EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

16 March 2016

Case Document No. 6

European Organisation of Military Associations (EUROMIL) v. Ireland
Complaint No.112/2014

FURTHER RESPONSE FROM THE GOVERNMENT

Registered at the Secretariat on 26 February 2016

EUROPEAN COMMITTEE OF SOCIAL RIGHTS

Complaint Number: 112/2014

EUROPEAN ORGANISATION OF MILITARY ASSOCIATIONS (EUROMIL)

COMPLAINANT

V.

IRELAND

RESPONDENT

REPLYING OBSERVATIONS OF THE RESPONDENT

26 February 2016

APPENDICES

Appendix I *Scariff v. Taylor* [1996] I.R. 242

Appendix II Extracts from "Irish Defender" Magazine [2011 – 2014]

I Introduction

1. The Respondent reiterates each and every point made in its previous submissions on the merits. Arising from the Response of the Complainant, however, the Respondent wishes to raise a number of further observations.

PRELIMINARY OBJECTION

2. It appears that the Complainant has shifted its position firstly, in relation to the allegation of a violation of the right to collective action and secondly, with respect to acceptable conditions of affiliation. In this respect, at paragraph 7.8 of the Response, the Complainant has stated that it is willing to *"…accede to reasonable restriction including, if necessary, a direct provision within is constitution to the effect that no member will call for, or countenance strike action."* At paragraph 9.1, the Complainant has clarified that it is merely raising a complaint under Article 6.4 in order to *"…establish the parameters, to which collective action, if indeed the committee would countenance any, which could reasonably be undertaken by members of armed forces."*

3. It would appear therefore that the Complainant accepts the prohibition of strike action on the part of the armed forces as a reasonable restriction in the Irish context. Accordingly, it is unclear whether the Complainant is maintaining its case that The Respondent has breached Article 6.4 of the Charter by proscribing strike action on the part of the Defence Forces. It is therefore asking the Committee to "establish the parameters" of permissible collective action by way of hypothesis. The Respondent submits that this is an inappropriate use of the Collective Complaints Procedure; the Respondent is entitled to know the case to answer from the outset and a Complaint should not be advanced in a factual vacuum.

II Command Structure of the Defence Forces and Unique Nature of Military Life

4. The content of the Complainant's Response at paragraphs 1.2 and 1.3, demonstrates a fundamental misunderstanding on the part of the Complainant as to the command structure of the Defence Forces. Although the Complainant has suggested that PDFORRA could affiliate to ICTU (hereafter "Congress") with *"whatever caveats the then Government deemed necessary,"* it has not explained how the unique command structure of the military and exigencies of military law could be accommodated within the hierarchy or decision-making structures of Congress. That is a more fundamental problem with affiliation which would not be cured by a discrete requirement proffered by the Government, such as (for instance) a requirement that military personnel do not partake in collective industrial action.

5. The Respondent has particular difficulty understanding the reference to Article 6(d) of the Constitution of Congress at paragraph 1.3 as a basis upon which the Government might "assert" that Congress was acting *ultra vires* where the Government believed an issue "impacted on State Security, Public Morals, etc." Firstly, the non-statutory provision to which that paragraph refers, merely states an "object" of Congress as being *"to support the democratic system of government and promote the social and economic policies and programme of the workers of Ireland as expressed from time to time by the Irish Trade Union Movement;"* it is difficult to see how the provision is capable of addressing the concerns of the Respondent . Secondly, this paragraph demonstrates that the arrangement proposed by the Complainant envisages Congress as having jurisdiction to determine what reasonably constitutes a matter of state security, and that jurisdictional matters would be defined by the non-statutory rules of Congress. This approach is irreconcilable with military law. It is also instructive as to the conflicts in lines of authority which are likely to be precipitated by affiliation.

6. In this regard, Article 13(4) of the Irish Constitution provides that: *"The supreme command of the Defence Forces is hereby vested in the President."* Section 17(1) of the Defence Acts 1954-2011 sets out the statutory basis for command. It provides that *"Under the direction of the President and subject to the provisions of this Act, the military command of, and all of the executive and administrative powers in relation to,*

the Defence Forces, including the power to delegate command and authority, shall be exercisable by the Government and, subject to such exceptions and limitations as the Government may from time to time determine, through and by the Minister."

