THE EMPLOYMENT RELATIONSHIP, AUTOMATIC DECISION AND THEIR LIMITS. THE REGULATION OF NON-UNDERSTANDABLE PHENOMENA

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ABSTRACT

There is currently a debate about the problem of possible limitations to the decision making of workers/employees based on automatic systems that in the end caused choices to not be made by humans. This issue has now become extremely relevant, especially in contemporary labour law, and for quite evident reasons. However, law scholars are the victims, not the protagonist of this debate since they must discuss the regulation of profiles and elements which they do not understand, not even superficially. This is the basic question: how can law interact according to reason towards decision-making methods based on mathematical resources so complex even their fundamental features are impossible to understand? This can very well be called a challenge to regulate the unknown. Can there be a rational regulation of a phenomenon incomprehensible to law and its scholars?

KEYWORDS: Automatic systems, contemporary labour law, decision-making, methods mathematical resources, decision making of workers/employees.

1. THE EMPLOYMENT RELATIONSHIP AND DECISIONS BASED ON SOPHISTICATED ALGORITHMS

There is currently a debate about the problem of possible limitations to the decision making of workers/employees based on automatic systems that in the end caused choices to not be made by humans. This issue has now become extremely relevant, especially in contemporary labour law, and for quite evident reasons. However, law scholars are the victims, not the protagonist of this debate since they must discuss the regulation of profiles and elements which they do not understand, not even superficially. This is the basic question: how can law interact according to reason towards decision-making methods based on mathematical resources so complex even their fundamental features are impossible to understand? This can very well be called a challenge to regulate the unknown. Can there be a rational regulation of a phenomenon incomprehensible to law and its scholars?

The issue does not only concern the work organised by the so called digital platforms, but also (and above all) the industrial and commercial company structures with a more traditional organisation. The continuity of the relationship and the inclusion of performance in a business context makes automatic decision paths a common feature of many employment relationships, and obviously companies exploit this feature with increasing frequency. Which regulatory strategies can be adopted with automatic decision-making systems? Barring the anachronistic

prohibition of similar mechanisms, since Luddism has never had much space in Western thought, the traditional idea was to force the company to disclose the basic assumptions and premises employed by these automatic evaluation systems so as to allow the workers to understand how they are judged. The public availability of said data would help workers/employees to react accordingly, but this strategy has two obvious limitations. On the one hand, given the current structure of the civil trial, even if the company revealed the way automatic judgments were made, verifying whether their statements are true would have unrealistic costs and times and, therefore, there would be no realistic penalty for those who lie. It is difficult to calculate whether and to what extent companies are tempted to conceal their evaluation systems behind convenient descriptions. However, due to the complexity of the mathematical models and the nature of a civil law trial, even if the companies presented unreliable theses, said unreliability would never be discovered, in the ordinary proceedings of a judgment, in which a reconstruction of the setting of an algorithm is actually impossible, due to the very nature of the issue. This statement may surprise and the demonstration is not easy, especially for those who have no experience of a civil law trial. However, the conclusion is obvious, because a trial is not the place where such complex scientific questions can be explored. The referring to technical advice and consultancy follows well-established models that are however based on issues that are quite different from the installation of an algorithm and, due to their very nature, these problems cannot be defined with traditional procedural schemes.

On the other hand, it is indeed possible to discuss the protection afforded to the workers from providing information beforehand on the significant elements for the automatic assessment; the idea is trying to recreate organizational situations similar to those where the decisions entrusted only to men are made, while the technological innovation generates a completely different context. When examining an algorithm, the position of those who feel the effects of an automatic decision is not comparable to that of those who are evaluated by a human, as the latter is ruled by emotions and by that complex articulation of opinions and suggestions typical of our mind. The algorithm cannot be considered similar to a subjective decision, due to the profound difference in the way the decision is made.

