decision can be objectively justified, in order to assess whether there indeed has been discrimination. It is suggested that where an employer is unable to explain why the software did decide in a particular way, and this might be even more difficult where unsupervised machine-learning algorithms are involved'.

[58] *Case* C-415/10 *Meister* [2012] EU:C:2012:217. See also Opinion of Advocate General *Mengozzi* delivered on 12 January.

However, after refusing to endorse the existence of a right to information, the Court also held that

> 'it cannot be ruled out that *a refusal of disclosure* by the [employer], in the context of establishing [facts from which it may be presumed that there has been discrimination], could risk compromising the achievement of the objective pursued'

by the directives on equal treatment and thus depriving the provisions concerning the burden of proof, in particular, of their effectiveness.[59]

According to the Court it cannot be ruled out that a defendant's refusal to grant any access to information may be one of the factors to consider when establishing facts from which it may be presumed that there has been direct or indirect discrimination.

It is also worthy of note that the case of the employer's refusal to grant any access to information is very similar to that of automated hiring. In both cases the employer continues to be the only party in possession of the evidence upon which the substance of an action brought by the unsuccessful job applicant ultimately depends and, therefore, its prospects of success.

This is why it is not at all surprising that in the United States some legal scholars have proposed a new burden-shifting theory of liability (discrimination *per se*) in order to challenge the problem of the algorithmic bias of automated hiring platforms. The idea is that it is up to the claimant to assert that a hiring practice is so egregious as to amount to discrimination *per se*, and this would shift the burden of proof from the claimant to the respondent (employer), who must then prove that the treatment is non-discriminatory. For example, employers could be required to conduct internal and external audits that would ensure that the criterion used is actually related to the tasks required by the job.

The ruling of the Bologna Court shows that the increasing use of automated hiring platforms requires adequate safeguards to avoid the job applicant being entirely dependent on the good will of the employer when it comes to obtaining information and preventing unlawful employment discrimination.

V. Legal Standing and Collective Bodies. The Role of National Courts and the Legitimate Interest in Bringing an Action

Italian law has not only introduced a large variety of specific procedural instruments and rules to facilitate individual judicial enforcement of antidiscrimination law but has also entrusted collective and/or public interest bodies dedicated to the assistance of victims of discrimination with the important task of engaging in court proceedings if they demonstrate a legitimate interest.

[59] Case C-104/10 *Kelly* [2011] ECR I-6813, para 39.

A major characteristic of the Italian system is that the legal regulation of judicial procedures for enforcing equality is greatly fragmented and diversified, especially with reference to collective/public complaints.[60]

The Legislative Decrees nos 215 and 216, enacted in 2003 in order to implement the so-called second-generation non-discrimination Directives in Italian Law, have contributed to multiplying rules with regard to court actions and the types of entities entitled to act on behalf of victims of discrimination. This scenario also remains fragmented as a result of Legislative Decree no 150/11 (Art 28). The harmonization intervention carried out by the legislator in 2011 has mitigated the fragmentation concerning the procedural instruments to combat discrimination. But there are still different rules regarding gender and other grounds of discrimination, and this different treatment is not always reasonable or easy to understand.

Of course, the topic has been addressed in EU antidiscrimination Directives (2000/43/EC, 2002/73/EC and 2004/113/EC) according to which legal entities have to be entitled only to *engage* in court proceedings on behalf (or in support) of the victims of discrimination.[61] EU law does not require public/collective interest bodies to also be necessarily entitled *to bring* a discrimination claim.[62]

However, in *Feryn*[63] the Court went on to argue that even though Member States are only obliged to grant legal standing to public interest bodies to engage 'either on behalf or in support of the complainant with his or her approval' in court proceedings, *they are not precluded* from enabling public/collective interest bodies to have *locus standi* (legal standing) also to bring judicial proceedings in the absence of a complainant who claims to have been the victim of discrimination.

This is the logical implication of a broad interpretation of the concept of discrimination: the CJEU introduced the concept of collective discrimination, holding that the existence of direct discrimination is not subordinated to the identification of a complainant who claims to have been the victim (see para 23): as a matter of fact, the effect of statements revealing discriminatory recruitment policies could hamper the emergence of a socially inclusive labour market and

[60] With regard to court actions, see F. Guarriello, 'Azioni in giudizio', in L. Gaeta and L. Zoppoli eds, *Il diritto diseguale. La legge sulle azioni positive. Commentario alla Legge 10 aprile 1991, n. 125* (Torino: Giappichelli, 1992), 196; L. Curcio, 'Le azioni in giudizio e l'onere della prova', in M. Barbera ed, *Il nuovo diritto antidiscriminatorio: innovazione e continuità* (Milano: Giuffrè, 2007), 529.