7. It is submitted that by association with Congress under the arrangement envisaged, members of the Defence Forces would essentially be submitting to a line of authority outside of the Defence Forces command structure set out by both the Constitution and by statute. As explained in the Respondent's previous observations, the Defence Forces play a unique role within the State. Non-compliance with a responsibility assigned by the Government, at the behest of a third party, has the potential to seriously undermine the security of the State.

8. The point raised at paragraph 1.4 is accordingly misconceived. One particular point of distinction between military personnel and other groups of employees, is that military personnel are in accordance with Sections 118 and 119 of the Defence Act 1954 *"…subject to military law at all times."* This requirement sets the Defence Forces apart from groups such as nurses who are not subject to the rigours of military discipline and the military justice system. The purpose of military law is to ensure the maintenance of good order and discipline within the Defence Forces, which is a key element of military life.

9. The maintenance of good order and discipline as a key element of the unique nature of military life, is widely recognised in jurisprudence. In *Parker Warden v Levy*[1] Rehnquist J. of the United States Supreme Court stated that the military is by necessity a specialised society separate from civilian society. He explained that *"…the army is not a deliberative body. It is an executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer or in the duty of obedience in the soldier."* The Irish judicature has recognised that *"obedience to commands is integral to a soldier's whole existence*" and that recruits voluntarily submit to these codes upon joining the military.[2]

[1] (1974) 417 U.S. 733
[2] *Scariff v Taylor* [1996] IR 242 (Appendix I)

10. In the Irish Supreme Court case of *Scariff v. Taylor*,[3] it was observed that the *"…Court can and should pay a particular respect to the fundamental importance under the Constitution and under a structure of society of the disciplinary machinery and disciplinary codes of the Defence Forces and is only entitled to intervene therein when such intervention is necessary to do justice to a member of the Defence Forces in relation to any particular proceedings or position in which he finds himself."*

11. It is also well established by the European Court of Human Rights that a distinction between treatment of civilians and members of the Armed Forces of the Member States is permissible. In *Engel and Others*[4], the Court found *"…it must bear in mind the particular characteristics of military life and its effects on the situation of individual members of the armed forces."* The Court specifically refers to the "*conditions and demands of military life being by nature different from those of civil life."* Accordingly, when interpreting the Convention, the Court of Human rights will take into account the particular characteristics of military life such as military discipline, the hierarchical structure, and the necessity to protect morale. It is very clear from *Engel* that a distinction between the treatment of civilians and military personnel does not in itself run counter to Convention obligations.

12. It is true that *Matelly v France*[5] made clear that although the right of association under Article 11 ECHR extended to the armed forces. It specifies however, that restrictions (even significant ones) may be placed on the exercise of freedom of association by military personnel, since the specific nature of the armed forces' mission requires that trade union activity be adapted in consequence.

13. Of particular interest is the distinction drawn in *Matelly* between the extent of permissible restrictions on members of the police force on the one hand and members of the armed forces on the other. The Court noted the decision of the *European Social Committee in European Federation of Employees in Public Services v France* (Collective Complaint No. 2/1999) where the Committee reviewed the legislative history of the European Social Charter's acceptance of limitations on freedom of

[3] [1996] IR 242, Hamilton C.J. at p.258
[4] *Engel and Others v. the Netherlands*, 8 June 1976, Series A no. 22
[5] *Matelly v. France*, no. 10609/10, 2 October 2014

association for members of the armed forces, including in certain circumstances a complete prohibition on certain actions. The Court further considered the Committee's Conclusions where it recalled that Article 5 had been adopted unchanged into the Revised Charter. The distinction between the situation of armed forces and police forces is accordingly maintained. It is submitted that The Respondent has gone as far as possible in ensuring a system of effective and fair representation of the interests of military personnel, while safeguarding the unique code of military discipline and requirements of military law. Contrary to the assertions made at paragraph 1.5 of the Response, any restriction is both necessary and proportionate.

III Security Situation in Ireland

14. At paragraphs 2 and 2.1 of the Response, the Complainant has attempted to draw a comparison between the security situation of the Respondent and other States. The Complainant firstly downplays the "status" and "function" of the Irish Defence Forces within the State and secondly suggests that the restrictions imposed are unnecessarily severe by comparison to other European States.