The law system must accept automatic decisions for what they are, without thinking of dealing with them by forcing them to take features or components of the traditional ones. Modern technologies and the systems built with them cannot be regulated by reusing schemes and duties designed for natural persons and, first of all, any norm must be discussed on the basis of its effectiveness. Since there cannot be a decision made by a judicial body on the structure and working of an algorithm and our civil trial is not ready to face such a challenge in general (let alone at the costs reasonably affordable by an employee), the law system must openly state its acceptance of reality. Which goals can be pursued in the context of the employment relationship and especially of relationships based on continuous collaboration , so that the inevitable recourse to automatic decisions is compatible with the protection of the workers' rights and demands? Very often, when discussing this topic, many ask for a sort of "humanization" of technologies and their methods, and while this is a fascinating perspective from an ethical point of view, it is altogether not possible on the practical side.

Regardless of the fact that, no matter how one can imagine it, an algorithm is different from human reasoning, if only because the latter is never neutral in considering the elements submitted to its analysis as it is influenced by internal conflicts and by the impact of emotions, as well as of whatever element may be beyond the reach of a precise calculation, one must ask what can we actually learn about the way automatic decisions work during a civil trial - and the

answer is an utterly disheartening one. Even if it were possible to set up an analysis on the algorithm and even if we overcame the momentous complexity of the issue, using all available experts and having an acceptable amount of time for the process, the costs would be unsustainable in any labour dispute, thus going against the interests protected therein. For this reason the automatic decision processes are impossible to understand especially considering the actual dynamics of the disputes, because it is not possible to clarify how these processes actually work and, in fact, the only information one has is the version provided by the companies, whose credibility cannot be verified. Everything that lies beyond the empirical analysis of the judge is presented as a mechanism that cannot be dominated, a kind of unknown terrain which, on the one hand, conditions the development of the employment relationship and on the other hand, escapes full understanding because the way it works is described by the company without anyone else knowing whether this description is actually true.

2. THE APPROACHES AND TRENDS OF EUROPEAN LAW AND THEIR STRUCTURAL LIMITS

Article 22 of the European Union regulation n. 679 of 2016 only apparently prohibits decisions based on automatic processing, since it allows them in the execution of contracts. In fact, on the one hand, art. 22, paragraph 1, has a generalist approach because it states the principle that the data subject has "the right not to be subject to a decision based solely on automated processing", a principle which is reinforced by a clarification that is difficult to interpret, whereby the prohibition operates if the decision "produces legal effects" which concern the interested party or which "similarly significantly affects him or her", with a significant space left to subsequent judicial interpretation. However, for the employment relationship, the main problem is caused by art. 22, paragraph 2, lett. a), which states that the principle of paragraph 1 is not applied if the "automated decision [...] is necessary for entering into, or performance of, a contract between the data subject and a data controller;" and this is the case of an employee, which means we can reasonably expect this provision to be applied extensively, both for the decisions taken in a pre-hiring selection phase and to those concerning the subsequent employment.

Nor can we imagine a restrictive reading of the concept of "necessity" of art. 22, paragraph 2, lett. a), because the behaviour the sentence refers to is not "indispensable" objectively but rather it is so only within the limit of a company assessment which is therefore driven by the interest of the company, albeit inherent in the stipulation or implementation of the agreement, and of this reading there are significant traces in motivation (point n. 71: "decision making based on such processing, including profiling, should be allowed," albeit regulated pursuant to art. 22). If, then, in an indeed unpredictable way, art. 22, paragraph 2, lett. a), had a selective exegesis by the judges, the condition of the workers would not improve much, since the determination based on the algorithm would still be allowed in the same way as art. 22, paragraph 2, lett. c), for which "the data subject's explicit consent" is enough.

The worker, who find themselves at the apex of social weakness at the time they enter into an employment contract (as they are finally getting a job which often they have sought for a long time) cannot exercise any negotiating power and cannot offer resistance towards the company, which requires consent to automatic decision-making processes and, according to a well known scheme in labour law, with the minimum emphasis on forms of protection based on consensual instruments. The company's interest in introducing binding evaluations based on algorithms is fully satisfied, as far as the employment relationship is concerned, by art. 22, paragraph 2, lett.

c), since its full, straight implementation makes any rigorous and restrictive interpretation of art. 22, paragraph 2, lett. a) irrelevant.

