EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

6 September 2017

Case Document No. 1

***Unione Sindicale di Base* (USB) v. Italy**
Complaint No. 152/2017

COMPLAINT

Registered at the Secretariat on 12 July 2018

Department of the European Social Charter,
Directorate General of Human Rights and the Rule of Law
Council of Europe, F-67075 Strasbourg Cedex

For the attention of the Executive Secretary of the European Committee of Social Rights, acting on behalf of the Secretary General of the Council of Europe

COLLECTIVE COMPLAINT

pursuant to Article 1(c) of the Additional Protocol to the European Social Charter providing for a system of collective complaints

*

INFORMATION RELATING TO THE COMPLAINANT TRADE UNION ORGANISATION USB

1. The USB – *Unione sindacale di base – settore pubblico impiego* (see Statutes, Doc. 1), Via dell'Aeroporto 129 00175 – ROME, Tel: 06.59640004, Fax: 06.54070448 Email: usb@usb.it, Italian tax ID and VAT number 97207930583, represented by its current legal representative Ms Daniela Mencarelli, born in Peschici on 15 January 1960, Italian tax ID MNCDNL60A55G487P, is a trade union association that represents and assists public sector workers at national level and has a level of membership that makes it one of the most representative.

2. The level of membership of the USB is attested by the declaration made by the ARAN (Public Sector Collective Bargaining Agency) which certifies that it has significant representative status within the public sector (Doc. 2).

3. The USB is represented by the above-mentioned Ms Mencarelli in this collective complaint. The email address d.mencarelli@usb.it and telephone numbers 3473804420 have been chosen as contact details for the purposes of this complaint.

4. For the purposes of this complaint, the USB is assisted by Counsel Sergio Galleano of the Milan Bar (Italian tax ID GLLSRN52E18F205N), Counsel Ersilia De Nisco of the Rome Bar (DNSRSL79T68A783N) and Counsel Federico D’Elia (DLEFRC81A08F205B) of the Milan Bar.

Reference email address: roma@studiogalleano.it

*

Contracting party which violated the European Social Charter: ITALY

*

THE FACTS

5. The previous career structure for employees of Italian ministries, including therefore also the Ministry of Justice, to which this complaint relates, comprised nine categories. The first three related to strictly operational tasks (so-called "auxiliaries"), the 4th to the 6th to ordinary clerical tasks and the last three to intellectual or managerial tasks.

6. The 1998-2001 National Collective Labour Agreement [NCLA] for Ministries (Doc. 3) reviewed the classification of workers, providing that the previous nine categories should be regrouped into three different categories, specifically A (incorporating former categories 1, 2 and 3), B (former 4, 5 and 6) and C (former 7, 8 and 9).

7. Article 24 of the Supplementary Collective Labour Agreement for the Ministry of Justice concluded on 5 April 2000 (Doc. 4) defines the tasks of "auxiliaries":

Functional category A

Economic position A1

Employees working in support of the various activities (including for example the transfer of files, other items, documents and library material; photocopying and the arrangement of copies into folders, where appropriate affixing stamps and seals; collection and delivery of correspondence) and who receive members of the public.

Reference professional profile under the previous system for functional qualifications (Italian Presidential Decree no. 1219 of 1984, as amended) and the organisation of the work to which the said system related: auxiliary services and back office staff member.

8. These are extremely simple tasks which, following the modernisation and automation (as well as digitisation) of the public administration, are no longer carried out, or only in part. In addition, it is no coincidence that, whilst the 1998 collective bargaining had identified various salary grades within categories B and C (at least three for each category: cf. Appendix A to the NCLA cited above), no professional differentiation was provided for within category A.

9. Paragraph 2 of Appendix 5 to the Supplementary Collective Labour Agreement for the

Ministry of Justice concluded on 5 April 2000 defined the criteria governing the transfer of auxiliaries:

Memorandum of understanding concerning the selection criteria for transfer from a category to the starting grade within the category immediately above.

The parties undertake to define within 30 days of signature of the supplementary collective labour agreement the procedures for conducting the public competition provided for under Article 15(a) of the NCLA with reference to staff employed in the financial grade of the lower category corresponding to the same professional profile as the starting grade within the category immediately above.