[61] Member States should ensure 'that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement' of European rules.

[62] K. Riesenhuber, *Europäisches Arbeitsrecht: eine systematische Darstellung* (Munich: C.F. Müller, 2009), 191.

[63] *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding* v *Firma* Feryn *NV* (C-54/07) EU:*C*:2008:397.

thus, in the Court's opinion, go counter to the aim of the Directive.[64]

In some non-binding legal instruments and documents, the EU Commission seemed to continue on this path, passing an important recommendation in 11 June 2013 on injunctive and compensatory collective redress mechanisms.[65] The EU Recommendation also deals with the crucial question of whether or not entities should have the standing to bring representative actions. Unlike non-discrimination Directives, the Recommendation expressly provides that all Member States should have collective redress systems at the national level even though the legal standing to initiate representative collective actions is granted only to representative entities that have been designated in advance or entities that have been certified on an *ad hoc* basis.[66]

Even though those sources mainly take into account the fields of competition and consumer law, where the 'supplementary private enforcement of rights granted under Union law in the form of collective redress is of value', it is possible to argue that the principles set out in them can extend to the field of the social rights granted under Union law and in particular to discrimination cases (ie, beyond consumer law).[67]

It is important to stress that Italian non-discrimination law has gone beyond the minimum originally required by EU anti-discrimination Directives (2000/43/EC, 2002/73/EC and 2004/113/EC).

As explained above, the legal regulation of judicial procedures for enforcing equality is very fragmented and diversified. For example, in the field of equality between women and men at work, Italian law, on the one hand, grants legal standing to different entities to bring a complaint of discrimination with the consent of the worker concerned, including trade unions, associations and organisations engaged in antidiscrimination law, or Equality Advisers (*consiglieri di parità*)[68] (Art 38 of decreto legislativo no 198 of 2006). On the other hand, in

[64] The aim of that Directive is 'to foster conditions for a socially inclusive labour market' and that 'objective would be hard achieved if the scope of the Directive were to be limited to only those cases in which an unsuccessful candidate for a post, considering himself to be the victim of direct discrimination, brought legal proceeding against the employer'.

[65] COM (2013) 401 final, 11 June 2013. See also the resolution adopted by the European Parliament 'Towards a Coherent European Approach to Collective Redress', 2011/2089 (INI).

[66] In addition, or as an alternative, the Recommendation states that the Member States should empower public authorities to bring representative actions (points 4-7).

[67] According to the Court's settled case-law, 'national courts are bound to take (recommendations) into consideration for the purpose of deciding disputes submitted to them, in particular where the recommendations cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding EU provisions': AG Sharpston delivered on 31 October 2019 Case C-507/18 *NH* v *Associazione Avvocatura per i diritti LGBTI – Rete Lenford*) ECLI:EU:*C*:2020:289.

[68] This proceeding is structured along the lines of Art 28 of the Workers' Statute: the Court can issue an immediately enforceable judicial order, not only to put an end to the discriminatory behaviour and to remove the effects the conduct has had thus far, but also to redress the damage caused by the discriminatory act. The failure to comply with the order or judgment in the trial of opposition is a criminal offence.

order to combat gender discrimination, in 1991, the legislator allowed *public* bodies (and only them) to bring proceedings on *their own behalf* (obviously without the approval of a victim) (Act no 125). The Equality body can act '*in its own name*' to challenge labour market discrimination (Art 37 of decreto legislativo no 198 of 2006)[69] and is entitled also to carry out conciliation proceedings (Att. 15(*1-a*), decreto legislativo no 198 of 2006).

Focusing here on discrimination due to trade union membership, as mentioned above, there is no doubt that this type of discrimination is also prohibited by the national non-discrimination rules on the ground of belief implementing European law. Indeed, the notion of '*belief*' to which the legislation refers must be interpreted in a broad sense so as to also include the meaning of the relationship between the social partners and the mode of relating to the employer.[70]

So, with reference to discrimination on this ground (but it is the same for age, sexual orientation, religion and disability), the standing to initiate legal proceedings – originally granted only to nationally representative trade unions – has been extended to any trade union, association and organisation 'representative of the infringed right or interest': Art 5 decreto legislativo 216/2003). However, it should be pointed out that the bodies engaged in non-discrimination law only have the power to bring actions before the courts as representatives of the victims because they have been granted the standing to act '*either on behalf or in support of the complainant*'.[71] Only, and exceptionally, in the event of collective discrimination, where no victims to support or represent are identifiable, does Italian law allow these entities to act on *their own behalf* (art 5, 2, decreto legislativo no 216/2003).