Nor can we see a significant rebalancing of the positions of the employer and the employee carried out by art. 22, paragraph 3, whereby, in the event of implementation of art. 22, paragraph 2, lett. a) and lett. c), "the data controller shall implement suitable measures to safeguard the data subject's rights and freedoms and legitimate interests" of the person involved, first of all due to the generic nature of the provision, which lacks any limiting specification (especially so when complex mathematical tools, whose functioning has no realistic possibility of being revealed in a judgment and, even less, of being understood in advance are used). The rule does not specify any constraint and, if any, refers to the judicial knowledge, so that forms of reconciliation between opposing expectations can be identified, with a deferred effectiveness over time (that is, at that time where there will be a significant jurisprudence) and limited by the impossibility of dominating the action of the algorithms.

Not surprisingly, art. 22, paragraph 3, introduces a minimum protection, indicative of the low value of the initial statement of principle, since it is expected "at least" (and the word is important, as it reveals the creation of… a sort of rear guard!) "the right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision." As can be deduced from point n. 71 of the reasons, the three limitations were not designed for the employment relationship, but for commercial activities and for large-scale sales strategies, in particular electronic marketing and sales, with the identification of possible buyers of general consumer goods. In fact art. 22, paragraph 3, has no chance of affecting the company organisation in any way since, in the first place, requesting the so-called "human intervention" does not change the impact of the "automated decision", not only because the personal evaluation can be subsequent to that produced by the mathematic mechanisms, but also because human evaluation can very well entail a simple confirmation of the judgment and a subsequent endorsement of the results achieved, without causing an amendment or erasure of the results nor a change in either their genesis, or in their consequences.

Secondly, the same remarks apply to the employee's right to "express his or her point of view", with a debate of little scope and depth, as it is based on the assumption of the determination, and destined to limitedly condition the "human intervention", so that both are weak and of limited scope, in the frenetic organizational dynamics of most of the productive contexts. Nor is of any help the principle that the worker can "challenge the decision", since this is taken for granted in every system, which, however, admits judicial knowledge of the company's unilateral acts. As far as out-of-court oppositions are concerned, there is still no immediate effect on the exercise of corporate power, which would make the condition of the employee, considering the expensiveness of the process far better off due to the poor possibility of an actual, valid court decision on the functioning of the algorithms.

Indeed, if the company wished (and it is not always plausible), it could easily use the "special categories of data" of art. 9, paragraph 1, since, pursuant to art. 22, paragraph 2, the prohibition is apparent, as the exception of art. 9, paragraph 2, lett. a), and the prohibition is removed in case of consent of the so-called data subject. For the very reason that the worker is in serious contractual weakness at the time of hiring, he/she is led to consent and can rarely exercise resolute opposition. The situation is not actually much rebalanced by the last part of art. 22, fourth paragraph, for which, for the purposes of the evaluation and of the "special categories of data", there must be "suitable measures to safeguard the data subject's rights and freedoms

and legitimate interests" once again with general expressions of limited limitation and with the reference to a dubious, slow-to-form jurisprudential initiative conditioned by the scarce ability to understand the phenomenon.

Nor is there much to expect from the national regulations which so far, as it happened to Italy, have confirmed the European forecasts, also due to the fear of long-range impacts on international competition, and damage to the companies' ability to compete in each country, as the companies are not eager to see restrictions or compromises on the adoption of innovative organizational techniques. Article 22 as a whole is designed to regulate phenomena different from those of the corporate structure, especially for the protection of the consumer, subject to the interference of others, but, in any case, as the depositary of the economic resources that feed the market, in a position of greater power than that of the employee. Even if art. 22 can give some protection to whoever is subject to capillary commercial actions based on the collection and cross-referencing of information, the same does not apply to the workers, who are rarely against expressing ... any consent, for finding the long-awaited professional position.

3. THE USE OF ALGORITHMS IN EMPLOYMENT RELATIONSHIPS, THE CONSENSUS PRINCIPLE, TRADE UNION ACTION AND ADMINISTRATIVE ACTION

Consistently with more general considerations relating to the meeting between labour law and technological innovation, art. 22 of the European Union regulation n. 679 of 2016 fails to provide effective protection to the workers, due to its trust in strategies based on the consensual principle, despite the evident lack of contractual power of the employee. As labour law has known very well, in any system and for almost a century, the consent of the worker can be obtained easily as he/she has few resources to oppose the request of the company, so that protection objectives of standards such as the aforementioned art. 22 are useless in a context of strong psychological pressure, which is the one in place in any company, regardless of its mode of action and of its economic resources.