2. Upon the initial application, simplified selective procedures shall be put in place within the same time limit for the transition from salary grade A1 to the starting salary grade within category B, in accordance with the rule applicable to public competitions laid down in the national collective agreement, which shall have a shorter duration and involve a final verification of suitability.

10. Following the approval of this contract, attempts have been made on various occasions within the Ministry of Justice to launch the procedures for vertical advancement between categories and within individual categories, although these have in all cases been blocked both by the courts, which have accepted the challenges brought, and very often because of the inability of the administration to face up to its own responsibilities (cf. regarding this issue, the judgment of 18 December 2014 of the *Tribunale di Verona*, which provides a summary account of the overall issue: Doc. 5).

11. On 21 May 2001, following repeated agreements (5 February 2000: Doc. 6; February 2001: Doc. 7; 10 May 2001: Doc. 8), the Ministry ordered the transfer of 3,200 auxiliaries from category A to category B (Doc. 9); however, that order was not acted upon, and on 9 February 2006 (Doc. 10), following various meetings, the parties undertook once again to complete the reclassification procedures.

12. Thereafter, numerous agreements were concluded providing for the launch of reclassifications, although none was acted upon.

13. The effect of this confused situation is that advancement between categories and within categories came to a halt because the Ministry, alleging confusion within the case law of the Italian courts, took advantage in order to block all advancement (thereby saving money that should have been spent on the career advancement of employees), rather than intervening

with legislative measures enabling the implementation of the trade union agreements.

14. Staff working in category A suffered this fate more than others, and only 5% of the total number of auxiliaries on the workforce (around 200 people), as against around 30% of staff working in other categories, benefited from a small pay increase, becoming "A1 super". However, this did not resolve the impasse affecting those working in category A, who had been forced since the 1990s to work in positions that extended beyond the formal competence required for the category of origin (Docs. 11-16: only some are filed in order to avoid increasing excessively the size of the case file, although the complainant reserves the right to file others at a later stage), without any financial recognition (except for the few people who took court action: see Docs. 17 and 18), and above all without any career prospects.

15. Therefore, as is apparent from the documentation filed, both due to the substantive cessation of the tasks originally envisaged for members of the category and also on account of the successive measures adopted over the last twenty years by the Italian parliament in order to reduce staffing levels and block turnover, with the passage of time, the members of category A have been "recycled" into more senior roles, which *de facto* fall under the higher category B and involve the provision of support to staff from higher levels, although without any recognition of the change or any career advancement.

16. Auxiliaries perform their tasks at all judicial offices (honorary judges, courts of first instance, courts of appeal, public prosecutor's offices, etc.) and the central offices of the Ministry of Justice (Court of Cassation, National Anti-Mafia Directorate - Ministry - Office of the Public Prosecutor General at the Court of Cassation) and in a very considerable number of cases, in addition to their ordinary tasks, have been used also for intellectual tasks that require specific expertise.

17. In particular, they manage the archives totally independently, scan and electronically record correspondence and other documentation and use IT instruments on a daily basis in order to perform ordinary operations. However, much more importantly, in addition to working together with colleagues classified as judicial officers, judicial assistants and registrars, they also replace them, where required.

18. The conclusion of the new collective labour agreement on 14 September 2007, which applied for the period 2006-2009 (Doc. 19) further changed the classification of workers, providing again for three categories (now referred to as I, II and III, replacing respectively

the previous categories A, B and C) and stipulating different pay bands: from F1 to F3 for

the first category, from F1 to F6 for the second and from F1 to F7 for the third (cf. table B in the NCLA).

19. The modification was at least in theory of some importance because, whilst the previous NCLA from 1998 provided for different professional grades within each of the various categories (B1, B2.... and C1, C2...., except, as mentioned above, category A), indicating specific tasks falling to each professional grade, the new classification established under the NCLA for 2006-2009 lays down professional status only for entire bands (1, 2, 3....), within which distinctions are only drawn between mere salary grades (F1, F2, F3, F4 etc.).