However, there are some gaps in Italian regulation on this topic.

First of all, the legislator did not lay down the criteria to determine *which* organisations have 'a legitimate interest in ensuring that the provisions of Directives are complied with' and '*are representative of the infringed right or interest*'. This requirement is very vague.

Only in some sectors does the law require registration in a register approved by ministerial decree (for example, discrimination on grounds of race and ethnic origin: Art 5 of Legislative Decree No 215 of July 9, 2003).

This means that the courts play a significant role: they have the power to undertake a double investigation to ascertain that: a) it is impossible to identify a complainant who claims to have been the victim of discrimination; and b) the

[69] See P. Widmann, 'La tutela processuale contro le discriminazioni con particolare riferimento ai d.lgs. 215/2003 e 216/2003', in A. Viscomi ed, *Diritto del lavoro e società multiculturale* (Napoli: Editoriale Scientifica, 2011), 632.

[70] For example, M. Aimo, 'Le discriminazioni basate sulla religione e sulle convinzioni personali', in M. Barbera ed, *Il divieto di discriminazioni basate sulla religione e sulle convinzioni personali* (Milano: Giuffrè, 2007), 48-49. Cf Corte d'Appello di Roma 9 ottobre 2012, available at www.dejure.it.

[71] See D. Schiek, 'Enforcing (EU) Non-discrimination Law: Mutual Learning between British and Italian Labour Law' 28(4) *The International Journal of Comparative Labour Law and Industrial Relations*, 502 (2012): 'equality rights are conceptualized as individual rights'.

association is truly representative of the interest in question[72].

However, for reasons of legal certainty, practicability, and simplicity, the legislator should not only require a direct relationship between the main objectives of the entity and the rights granted under European Union law that have allegedly been violated, but they should also clarify the criteria that the entity has to fulfil to be considered '*representative*' and be entitled to bring enforcement proceedings. Furthermore, in accordance with the EU Recommendation mentioned above, the organisations should be not-for-profit and, secondly, have sufficient capacity in terms of financial resources, human resources, and legal expertise to represent multiple claimants and act in their best interest.

Additionally, there is still no clear understanding of the relationship between the different enforcement proceedings before which collective interest bodies are entitled to bring a case in the absence of an identifiable complainant.

In cases of discriminatory acts against workers because of their union activity (dismissals, transfers) – whenever these measures indirectly affect the rights of the unions and prejudice their position within the firm – not only are trade unions entitled to bring an action under antidiscrimination legislation but also (according to the prevailing opinion among judges and labour law scholars) enjoy standing to initiate different proceedings on their own behalf under Art 28 of the Worker's Statute.

In both cases, collective bodies have the right to bring enforcement proceedings without acting in the name of a specific complainant or in the absence of a complainant claiming to have been the victim of discrimination.

However, as far as Art 28 is concerned, it is important to stress that this provision does not allow a union to bring an individual case before the Court or to act (also) on behalf of workers who may be injured by the employer's behaviour: unions act only in their own collective interest, and can do so even without or against the complainant's consent.[73]

Art 28 only protects collective interests, as interpreted by the trade union organisation itself, and the union has direct legal standing to initiate legal proceedings in order to defend its right; the interests of the individual workers affected by the employer's behaviour are not formally considered by the legislator in this article (the individual worker affected by discrimination being easily dissuaded from suing the employer for obvious reasons).

[72] Corte di Cassazione 20 July 2018 no 19443, available at www.dejure.it.

[73] For the Constitutional Court, it is a matter of 'interessi collettivi dei quali il sindacato è titolare e gestore autonomo, e con il quale esso non agisce in rappresentanza dei lavoratori colpiti dai suddetti comportamenti, tant'è che può esperire il ricorso anche in caso di inerzia o contraria volontà di questi', Corte costituzionale 24 March 1988 no 334, available at www.giurcost.org.