The European Union regulation n. 679 of 2016 does not significantly strengthen the weak safeguards of art. 22 for "automated decisions". In particular, the adoption of the codes of conduct of art. 40 is voluntary and, if they can identify (art. 40, paragraph 2, lett. b) "the legitimate interests pursued by controllers in specific contexts;" the benefit is possible and limited, if only because the unilateral acts are conceived by the person carrying out the treatments or by representative organizations, with control (art. 41) and certification procedures (art. 42) which in any case come after the original status of free choice of setting codes and without direct relevance to the theme of "automated decisions".

In this regard, at least in Italy, there were no significant interventions by the supervisory authorities (art. 51 and following of the European Union Regulation n. 679 of 2016) and this can be easily explained, for several reasons. First of all, with regard to deliberative power, it is difficult to devise and develop an overall regulation, at least at a national level, due to the heavy sector-specific character of each IT solution, with a high sophistication and strong personalization. Although in the workplace, the possible decisions pertain to infinite profiles and their setting is related to organizational models of various companies who, often, are in competition, and have an obvious interest in extreme confidentiality. In addition to that so far, although the topic has been known and relevant for over twenty years and has led to numerous scientific reflections, there have not been many reports of employees, with regard to their fate,

both for the difficulty of understanding the functioning of the algorithms, both for the psychological pressure inherent in the desire to acquire or to maintain a coveted job.

Not surprisingly, in December 2019, on the basis of news published in the press, there has been a strong challenge to the use of decisions obtained with the use of algorithms by a company from northern Italy, but the initiative was collective, proposed by a trade union association and, based on what has been understood, without immediate complaints addressed to the control body, but rather with threats of legal action. In particular, the company has been accused of exasperating the work rhythms, with methods of detecting individual production linked to rewarding systems. If these reports are true, they confirm the low confidence of the employees in the Italian Authority, a low confidence which to be honest has an implicit endorsement in the regulation, whose articles 57 and 58 summarize the functions of the control body, but contain no indication about the execution of art. 22.

Article. 88 of the regulation envisages a more stringent protection "in the context of employment", but does not expressly dwell on the implementation of art. 22 (instead mentioning the "transfer of personal data within a group of enterprises engaged in a joint economic activity" and the "monitoring systems at the work place") (art. 88, paragraph 2). The regulation authorizes implementation of stricter national laws and regulation, even with the intervention of collective agreements, but, at least in Italy, there is no regulation about "automated decisions". In art. 88, paragraph 2, the most significant prescriptive fragment is given by the reference to the incentive of the "transparency" of the "processing", in line with the traditional idea for which the setting of the processes leading to the "automated decision" should be known, but, for all the reasons set out and for its indirect reference to the consensus principle, this strategy is weak and leaves companies without effective restrictions.

There is not much confidence in union action, both because, in the current macroeconomic situation, it is forced to direct its initiatives towards the protection of the minimum wage and, if ever, towards its partial improvement, because the cultural complexity of the problem makes it hostile and resistant to collective examination, since any measure targeting national contracts is blocked by the personalized character of each corporate organizational project and, in this context, there are rarely the conditions for balanced negotiations. Unsurprisingly, in the hypothesis mentioned in December 2019 by the press, the complete failure of the dialogue with the company was stated clearly and, thanks to the wide freedom granted by art. 22, the latter can be authorised to exercise its power in technological innovation and to introduce extreme "automated decisions" solutions.

Article 22 approaches the phenomenon with a transversal logic, as if every aspect of it, especially on the technological side, could be regulated basing on its intrinsic features. This cannot be done. Since labour law is connected to the principle of non-negotiability of the regulations of the law and of collective agreements, it requires a selective strategy, which takes into account its issues and imposes protection models which are based on the selection of realistic and limited objectives with targeted actions. For these reasons, dissatisfaction with article 22 should coincide with the search for new paths, especially if it affects the growing importance of the issue.

