



European
Social
Charter

Charte
sociale
européenne



**EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX**

4 June 2018

Case Document No. 6

Irish Congress of Trade Unions v. Ireland
Complaint No 123/2016

**FURTHER RESPONSE FROM THE GOVERNMENT
ON THE MERITS**

Registered at the Secretariat on 16 April 2018

EUROPEAN COMMITTEE OF SOCIAL RIGHTS

Complaint Number 123/2016

Irish Congress of Trade Unions

-and-

Ireland

SUPPLEMENTAL RESPONSE OF IRELAND

16 April 2018

Introduction

1. On 18 July 2016, the Irish Congress of Trade Unions (ICTU) lodged a collective complaint (“*the Complaint*”) against Ireland with the European Committee of Social Rights (“*the Committee*”), in which it is alleged that Ireland is in breach of its obligations under Article 6 of the European Social Charter 1996 (“*the Charter*”) in respect of the entitlement of certain categories of self-employed persons to engage in collective bargaining. On 8 September 2017 Ireland submitted a comprehensive response to the Complaint in which the enactment of the Competition (Amendment) Act 2017, was described and in which Ireland denies any violation of Article 6 of the Charter.
2. The Competition (Amendment) Act 2017 (*‘the 2017 Act’*) provides a legislative framework under which classes of self-employed persons may be exempt from Section 4 of the Competition Act 2002 and therefore be entitled to engage in collective bargaining. It is the position of Ireland that arising from the significant legislative change brought about by the enactment of the 2017 Act no violation of Article 6 arises and the complaint ought to be declared to be unfounded.

3. On 17 January 2018 ICTU registered a response to the submission of the Government of Ireland with the Secretariat of the Committee (*the Response*). Ireland was notified of this Response by letter of 9 February 2018 and, in accordance with Rule 31(3) of the Rules of the European Committee of Social Rights, has been given an opportunity to submit a further response to the complaint.
4. In the Response ICTU make two central arguments. Firstly, that the 2017 Act gives no protection against the law of the European Union, an argument that is premised on a criticism that the 2017 Act does not purport to amend the Treaty on the Functioning of the European Union (*TFEU*). Secondly, ICTU argue that the 2017 Act is deficient in a number of specified ways.

The 2017 Act gives no protection against European Law

5. The response submitted by ICTU argues that the 2017 Act does not preclude the application of European Competition Law and therefore “*will not and cannot afford protection against Article 101 of the Treaty*”. It is respectfully submitted that an argument of this nature (as set out at Paragraphs 5.5 of the Response) is misconceived and should more properly be seen as an attack on the law of the European Union and not a complaint in relation to any domestic law of Ireland. It is the position of Ireland that the argument made in this regard is inappropriate and ought to be disregarded by the Committee.
6. The complaint that has been lodged by ICTU is as against Ireland as a Contracting State to the Charter. Ireland has submitted a response to that complaint as it relates to compatibility of its domestic law with Article 6 of the Charter. The compatibility of Irish domestic law is the only matter that is properly before the Committee and, in these circumstances, it is respectfully submitted that it would be inappropriate for the Committee to engage in any consideration of the compatibility aspects of European Law, including Articles of the Treaty, with the Charter.

7. Any complaint of alleged incompatibility of the TFEU or European Legislation introduced on foot of the TFEU with the Charter could only properly be brought against the European Union itself, were the Union to be a party to the Charter. As the Union is not a Party to the Charter, the Committee lack jurisdiction to consider any question of compatibility of European Law with the Charter. Further, it would not be appropriate for Ireland, as an individual Member State, to purport to defend the compatibility of aspects of European Union Law with the Charter. The defence of European Law as regards any alleged incompatibility with the Charter would, more properly, be a matter for the European Commission who is not a party to this complaint. It would not be appropriate for a single Member State to purport to express the views of all Member States and or the institutions of the Union. Ireland is only in a position to answer the complaint that has been made to the Committee. That complaint relates to the entitlement of self-employed persons in Ireland to engage in collective bargaining. That complaint has been fully dealt with in the response already submitted by Ireland. Anything else falls entirely outside the framework of the Complaint. It is respectfully submitted that the Committee do not have jurisdiction to consider that which falls outside of the Complaint.

Alleged deficiencies in the Competition (Amendment) Act, 2017

8. The position of ICTU with regard to the 2017 Act is contradictory and inconsistent. It is acknowledged at Paragraph 2 of the Response that ICTU is '*appreciative*' of the 2017 Act and further that the support of the Minister for Jobs, Enterprise and Innovation (now the Minister for Business, Enterprise and Innovation) was '*a source of considerable satisfaction to Congress*'. However, the Response also identifies and describes as a '*fundamental flaw*' the reliance placed by Ireland on the 2017 Act in the defence of this Complaint. ICTU allege that the exemptions provided by the 2017 Act are '*partial and inadequate to safeguard the rights, under the European Social Charter, of self-employed workers to bargain collectively*'. This argument is premised on the purported identification of '*deficiencies*' in the 2017 Act. ICTU identify the alleged deficiencies under four headings:
 - i. The limited coverage identified in Schedule 4 of the 2017 Act
 - ii. Limited definition of "*false self-employed worker*"

- iii. Limited definition of “*fully dependant self-employed worker*”
- iv. Procedural limitations on applications.

