



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

20 June 2018

Case Document No. 8

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

ADDITIONAL OBSERVATIONS BY THE GOVERNMENT

Registered at the Secretariat on 8 June 2018

EUROPEAN COMMITTEE OF SOCIAL RIGHTS

Complaint Number 123/2016

Irish Congress of Trade Unions

Applicant

-and-

Ireland

Respondent

SECOND SUPPLEMENTAL RESPONSE OF IRELAND

8 JUNE 2018

Introduction

1. On 18 July 2016, a collective complaint (*‘the Complaint’*) was lodged against Ireland with the European Committee of Social Rights (*‘the Committee’*) by the Irish Congress of Trade Unions (*‘ICTU’*). The central complaint made by ICTU is that the Respondent 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 the Respondent submitted a comprehensive response on the merits of the Complaint in which the enactment of the Competition (Amendment) Act 2017, was described and in which the Respondent denies any violation of Article 6 of the Charter. On 17 January 2018 ICTU registered a response to the submission of the Respondent with the Secretariat of the Committee (*‘the Response’*). A Supplemental Response was lodged by the Respondent on 16 April 2018. By letter of 24 May 2018 the Respondent was notified that ICTU had lodged additional observations with the Committee on 10 May 2018. Pursuant to Rule 28(2) of the Rules of the European Committee of Social Rights Ireland has been given a further opportunity to respond to the additional observations.
2. Firstly, the Respondent repeats that the substance of the complaint made by ICTU has been resolved by the enactment of the Competition (Amendment) Act 2017 (*‘the 2017 Act’*), under which a legislative framework has been established that enables classes of self employed persons to be exempt from Section 4 of the Competition Act, 2002. The complaint originally made by ICTU related to an alleged violation of Article 6 of the Charter arising from the operation of section 4 of the Competition Act, 2002 to certain classes of self employed persons with the consequence that they were unable to exercise their right to engage in collective bargaining. That complaint has been resolved by the enactment of the 2017 Act.
3. However, notwithstanding the fact that the substance of the Complaint has been resolved through the amendment of domestic legislation, ICTU now try to alter the substance of the Complaint to make a broader point in relation to the operation of

European Union Law. This constitutes a significant departure from the original complaint made by ICTU and ought to be recognised as such.

Jurisdiction

4. The additional observations misunderstand the argument made by the Respondent in respect of the jurisdiction of the Committee. The original complaint made by ICTU related to the operation of competition law in Ireland in the context of the domestic law of Ireland. Any references to the law of the European Union in the original Complaint were made in anticipation of Ireland seeking to defend its domestic law by reference to its obligations as a Member State of the European Union. In those circumstances, it was not necessary to raise any issue at the admissibility stage.
5. However, in the Response lodged by ICTU on 17 January 2018, the nature of the complaint being made by ICTU fundamentally changed. In this response, ICTU purported to extend the nature of the Complaint to be one in respect of the compatibility with European Union Law and the rights derived under the Charter. Therefore, rather than this issue being an *'afterthought'* on the part of Ireland, it is, instead, a response to the attempt by ICTU to fundamentally alter the nature of the complaint being made to the Committee.
6. In respect of the substantive issue, the reliance placed by ICTU on the earlier case law of the Committee In *Federation of Employed Pensioners of Greece (IKA-ETAM) v. Greece (2013) 57 EHRR SE2*, *Confederation Generale du Travail (CGT) v. France (55/2009, 23 June 2010)* and *Swedish LO and TCO v. Sweden (2015) EHRR SE7* is misplaced. Those decisions consider the position where a Member State seeks to defend a complaint by reference to obligations placed on it by virtue of its obligations as a Member State of the European Union. That does not arise in these circumstances as is evident from the two Responses already submitted by the Respondent.
7. The European Union is not a Contracting Party to the Charter and it is not appropriate for the Committee to consider the compatibility of European Union Law with the Charter particularly in the circumstances where the Institutions of the European Union are not a party to this complaint. Without prejudice to the forgoing, in so far as ICTU

argue that obligations arising from the Treaty on the Functioning of the European Union or any other obligation under European Law may be directly enforceable in domestic legal systems, such a complaint is made entirely on a speculative basis. ICTU present no evidence that any self employed person has been prevented from exercising his or her right to engage in collective bargaining by reason of the direct application of European Union Law. The argument made by ICTU is predicated on the wholly unrealistic contention that an attempt will be made by some unknown party to restrict the right to engage in collective bargaining by reference to the law of the European Union. This is speculative in the extreme and has no basis in fact.