4. AN ALTERNATIVE PROPOSAL ON THE REGULATION OF AUTOMATIC DECISIONS IN THE EMPLOYMENT RELATIONSHIP

The company must be free to use mathematical tools of its choosing for decision-making, but the laws must set down and codify rights with binding prerequisites for fundamental measures. An oppositional strategy, as far as technical innovations are concerned, cannot lead to lasting success, even more so if the phenomenon to be regulated cannot be credibly and effectively regulated by the judges. The laws and regulations should divide the possible automatic choices into two veins, one left free for the unconditional application of the mathematical tools, the other strictly regulated, because it pertains to the necessary protection of fundamental interests of the employee, in which the automatic interventions can create disturbances in the implementation of protected values.

In these areas, regardless of the results of the automatic analyses, the decisions must correspond to selected reasons, and the employer must provide a demonstration. To comply with the law the employer should set their computer aids (however sophisticated) using a conditioning evaluation grid as a reference and they should be able to prove compliance to said grid in court. In other areas, the employer would be free to use their preferred decision-making strategies. The protection would be selective and would not concern any decision, but only those on crucial assets, of extreme importance for the worker. This stronger but limited protection would force companies to compare their merits with mandatory regulatory indications. In other words we should move from regulating all automatic decision-making procedures to a much stronger protection only for some, for example those regarding pay, assignments, transfers, training opportunities and dismissal.

The protection based on the explanation of decision-making methods is illusory; the worker cannot possibly dominate the algorithms that surround him/her and that are used for decisions against him. We should rather, with a more modest but also more effective approach, be content with substantial constraints on the decisions made in some matters, in which, free to process information, the company should motivate according to predetermined selection lines, while remaining free from constraints in other areas. Two alternative routes should be created, one regulated by laws and norms that pertain to the object of the evaluation and the other left in an empty space by law, which makes application of the preferred automatic solutions possible.

Let us give some examples; if a system has to select the employee worthy of a prize, it is foolish to think that the decision-making processes may be made clearer by disclosing in advance the parameters used for setting the algorithm, it goes without saying that if it is complex, it uses many information and applies to a large number of employees. In the event of a dispute and in the context of a civil trial, it will never be possible to clarify the actual functioning of the algorithm and, therefore, to establish whether the statements made by the company are true or whether, on the contrary, the information given on the setting of the selection are incorrect. Nor can one think of banning such an initiative, since the strategy would be anti-historical. A different case would be whenever, in a litigation started by a dissatisfied worker, the company is forced to demonstrate positively (with the ordinary procedural instruments) the fact that the choice corresponds to the criteria established by law. This solution could be excessive in the cases pertaining to rewards, since these would be about a benefit exceeding the minimum remuneration and connected to individual merit.

But what about the cases of transfers to workplaces located very far from one's hometown or promotions? In such cases, little it matters to establish which parameters are used by the algorithm, since, in fact, it is impossible to verify in court a similar statement. Having established the legal limits to the decision, the company must be free to resort to the preferred technological solutions but, in case of a trial, it must prove to have based its decision on a motivation consistent with the laws in force. For example, with regards to the transfer, the law can prescribe that only management profiles shall be considered for transfers and that, when evaluating profiles meeting the professional requirements, family requirements shall be taken into account.

Consider the case (far too “popular”) of the so-called digital platforms and of the mechanisms for selecting workers in charge of a service. Even if the company owning the so-called platform declared which facts are relevant for the purposes of the decisions taken with complex mathematical tools, one would never be able to establish in judgment the veracity of such statements and any attempt would have appalling costs, in no way proportionate to the economic interest of the individual worker. The law must take an opposite stance; the company decides as it wishes, with its instruments, but, in the event of a reliable objection, based on data that reveals an objective problem, it must demonstrate that no discrimination has been made and that the functioning of the algorithm does not affect subjects basing on of sex, religion, race, and so on.