20. This is in point of fact a legal fiction because the salary bands still reflect the allocation of tasks of gradually increasing professionalism. In other words, an employee classed under the second category (band II or III) is provided with the simplest tasks within the band of origin, whilst employees in higher salary grades perform functions within the band of origin that require greater experience and professionalism.

21. Accordingly, the new classification set forth in the new contract now features three salary grades in band 1 (F1, F2, and F3), which however - in this category, and for the reasons mentioned above concerning the progressive disappearance of the original tasks - only define pay differentials. In fact, the vast majority of "auxiliaries" were then classified under salary grade F2, and only a small number in F3. Whilst this did entail some financial benefit, it did not change their professional status, as there remained a mismatch between their formal classification and the duties actually performed, and no possibility for future advancement in terms of either career or salary.

22. The new contract for 2006-2009, which acknowledged the problem raised in this complaint, also attempted to remedy the situation of former category A (now category I) described above and, by the transitory provision laid down by Article 36, provided as follows:

On an exceptional basis and upon the initial application of this contract, in order to foster processes involving the reorganisation of the administrations, supplementary contracts may promote professional reclassification initiatives that seek to facilitate transfers of staff in service upon inception of this contract from the First to the Second Category in accordance with the percentage levels stipulated for external access. The burden

associated with such transfers shall be covered out of resources that are certain, stable and ongoing from the Fund established pursuant to Article 31 of the NCLA concluded on 16 February 1999, as supplemented by later NCLAs.

23. *Thereafter, the Supplementary Collective Labour Agreement for the Ministry of Justice (Doc. 20) signed on 29 July 2010 variously defined the relative tasks: "Auxiliary activities and support for organisational and management processes within the sector of origin with the assistance of equipment made available, including IT equipment. Workers who perform the following activities: transfer of files, other items, documents and books; photocopying and the arrangement of copies into folders; attending to the reception of members of the public*", thereby expanding the tasks and bringing them into line with the times, considering the progressive advance of digitisation within the Public Administration.

24. The Supplementary Collective Labour Agreement also provided as follows:

Article 64

(Single Administration Fund of the Department for the Organisation of the Courts, Staff and Services - Year 2009 and residual amount for the Year 2008)

The resources of the single administration fund for the year 2009, amounting to a total of €104 331 899.00 including the charges to be borne by the administration, net of the annual cost relating to pay increases for "SUPER" grades awarded over the years 2002/2007, shall be allocated for the promotion of the efficacy and efficiency of the services and to that effect shall be used:

a) up to a maximum limit of €75 102 405.98, in order to enable the financial advancement provided for under Article 65 below[1] *with effect, following completion of the procedures, from 1 January 2009.*

b) <u>in the amount of €140 022.00 in order to finance 270 pay increases for staff currently classified as Auxiliaries (category one) to the new professional profile of judicial operators</u>

---

[1] Article 65 provides as follows: **Article 65** ***(Financial advancement within the Department for the Organisation of the Courts, Staff and Services for the year 2009)***
Upon the initial application, participation in procedures to obtain a pay increase within the individual categories falling under this NCLA shall be open to all staff with tenured status of the Ministry of Justice - Department for the Organisation of the Courts, Staff and Services, in service on 1 January 2009.
With regard to the provision contained in paragraph 1, the parties agree to allocate to the financing of pay increases within the individual categories during 2009 a share of the Single Administration Fund equal to **€75 102 405.98**, which shall be allocated to enable a total of **41,514** pay increases, as set out in detail **in Appendix. I**, with effect for each, following completion of the procedures, from 1 January 2009.
Within the context of the pay increases referred to above, the distribution of positions designated for each professional profile within each category and pay grade shall be determined by the Administration immediately after the classification of staff within the new professional levels.

(category two) pursuant to Article 36 of the NCLA signed on 14 September 2007, which positions shall be available for internal candidates in relation to vacancies confirmed as at 28 February 2010, with effect for each from the day on which the new position is taken up. The said transfers shall under all circumstances be implemented in accordance with applicable legislation on the hiring of staff, and also in accordance with the principle of appropriate access for external candidates.