15. It is surprising that the Complainant would attempt to undermine the role of the Irish Defence Forces given the nature of the Respondent's security background. The Respondent is atypical not only in terms of the structure of its security forces (as outlined in the previous observations) but also from the perspective of having to deploy security services in order to counter an internal security threat from unlawful paramilitary organisations over the course of almost five decades. Military personnel in the Respondent State do not face restrictions which are unusually severe by comparison to other European States. In any event, it is submitted that the security situation in the Respondent State is distinguishable in light of its particular political and historical context.

16. The Respondent is also somewhat unusual in terms of the structure of its police and security forces. As outlined in the Respondent's observations on the merits, An Garda Síochána is a single police force whose responsibilities traverse routine policing, border control, immigration, internal security and intelligence. There are no other policing forces in the State with which to share these responsibilities. In the event that An Garda

Síochána were unable to act, the only security service capable of ensuring the security of the State, is the Defence Forces.

IV Bargaining Rights and the Conciliation and Arbitration Process

No Disadvantage by reason of non-affiliation

17. The Respondent emphatically refutes the assertion at paragraph 5.4 of the Response that PDFORRA operates at a significant disadvantage to other Representative Associations who represent their members' rights. The fact of PDFORRA having requested permission to affiliate to ICTU is not probative of the allegation of disadvantageous treatment. The Respondent has set out in its observations many instances in which it considers military personnel to have benefitted from specialised representation and grievance structures.

18. In relation to paragraph 6.1 of the Response, the Respondent does not accept the Complainant's assertions with respect to the extent of limitations arising from legislative provisions. While there are certain limited exemptions to specific avenues of redress under the employment law mechanisms, it is submitted that they are counter-balanced by the separate machinery previously outlined by the Respondent and by the statutory appointment of an independent Ombudsman for the Defence Forces. The appointment of Ombudsman is supported by a statutory complaints mechanism under Section 114 of the Defence Act, 1954 and the Ombudsman (Defence Forces) Act, 2004[6], which provides for redress in respect of any wrong arising in relation to any service related matter.

19. The contention of the complainant in respect of limitations on access to the Rights Commissioner in respect of leave and the Organisation of Working Time Act 1997[7] is also somewhat misleading, as any challenge brought before a Rights Commissioner in respect of leave is brought under the provisions of the Organisation of Working Time Act. Essentially these actions are one and the same and while there is currently a blanket

[6] Section 114 of the Defence Act 1954 is available at: http://www.irishstatutebook.ie/eli/1954/act/18/section/114/enacted/en/html#sec114. A copy of the Act is available at http://www.irishstatutebook.ie/eli/2004/act/36/enacted/en/html.
[7] A copy of this Act is available at http://www.irishstatutebook.ie/eli/1997/act/20/enacted/en/html

exemption for members of the Defence Forces in respect of the Organisation of Working Time Act, deviation from the statutory norms only arises in cases of operational necessity. The Organisation of Working Time Act is currently under consideration by the Department of Defence in the context of identifying roles which can be accommodated within the parameters of that Act without compromising the operational requirements of the Defence Forces. The Complainant has made representations through the Conciliation and Arbitration Scheme in the context of the application of the Working Time Act to the Defence Forces.

20. It is also the case that members of the Defence Forces enjoy access to redress under the Employment Equality Act in respect of all grounds for discrimination, save for age and disability. Similarly, members of the Defence Forces can bring cases to a Rights Commissioner in respect of breaches under the Terms and Conditions of Employment Act, and these provisions have been invoked on a number of occasions by members of the Defence Forces.

21. For the information of the Committee, it might be noted that the functions of the Rights Commissioners has now been subsumed into the functions of Adjudicators in the Workplace Relations Commission under the Workplace Relations Commission Act, 2015[8]. This newly established statutory commission is now the principal body for the enforcement of employment law in the Respondent State, to which members of the Defence Forces have access, albeit with certain limitations under some statutes.

22. The Respondent agrees with the Complainant as to its assertion at paragraph 7.3 that participation in the activities of the military Representative Associations have not impacted on operational effectiveness. Indeed, this is indicative that the Respondent has struck an appropriate balance between competing interests.

23. In relation to paragraph 7.9 and 7.10, it has already been set out in detail why the situation of the military differs from that of other groups such as nurses. Nurses do not occupy the same role within the State and are not subject to military law.