In case the collaboration is an articulated and continuous, prolonged one, such as that typical of subordinate employment, opportunities for decisions based on automatic choices multiply. Precisely for this reason, the legal response must be selective, since an overall regulation of the court decisions entrusted to algorithms would presuppose their precise understanding and demonstration in court of their functioning, but such results cannot be achieved, nor are there hopes or actual prospects of overcoming these obstacles, since, if well understood, the complexity of the IT resources is destined to increase making them increasingly difficult to regulate. If one wanted to mitigate the difficulties proposed by the technological context, the selection of targeted and limited objectives is the first step, as it allows focusing one's attention on issues in which the goal of protecting the employee is more evident, without having to engage in an all-compassing, and therefore only generic, law.

In fact, if one wanted a law to hope to be fruitfully applied, one should take into account not the modern technological resources, but the specific aspects of the employment relationship. On these issues, the company must be forced to justify its decisions, in the form of a predefined and circumscribed group of elements, considered consistent with the objectives of the system. The passage from regulating algorithms to regulating certain areas of the employment relationship shifts the focus on safeguarding the person from decisions that have a harmful potential and on the basis of traditional legal reasoning and analysis.

5. THE REASONS OF LABOUR LAW AND THE REASONS OF TECHNOLOGY

The problem of automated decisions is a sign of a more complex comparison between technological transformations (and their impact on company organizational models) and labour law. The latter, left without a direction, because it is used to regulating a consolidated structure, in the face of a range of solutions very different from each other, with that originality allowed precisely by the extension of computer mechanisms that leave wide berth to the initiative to the employer. The solution cannot be a "transversal" approach to regulation of the so-called "data

processing" and the insistence of the Community system demonstrates the little awareness of the ineffectiveness of this approach, with regards to the protection of workers. The European Union regulation n. 679 of 2016 does not grasp the specific profiles of their condition and looks at the company's computer and knowledge resources without distinguishing the different contexts in which they are applied, in particular without seeing the typical protection needs of employees.

On the one hand, the authority of the employer creates the premises for the repeated appearance of decisions destined to become "automated" to an increasing extent and without any reasonable chance of actual judicial control. On the other hand, the continuity of the relationship exposes the interests of the employee to stronger threats just because of its length and its being characterised by constant technical evolution, with modifications of the tools that becoming even more significant the longer the relationship lasts. Furthermore, the social weakness of the worker does not allow him to effectively exercise the contractual powers recognized to him, in particular by the regulation of the European Union n. 679 of 2016, and the collective agreements are weakened by the lack of information and action capacity of the trade unions, unable to condition the organizational change, of which they are mere spectators.

The error of European Union regulation no. 679 of 2016 lies in its wanting to regulate information in all areas, without reflecting on the needs of the employment relationship, in which, especially regarding the "automated decisions", what needs regulation (with an accurately selective approach) is the powers of the employer, rather than their analytical background, which escapes the judicial understanding. Rather than trying to change organizational paths, if labour law wants to have hopes of success it must look at the individual provisions influencing the employee's sphere. The problem is not the application of the algorithms, but the justness of the decisions stemming from them and, for this purpose, it is necessary to identify each decision's binding assumptions, with the company having the burden to prove the consistency of its decisions with these assumptions.

As much as this may displease some, there is no possible resistance to technological change in the company and the laws and regulation must be careful not to set such an unachievable goal. There is another goal to pursue, that is to condition the exercise of the powers, which can exploit the knowledge or indications governed by complex mathematical models, but must also, in court proceedings, be able to generate an argument consistent with the regulatory parameters and submitted to the judge for the final decision. Although their background is "automated", decisions fall within the province of man when they become the possible subject of a judgment and this happens if the law creates a grid of significant factors, which the company must confront itself with and with respect to which there is the possibility of a coherent appreciation. In essence, corporate decision are in any case human decision not if they are forced to renounce mathematical elaborations, but if, in order to be legitimate, they must respect axiological parameters that can be dominated by the judge and mandatory for the setting and conclusion of the decision-making process itself.

In this, labour law rediscovers its original nature of containing the authority of the company, rather than changing organizational strategies, despite the fact that the illusion of being able to do the latter is still a popular one. The core and focus should not be the corporate structural criteria, but the prerequisites for unilateral powers affecting the position of the worker. Modesty in the selection of ends must be combined with realism in setting the rules, so that they can be effective and contribute to the rebalancing of the reasons of companies and employees.

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