25. Within the bargaining process concerning the Single Administration Fund during subsequent years, that amount was set aside in order to finance the few (270) transfers of auxiliaries; however, the administration has not even implemented this already limited measure.

26. *Under letter e) of Article 6 (Planning of interventions) of the agreement signed on 26 April 2017 (Doc. 21), the administration undertook to "Launch with effect from October 2017 the implementation of Article 64(1)(b) of the NCLA concluded on 29 July 2010 for transfers from the Auxiliary category in accordance with the conditions and procedures set forth thereunder, maintaining the ranking list of eligible candidates which will be established upon completion of the relative procedure for any further moves implemented in accordance with applicable legislation".*

27. On 14 June 2017 a further meeting took place at the Ministry including the agenda item "bargaining concerning the 2016 Single Administration Fund" and the draft presented by the administration repeats the ritual, essentially, setting aside the same figure for the same purpose. It should be noted that the same agreement makes provision for the transfer of all registrars from category two to category three, although for the auxiliaries only in respect of the 270 for whom provision had already been set aside in the 2010 Single Administration Fund, and that registrars also experience the same problem of transfer between categories.

28. *In addition, another trade union that signed the Supplementary Collective Labour Agreement for the Ministry of Justice from 2010 has initiated proceedings against the Ministry with a view to forcing it to launch the competition for auxiliaries. By judgment No. 7681 of 2016 filed on 22 September 2016 (Doc. 22), the Tribunale di Roma rejected the action in question on the following grounds: "In the opinion of the undersigned the claims should not be accepted because the collective agreement invoked does not grant any rights with immediate effect for the trade union and members, as the provision laid down in*

Article 64 of the supplementary NCLA refers to Article 36 of the Sectoral Contract, which in turn provides for the optional 'promotion of reclassification initiatives', and Article 64 does not lay down any more specific provision on the time-scales and specific arrangements for implementing the said transfers."

29. Similarly, workers from other Ministries have initiated similar procedures, the results of which have been entirely contradictory. Following an isolated initial favourable judgment (for the employees of the Ministry of Transport: Doc. 23), subsequent litigation has been blocked by obtaining (Ministry of the Interior) a declaration from the Regional Administrative Court for Lazio that the ordinary courts have jurisdiction (judgment No. 8697 of 2014: Doc. 24), whilst on the other hand (Ministry for Cultural Heritage) the Florence Court of Appeal has ruled that the Regional Administrative Court has jurisdiction (judgment no. 826 of 2016: Doc. 25).

30. For the time being, we do not trouble the Committee with an account of the full complexities of the cases brought before the Italian courts concerning the issue of which court has jurisdiction: the conclusion is that, as things currently stand, almost twenty years after the first trade union agreements that sought to find a solution to the problem of "auxiliaries" from the Ministry of Justice, the factual situation is as described above and which is now brought to the attention of this Committee.

THE VIOLATIONS OF THE EUROPEAN SOCIAL CHARTER REGARDING WHICH THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS IS REQUESTED TO MAKE A FINDING

31. The right to work and to fair and dignified working conditions had been enshrined by Italian law at constitutional level and is widely recognised and protected by the European Social Charter.

32. The USB is entitled as a trade union association to take action to protect the employment interests of its members, including within national proceedings, as it has done (a similar example can be seen in the *Unison v. United Kingdom* case, European Court of Human Rights judgment of 10 January 2002, application No. 53574/99) and to obtain recognition from the Italian courts of the rights of its authorised representatives.

33. The USB has, through its lawyers, sponsored various cases before the Italian courts

without obtaining any relief for the precarious workers who are members of the trade union,

which has had inevitable repercussions on its credibility.