8. It is evident that the now '*target*' of the Complaint is not the domestic Law of Ireland but rather the Treaty on the Functioning of the European Union and the Law of the European Union.

Alleged deficiencies of the 2017 Act

9. It is surprising that ICTU dismiss the absence of evidence relating to the operation of the 2017 Act. A complaint made to this Committee must be rooted in facts and for a violation to arise, it must be identified that persons are unable to exercise the rights derived from the Charter. That simply does not arise in this case. It is not the case that the Respondent '*has a law which violates a right guaranteed by the European Social Charter*'. As previously explained the 2017 Act provides a framework in which the rights guaranteed by Article 6 of the Charter may be exercised by certain categories of self-employed persons. For the avoidance of doubt, the Respondent does not accept that there is any substance to the claims made by ICTU that the 2017 Act does not respect the rights derived from Article 6 of the Charter, either in a substantive or procedural manner.
10. The Respondent recalls that none of the complaints that are now made were raised by ICTU (or SIPTU or any other Trade Union) in the course of the passage of the 2017 Act through the Irish Oireachtas (Parliament). The Respondent further recalls that the passage of the 2017 Act was welcomed by SIPTU. Ireland further recalls that none of the alleged deficiencies with the 2017 Act have been raised by ICTU or any Trade Union with the Department of Business, Enterprise and Innovation. It is noted again, that the complaints made in respect of the Competition and Consumer Protection

Commission (identified as the Competition Commission in the additional observations) are made on a speculative basis and that ICTU cannot point to any circumstances in which, post the passage of the 2017 Act, that the right to engage in collective bargaining has *actually* been restricted.

11. While the additional observations identify certain classes of self employed persons who could have their rights to engage in collective bargaining restricted, no evidence is put forward that any of those persons have actually had their rights to engage in collective bargaining restricted. The Respondent re-iterates that the 2017 Act provides an exemption from section 4 of the 2002 Act for categories of self employed workers listed in Schedule 4 to the 2017 Act while also providing a system whereby application can be made to the Minister for Business, Enterprise and Innovation for other categories of self employed workers to be recognised for the purpose of the 2017 Act. It remains the position that there have been no applications under section 15F of Part 2B of the 2002 Act. It is surprising that ICTU would describe this confirmation as *'fatuous'*. It is further surprising that ICTU would assert that the categories of self employed persons to whom reference is made do not qualify for recognition under the 2017 Act. In the absence of an application for recognition having been made, it is not open to ICTU to argue that the 2017 Act does not apply to the categories of self employed persons identified by them.

12. The Respondent rejects the assertion that any application for recognition of a class of self employed persons under section 15F of Part 2B of the 2002 Act (as inserted by the 2017 Act) would *'inevitably be rejected'*. That is an assertion without any foundation in fact and appears to reveal an unwillingness by ICTU to use the 2017 Act, the passage of which was supported and welcomed by SIPTU (one of its constituent Trade Unions).

13. Similarly, the Respondent does not accept that the procedural mechanisms provided in the 2017 Act constitute restrictions on the Charter right. The contrary is the position. The Respondent asserts that the procedural mechanisms provided in the 2017 Act through which additional classes of self employed persons can be recognised for the purposes of that Act do not violate Article 6 of the Charter. This argument is supported

by the very fact that ICTU are unable to identify any person or class of self employed person who has been unable to exercise a right to engage in collective bargaining following the passage of the 2017 Act. The absence of that evidence provides a full answer to the complaint made by ICTU, which again seeks to rely on entirely speculative assertions.

Conclusion

14. The Respondent respectfully submits that the additional observations do not advance matters in any substantive manner and nothing has been put before the Committee that would justify a finding that there has been a violation of Article 6 of the Charter. Arising from the 2017 Act, the categories of workers identified by ICTU are permitted to engage in collective bargaining and are exempt from the provision of section 4 of the Competition Act, 2002. The criticisms made of the 2017 Act are not founded in fact and are put forward on an entirely speculative basis, possibly for the purpose of maintaining this Complaint before the Committee. In truth, ICTU put forward no evidence to support the complaint that is made.

15. In the view of the Respondent, the real target of this complaint is now the Treaty on the Functioning of the European Union and certain aspects of European Law. As already outlined, the European Union is not a Contracting Party to the Charter and it would not be appropriate for the Committee to consider the compatibility of European Union Law with the Charter. This particularly arises in the circumstances where the Institutions of the European Union are not a party to this complaint.

16. Having regard to the foregoing and previously submitted observations, 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.