9. Ireland does not accept that the 2017 Act is deficient in the manner alleged by ICTU. The alleged deficiencies identified by ICTU in the Response are speculative and not supported by any evidence. It is notable that ICTU have not provided any evidence to support the contention that there are deficiencies in the 2017 Act, whether under the four specific headings or otherwise. It must also be empathised that during the passage of the 2017 Act through the Houses of the Oireachtas (the Irish Parliament) ICTU did not approach the Department of Business, Enterprise and Innovation (who held responsibility for the legislation) to seek to have the legislation amended to deal with the alleged deficiencies that are now relied upon. The 2017 Act passed both Houses of the Oireachtas unanimously and without a vote.
10. The central thesis of the Response is that the coverage provided by the 2017 Act is too limited and that there are classes of self-employed persons who will not be in a position to engage in collective bargaining notwithstanding the passage of the 2017 Act. This argument is entirely based upon speculation and no evidence is presented to support the contention that the 2017 Act insufficiently protects categories of self-employed persons.
11. As outlined in the Observations filed by Ireland, section 15E of the Competition Act, 2002 (as inserted by the 2017 Act) provides that section 4 of the 2002 Act shall not apply to collective bargaining and agreements in respect of a relevant category of self-employed worker. A ‘*relevant category of self-employed worker*’ is a class of self-employed worker either listed in Schedule 4 or one specified by an Order made by the Minister under section 15F of the 2002 Act. Therefore, the 2017 Act provides an automatic exemption from Section 4 of the Competition Act, 2002 to specific classes of self-employed workers and permits other classes of self-employed workers to apply to the Minister for Business, Enterprise and Innovation to be recognised for the purposes of engaging in collective bargaining. That process is established by section 15F of the 2017 Act. In so far as criticism is made of the definitions contained in the 2017 Act of ‘*false self-employed worker*’ or ‘*fully dependent self-employed worker*’, they are made on a theoretical basis and without reference to any evidence of actual

self-employed workers who have been excluded from the benefits of the 2017 Act by reason of the criticisms contained in the Response.

12. At the time of filing this Response there have been no applications under section 15F of Part 2B of the 2002 Act. It is noted that ICTU do not put forward any evidence of there existing a class of workers who seek to be prescribed as a class of self-employed workers under section 15F but who have been unable to do so by reason of the definition of '*false-self-employed worker*' or '*fully dependant self-employed worker*'. Further, ICTU have not identified any situation whereby a class of self-employed workers have sought to engage in collective bargaining following the passage of the 2017 Act but have been unable to do so by reason of the alleged deficiencies identified in the Response.
13. It is noted that the Response makes a complaint in relation to alleged procedural limitations on applications that may be made under section 15F of Part 2B of the 2002 Act and claims that this procedure amounts to a restriction on the right protected by Article 6 of the Charter. Again, this argument is made in the abstract without reference to any factual situation whereby a class of self-employed persons have been unable to exercise a right to engage in collective bargaining in accordance with Article 6 of the Charter. In those circumstances, there is no basis for an allegation that there is a restriction on a right that may be exercised under Article 6 of the Charter. In the absence of a factual basis that would give rise to a finding that there is a restriction on any right that may be exercised under Article 6 of the Charter, it is not necessary to enter into any analysis of whether the restriction meets a proportionality test.
14. Without prejudice to the foregoing, having a system whereby the Minister may prescribe classes of self employed persons in accordance with the manner identified in the 2017 Act is a proportionate requirement that does not improperly restrict any right that may be exercised under Article 6 of the Charter.
15. In the absence of any evidence to support the arguments being made by ICTU, it is respectfully submitted that there is no factual basis upon which a complaint could be upheld in respect of the 2017 Act.

Conclusion

16. It is respectfully submitted that there is nothing contained in the Response submitted by ICTU that would justify a finding that there has been a violation of Article 6 of the Charter. Arising from the 2017 Act, there is now an automatic exemption from the Section 4 of Competition Act, 2002 to the three class of workers specified in Schedule 4 and the Act permits other relevant categories of self-employed workers to be prescribed by the Minister for Business, Enterprise and Innovation to be recognised for the purposes of engaging in collective bargaining. The criticisms made by ICTU of the 2017 Act are speculative and not supported by any evidence. It is further notable that they are not criticisms that were made of the Act during its passage into law.

17. The true target of the complaint made by ICTU is the Treaty on the Functioning of the European Union and certain aspects of European Law. The compatibility of those aspects of European Law are not a matter that can properly fall within the Committee's jurisdiction in circumstances where the European Union is not a Contracting Party to the Charter. Further, it would not be appropriate to engage in any consideration of the compatibility of European Law with the Charter in the absence of the institutions of the European Union being a party to the Complaint and without those institutions being given an appropriate opportunity to put forward a defence.

18. Having regard to the foregoing, it is respectfully submitted that the Complaint should be dismissed, and the Committee should hold that there has been no violation of Article 6 of the Charter.