In the legal scholarship, see, for instance, M.G. Garofalo, *Interessi collettivi e comportamento antisindacale dell'imprenditore* (Napoli: Jovene, 1979), 203; M. Pedrazzoli, 'La tutela cautelare delle situazioni soggettive nel rapporto di lavoro' *Rivista trimestrale di diritto e procedura civile*, 844 (1973). More recently, see M. Falsone, 'Tecnica rimediale e art. 28 dello Statuto dei lavoratori' *Lavoro e Diritto*, 565 (2017)

On the contrary, in the case of antidiscrimination legislation, the union is involved in a different way because it is entitled to act on behalf of victims of discrimination: the power is bestowed upon it in the interest of the particular employee to not be discriminated against. Indeed, a trade union does not bring an action to defend its rights as an autonomous entity; it brings claims to defend the rights of persons to whom non-discrimination duties are owed.

The situation seems to be not very different from that of the class action introduced by the new Law No 31/2019.[74]

According to this law, class actions are available to protect 'individual homogeneous rights': the subjects entitled to bring the claim are, first of all, the individual users or consumers who have suffered damage due to the conduct of the defendant; non-profit organisations and associations listed in a public registry of the Ministry of Justice and whose purpose it is to protect such rights are entitled to bring the claim *on behalf* of class members.

As a rule, the subjects entitled to bring the claim in discrimination cases are also the individual victims. It is significant that collective actions can be initiated by representative entities and trade unions only in the absence of a complainant claiming to have been the victim of discrimination (Art 5.2, Legislative Decree no 216 of July 9, 2003).

In this case, it is the Italian legislation at issue which provides the right to take action (*locus standi*) because where there is no complainant or identifiable victim the standing of associations to act is *not* governed by EU law.[75]

As the CJEU has pointed out,[76] the aim of the national provision is to enforce the substantive rights that derive from EU law (protection from discrimination), thus trade unions are granted standing to sue on behalf of victims and can, therefore, claim individual rights.

In the case mentioned above concerning riders, the Bologna Court clarified that it is for national courts to verify that an association can satisfy the criteria established to have a legitimate interest to bring actions to enforce the rights and obligations stemming from Directive 2000/78.

According to the Bologna Court, there is no doubt that the aims of the Trade Union Filt Cgil correspond to those of an association with a *legitimate interest* to enforce the rights and obligations deriving from Directive 2000/78.

[74] On 12 April 2019, Parliament approved a new law expanding the scope of class actions. The new law amends the Code of Civil Procedure (CCP) by incorporating class actions into that Code (CCP, Art 840(a), para 1, added by Law no 31, Article 1(1)). Previously, class actions only appeared in Italy's Consumer Code, and applied only to consumer actions. Moreover, the Law provides that class actions are available to protect 'individual homogeneous rights', a broad category that can cover many types of disputes. (CCP Art 840(a), para 2). The legal basis for standing in a class action is set out in Art 140(a) of the Consumer Code; see G. d'Andria, '*Class/Collective Actions in Italy: Overview*' *Thomson Reuters Practical Law* (2019).

[75] See also A.G. Sharpston delivered on 31 October 2019, Case C-507/18 *NH* v *Associazione Avvocatura per i diritti LGBTI — Rete Lenford* n 67 above.

[76] Case C-507/18, CJEU (Grand Chamber), 23 April 2020.

In the case of trade unions, the legitimate interest to take a legal action is *in re ipsa*: as the right to strike is a typical expression of trade union activity, any form of direct and indirect discrimination in the exercise of this right might be considered an illegal interference with union freedom.

This means that in all discrimination cases the individual and collective spheres are closely related: in fact, unions, and generally speaking legal entities, can have their own legitimate interest, which is related to the statutory aim of the entity and substantive rights that derive from EU law, provided that the employer's behaviour could cause direct prejudice to both interests.

From what has been explained so far it follows that the special emergency procedure of Art 28 of Act No 300, which can be evoked in Italy to penalise and remove discriminatory acts, has essential features similar to those of procedural remedies under antidiscrimination legislation to enforce substantive rights deriving from EU law.

It would be wrong to focus the attention only on the different legal standing which the union has to initiate legal proceedings in each of two procedures because what matters is that, on one hand, prohibited conduct in case of discrimination on the ground of personal belief is capable of simultaneously harming both workers' and unions' rights and, on the other hand, the Supreme Court is of the opinion that the special procedure of Art 28 of Act no 300 can be used not only in all cases of employer's behaviour capable of limiting and violating the unions' rights, but also in case of acts of discrimination carried out by the employer directly against individual employees as long as they indirectly affect the rights and interests of the unions.[77]

Therefore in case of dismissals, transfers or other discriminatory acts against workers because of their union activity, the system provides the right to take different actions because the employer's behaviour affects both individual and collective interests.