[8] A copy of this Act is available at: http://www.irishstatutebook.ie/eli/2015/act/16/enacted/en/html

Conciliation and Arbitration Scheme

24. The Respondent does not accept the contention at paragraph 8.4 of the Response, that the current scheme is ineffective. As set out in previous observations, the Respondent has engaged as an employer with public service employee representatives including the Defence Sector in a number of different ways over the years. Public sector pay deals were included in all social partnership agreements since 1988 in what is known as the benchmarking process. Public sector pay increases over and above national increases were determined on a grade by grade basis through the conciliation and arbitration scheme. Indeed, as set out in the previous submissions, it has been argued by industrial relations commentators that the scheme has given rise to more costly settlements for the employer.

25. By way of illustration of the achievements for employees of the Conciliation and Arbitration Scheme, the Respondent appends extracts from the Complainant's own magazine, *Irish Defender*[9]. In that magazine, the Complainant lists as achievements secured for its members:

- Increase in annual leave by six days per annum;
- Retention of pre 1st Jan 1994 medical and fitness standards for continuing in service and discontinuation of cap on service proposals;
- Introduction of new allowances, eg Portlaoise Hospital Guard, Non Commissioned Officer Account Holders and Aid to the Civil Authority Allowances;
- Special 6.25% increase in Security Daily Allowance, Border Allowance, Prison Duty Allowance and Instructor's Allowance;
- Special increase for Electrical Artificer, Engine Room Artificers, Barrack Personnel Support Service Officers, Military Police Scene Of Crime Examiner, Instrumentalists, Printers, Radio/Radar technicians, Emergency Medical Technicians, Ammunition Examiners etc;
- Special increase in overseas allowances, the regularisation of its tax free status and its payment free of the pension levy and pre-cut rates;

[9] Appendix II

- Retention of border duty allowance on personal to holder basis, payment of Security Data Allowance on a personal to holder basis, payment of a Security Duty Allowance outside the original sanction and negotiation of special Security Duty Allowance list in the Air Corps;
- Higher gratuity payments, increased reckonability of technician pay and flying pay additions to pension and recognition of instructor's Allowances and Non Commissioned Officer Account Holder's Allowance for pension and gratuity;
- Significantly longer contracts for those enlisting post 1 Jan 1994 go minimum of 21 years;
- Significantly greater acting rank and substitution opportunities;
- Higher level of pensionability of Military Service Allowance on original pension scheme.

26. It is submitted that these "achievements" (as described by PDFORRA in its magazine) are over and above what the Complainant would have secured had the Conciliation and Arbitration Process not been available to it. By virtue of having a Conciliation and Arbitration Scheme process, it has been able to make claims directly to the employer and to resolve issues in an informal and conciliatory fashion.

27. Since 1993, a total of 229 Reports have been negotiated through the Conciliation and Arbitration Scheme. 73% were agreed, 27% were disagreed. The Respondent is not in a position to append tables of outcomes as they remain confidential under the scheme. This is a high level of successful outcomes for employees. These claims through the Conciliation and Arbitration process serve as an illustration of what the Complainant has achieved for its members over and above what was achieved through the central pay determination structures such as benchmarking.

Negotiation Structures

28. The Respondent does not accept the submission that there has been a failure to promote effective negotiation on behalf of the Defence Forces. The Committee should note that the Complainant is impugning the outcomes of collective bargaining at a time of serious fiscal constraint on the part of the State. As set out previously in observations, negotiation of a financial assistance package with the European Union and International

Monetary Fund, required the enactment of legislation to restore the public finances. The reductions to salaries and allowances contained the Financial Emergency Measures in the Public Interest (No. 2) Act 2009[10] applied to all public servants, not just the Defence sector.

29. Furthermore, as set out previously, the Complainant had equal opportunity to participate in negotiation structures and was in no way disadvantaged. In the national pay discussions, the military Representative Associations were specifically addressed in relation to application of all aspects of the national agreement to the Defence Forces. For instance, PDFORRA had an issue with pay rates for new entrants and these have been largely resolved to the Representative Association's satisfaction.

30. The Respondent refutes the assertions made at paragraph 8.7. In particular, it is not accepted that there was a *"failure to consult on the status of the joint review mechanism contained in the latest pay discussions."* At the most recent pay talk discussions in 2015, it was outlined to military Representative Associations that it was proposed to review outstanding adjudications centrally and by way of parallel discussions with the Representative Associations on the mechanism for reaching agreement as to how these could be paid. It was made clear to the Representative Associations that this paragraph was inserted as a reflection of the fact that there have been and are significant financial constraints in terms of monies available for outstanding adjudications claims across all sectors. In other words, this was a paragraph presented to reflect the current economic situation. It was presented to all sectors and it is irrelevant as to whether employees were represented by Congress or by way of parallel process by PDFORRA.