Even though the parties' *petitum* (ie subject of the party's claim during the trial), and *causa petendi* (ie the ground of a claim) can be different in part, there is no doubt that the two procedural remedies can mutually influence each other so that the action proposed under antidiscrimination legislation may to a certain extent have some effects on the other and vice versa.[78] In other words, it is not

[77] T. Treu, *Condotta antisindacale e atti discriminatori* (Milano: Franco Angeli, 1974), 17-19; U. Romagnoli, 'Aspetti processuali dell'art 28 dello Statuto dei lavoratori' *Rivista trimestrale di Diritto e procedura civile*, 1309 (1971).

[78] This approach could be useful considering that some gaps can be found also in art 28 of Workers' Statute. For example in some judgments courts held that this provision does not allow a union to act (also) on behalf of self employed or bogus self employed workers. According to these questionable rulings Art 28 may be used only by trade unions of employees who carry out their work in a subordinate position. See Tribunale di Firenze 9 February 2021, decreto *Nidil CGIL Firenze, Filt CGIL Firenze e Filcams CGIL Firenze* v *Deliveroo Italy s.r.l.*, available at www.dejure.it; According to B. Caruso, *Statuto, conflitto, relazioni sindacali e organizzazione del lavoro, nel settore pubblico, oggi*, WP C.S.D.L.E. 'Massimo D'Antona'.IT – 437/2021 (available

possible to mark a clear dividing line between the two procedural remedies: the prohibited conduct is the same because there is in fact a structural interdependence between collective interest and individual interest.

This idea is in line with a new approach in the Court's case law. Indeed, in the recent ruling mentioned above (no 1/2020), the Italian Supreme Court also argued that the special allocation of the burden of proof applies in all discrimination cases with reference both to individual and collective claims, including the emergency procedure provided for in Art 28 of Act no 300 (Worker's Statute), which enables trade unions to sue employers in their name in any case of anti-union activity on the part of the employer.

It may appear striking that the Court uses a special guarantee, designed to facilitate individual litigation and improve the effectiveness of the access to justice for victims of discrimination, in an emergency procedure like that provided for in Art 28.

As explained above, this type of action – like others provided in other jurisdictions[79] – is still highly problematic because trade unions, due to their role, can only bring a case to defend their collective interest[80] but cannot do anything on behalf of individuals.

However even though a trade union is not allowed to initiate proceedings to defend interests other than its own,[81] the individual and collective spheres could be considered closely related, especially where the individual workers have suffered damage due to the conduct of the defendant. This standpoint will contribute to the building of a coherent body of EC non-discrimination law and boost concomitant effective protection against discrimination.

VI. Conclusion

The in-depth analysis of the Italian case law on discrimination demonstrates

at http://csdle.lex.unict.it) 'lo statuto è norma di attuazione di tutte le norme della Costituzione che riguardano il lavoro tra cui anche l'art 35 nel cui perimetro rientra sicuramente il lavoro autonomo, a maggior ragione, se economicamente dipendente; che, infine, rientra nel principio e nella prassi dell'autonomia sindacale, tutelata dall'art 39 primo comma, la scelta dell'interesse collettivo da tutelare con gli strumenti che mette a disposizione l'ordinamento statutale tra cui, non ultimo, proprio l'art 28 dello statuto'.

[79] For example, in Germany according to para 17.2 AGG, if an employer commits a 'gross violation' of the provisions concerning protection against discrimination, trade unions and workers' councils are granted the standing to bring a discrimination case and are entitled to apply for an injunction to stop the violation of rights granted under this Act (the so-called *Unterlassungsansprucht*)

[80] This does not concern individual rights related to the order forcing an employer to stop the discriminatory behavior (*Unterlassung*) because para 17.2 allows a workers' council or a trade union to apply for a judicial order requiring the employer to stop the behaviour or to adopt or to remove specific measures.

[81] BAG 1 ABR 75/88 AP Nr. 53 zu para 112 BetrVG 1972. E. Kocher, H. Pfarr, *Kollektivverfahren im Arbeitsrecht. Arbeitnehmerschutz und Gleichberechtigung durch Verfahren* (Baden-Baden: Nomos, 1998), 51.

that Italian equality law still does not seem fit to challenge our increasingly algorithmic society.

In Italy the courts have held a view that has long hindered the expansion of antidiscrimination protection: until some years ago, for example, they still applied to dismissals the regulatory model laid down in the general rules of civil law, ie Article 1345 of the Italian Civil Code. The implications of such an approach seem odd because the courts – through reference to the said Art 1345 – came to reject the view that the more favourable regulation on the burden of proof is applicable precisely in the case in which discrimination reaches its peak, namely where the loss of a job is at stake: in this case, the employee was required to prove that the discriminatory reason is the only and determinant one when the decision was made, so that the existence of another reason for dismissal could allow the employer to avoid the test of whether dismissal is discriminatory, even though there was a ground of discrimination. As a result, the claimant's burden of proof for establishing a claim for direct discrimination had become too heavy.

The increasing use of algorithms and AI, especially in labour market recruitment and selection processes, can adversely affect the right not to be discriminated against, enshrined in the EU Charter of Fundamental Rights, because of specific characteristics of these systems, such as opacity, complexity, dependency on data, and autonomous behaviour. In order to address the challenges and concerns raised by these systems, recently, EU institutions launched some important initiatives: on 21 April 2021, for example, the EU Commission published a proposal[82] which sets out a robust and flexible legal framework aimed at prohibiting certain AI practices, laying down requirements for high-risk AI systems and obligations for the relevant operators, and laying down transparency obligations for certain AI systems. It is significant that according to the Commission the areas in which the use of AI systems deserves special attention are employment, worker management and access to self-employment: AI systems used in these areas should

> 'be classified as high-risk, since those systems may appreciably impact future career prospects and livelihoods of these persons'.

But the need to ensure the compatibility of AI systems with fundamental rights may also suggest the development of new techniques of protection against algorithmic discrimination.

The objective could be to create a legal framework that provides a consistent and clear division between existing key concepts of discrimination, and in particular direct and indirect discrimination.

Until now the jurisprudence of the Italian courts on this issue has been

[82] 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 (COM(2021) 206 Final).

problematic: even though an algorithm can be designed – intentionally or not – in such a way that the selection criterion used is a direct consequence of biased labeling, there has been a reluctance to classify the case as direct discrimination.

This approach is in line with the emerging consensus in the literature on algorithmic discrimination, where numerous legal scholars have claimed that the concept of indirect discrimination would be a better conceptual fit for algorithmic discrimination than that of direct discrimination where AI systems are not sufficiently transparent, explainable and documented. However, it is important to emphasise the danger of an improper and extensive use of the legal concept of indirect discrimination in this regard. The statutory definition of indirect discrimination includes a wide possibility of justification defence, either by reference to a test of proportionality or business necessity or some other balancing mechanism, and this broad scope of justification (which has doubtful moral foundations) increases the risk that the victim of discrimination by algorithms is left in legal uncertainty.

However, in AI systems used in employment it might be thought that, if the ground for the decision is one hundred per cent correlated with an adverse effect on a protected group, the less favourable treatment should fall under the category of 'disparate treatment' as it is somehow 'intrinsically' discriminatory.

On the other hand, the development of algorithms in employment decision-making and automated hiring platforms also raises the troubling question of the effectiveness of antidiscrimination protection.

The first rulings decided by the courts show that there is a need for adequate safeguards for victims of algorithmic discrimination: generally, it is extremely difficult, and sometimes quite impossible, to establish a *prima facie* case of discrimination without access to the data and the algorithms. Antidiscrimination law alone does not provide such access.

However, antidiscrimination law could help to fill some gaps and the weaknesses of some Italian procedural remedies, as until now there is still no clear understanding of the relationship between the different enforcement proceedings before which collective interest bodies are entitled to bring a case in the absence of an identifiable complainant.

Some types of collective action like that provided for in Art 28 of the Worker's Statute are still highly problematic because trade unions, due to their role, can only bring a case to defend their collective interest but cannot do anything (only) on behalf of individuals. Furthermore, according to some recent rulings the legal standing to initiate this collective action is not granted to trade unions whose purpose it is to protect the collective interests of self-employed or bogus self-employed workers. Therefore, there is still a general need to improve the effectiveness of the access to justice for victims of discrimination and in this regard antidiscrimination law could play a crucial role.