31. The Respondent rejects entirely the suggestion at paragraph 8.7 of the Response that PDFORRA was the only body whose members suffered actual pay reductions consequential upon their exclusion from Haddington Road Agreement discussions. This is a mischaracterisation of the actual position in other sectors.

32. In relation to the submission advanced by PDFORRA that it had to resort to initiating legal proceedings to best serve their members' interests, it is submitted that the

[10] A copy of this legislation is available at http://www.irishstatutebook.ie/eli/2009/act/41/enacted/en/html

initiation of legal proceedings by the Complainant was therefore a strategic one in a particular circumstance, which should not be used as probative of any dysfunction of the Scheme.

V Strike Action

33. In relation to paragraph 9.1 of the Complaint, the Respondent submits that it is entirely inappropriate to ask the Committee to use this Complaint to set out the parameters of permissible collective action, in circumstances where the Complainant appears to accept the appropriateness of a ban on collective action for PDFORRA. It is submitted that the Committee ought not to make a hypothetical determination.

34. Elements such as the unique nature of military life, the exigencies of the military command structure and the unique role of the Defence Forces within the State, justify distinguishing between military personnel and other workers in the context of the right to strike action. The various Conclusions of the Committee cited in the observations on the merits support the contention that a ban on strike action is permissible in the context of the armed forces (See in particular paragraphs 100 and 101).

35. It is well established by the European Court of Human Rights that rights vesting in military personnel can be justifiably limited to a far greater extent than those vesting in ordinary citizens. By way of analogy, in relation to the right to a hearing within a reasonable time under Article 6(1) ECHR, the Court determined in *Pellegrin v. France*[11] that the *"the only disputes excluded from the scope of Article 6(1) of the Convention are those which are raised by public servants whose duties typify the specific activities of the public service in so far as the latter is acting as the depositary of public authority responsible for protecting the general interests of the State or other public authorities. A manifest example of such activities is provided by the armed forces and the police."* The distinct nature of armed forces and the police was reiterated in *Vilho Eskelinen and Others v Finland*[12].

[11] *Pellegrin v. France* [GC], no. 28541/95, ECHR 1999-VIII

[12] *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, ECHR 2007-II

36. The Respondent has already set out in its submissions on the merits why it considers the prohibition of strike action to pursue a legitimate aim, and as being necessary and proportionate. An appropriate balance has been struck between the industrial relations needs of military personnel on the one hand and the preservation of public order and the maintenance of military discipline on the other.

37. In relation to paragraph 9.3, it is worth recalling that the Respondent's position is unusual in that there is only one police force covering the entirety of the State. That single police force has responsibility for the broad spectrum of national policing and security, including routine policing, border control, immigration, internal security and intelligence. There are no other policing forces in the State with which to share these responsibilities. In this respect, the Respondent can be distinguished from the majority of contracting states.

38. By their finding of the right to strike as extending to An Garda Síochána in *EUROCOP*, the Committee has envisaged a situation where the only remaining security service which could be called upon to maintain law and order (in circumstances where the Gardaí are unable to act) is the Defence Forces. Accordingly, should the right to strike also be recognised as extending to the Defence Forces, the only remaining back-stop for the maintenance of law and order would be removed. As a consequence, the extension of the recognition of the right to strike to members of the Defence Forces would give rise to significant prejudicial effect on the State's capacity to ensure the maintenance of law and order at all times.

39. As set out above, the Respondent is atypical not only in terms of the structure of its security forces, but also with respect to its historical and political context, having faced an internal security threat from unlawful paramilitary organisations for almost five decades.

40. In any event, the Respondent has already given examples of many countries in which members of the military forces are legally prohibited from engaging in strikes (see paragraph 112 of the observations on the merits). Indeed, the Committee's Conclusions to which paragraphs 100 and 101 of the submissions on the merits refer suggest that such a prohibition is permissible.

VI Conclusion

41. In light of the foregoing and previous submissions, the Complaint is misconceived. It is submitted that there has been no violation of the Charter.