34. The case law of the Italian courts, as noted above, has rejected outright (for one reason or another and due to the complicated structure of the Italian judicial system, which is divided between the jurisdiction of the administrative courts over public sector employment and the ordinary jurisdiction of the labour courts, which are in continuous conflict with each other, with disputes continuously bouncing back and forth between the two jurisdictions) the possibility both of implementing for all purposes the agreements concluded with the trade unions and of securing effective recognition for the level of professionalism *de facto* achieved by auxiliary workers. This situation results from the fact that, according to the case law of the Joint Divisions of the Court of Cassation (and the Italian Council of State), the transfer between salary levels within a particular category or band falls under the jurisdiction of the labour courts, whilst the transfer from one category or band entails the establishment of a new employment relationship (cf. on this issue the complaint already submitted to this Committee by the union UNADIS for former directors of the Italian Revenue Agency) requiring authorisation by the Prime Minister's Office (which is never granted, and cannot be easily challenged before the courts as it constitutes an act of high administration).

35. All of this is paradoxically justified by the requirement for a competition (imposed as a mandatory requirement under Article 97 of the Italian Constitution, which provides for appointment to the public sector by competition), whereas on the other hand according to Article 16 of Italian Law No. 56 of 1987, the recruitment of workers into the lowest categories – such as category II, band F1, through which auxiliary workers should have transited – does not occur by competition but rather by a simple reference from the employment office and a suitability test, which has always been precluded for Auxiliaries (regarding this issue, see the isolated judgment of the Regional Administrative Court for Lazio, filed as Doc. 23).

36. The conduct of the Italian public administration and of the courts, which deny the right to the professional reclassification of the auxiliary staff of the Ministry of Justice, constitute *de facto* an evident violation of the trade union activity of USB and of other trade union organisations which, notwithstanding the commitment obtained from the Ministry of Justice under the collective agreements for 1998-2001 and 2006-2009 and under the agreements concluded with the Ministry to launch the reclassification of auxiliary staff, are

then *de facto* unable to secure the actual initiation of such a process.

37. On the other hand, the workers are forced to perform tasks that fall beyond their level of classification and, in spite of the fact that they perform the same tasks as their colleagues appointed under category II, do not have any formal recognition of this, and above all are entirely excluded from the possibility of financial advancement which, as mentioned above, whilst corresponding in strictly formal terms to mere salary grades, *de facto* coincides with highly specific professional positions, so much so that certain tasks are assigned to level F1 staff whilst others, which require a higher level of professionalism, are allocated to F2 or F3 staff, and so on.

38. In other words, auxiliaries are denied any possibility of career advancement as they remain – and risk remaining for the rest of their employment relationship - "pinned" to the same category without any possibility of career advancement (in spite of the fact that they are *de facto* employed with tasks which fall under higher professional categories).

39. To provide a further example of the contradiction resulting from the current classification system, it is important to compare the positions of auxiliaries and the drivers of motor vehicles. Prior to the transformation of grades into categories (NCLA for 1998-2001), the difference in classification between the two grades was only one of level, namely level 3 for auxiliaries and level 4 for drivers. However, with the advent of categories, drivers were also reclassified as "auxiliaries", although with salary grade B1. At present they have reacquired the classification of drivers of motor vehicles and are classified under category two in salary grade F2, with the same classification as judicial assistants. Essentially, the gap has increased from one single grade to two: auxiliaries have consequently remained "trapped" in category one without any possibility of career advancement, whilst drivers have been able to progress from position F1 of category II to F2.

40. However this is not all. In recent years the Italian public administrations have experienced a process of mobility affecting workers from various bodies (e.g. the Red Cross) which has seen workers from the lowest categories (thus comparable with the classification of auxiliaries from the Ministry of Justice) transit into the employment of the Ministry of Justice. In breach of the tables introduced by the "Madia reform" (public administration), which stipulate equivalence between various public offices, these employees should have been classified under category one, salary grade F2 (corresponding

to the grade of auxiliaries with the Ministry of Justice), although they were by contrast classified under category two, salary grade F1 in spite of the fact that they had no expertise in the "justice" category. It may be added that in 1991 also certain casual workers entered into "category II" (at the time level IV) under an "ad hoc" competition based only on qualifications, from which Auxiliaries were barred. The same operation was repeated in 1998 and it is now planned to regularise "casual" workers in the Ministry of Justice, also in this case once again passing over the auxiliaries.

41. And yet those employees, who have often been trained in the tasks to be carried out at the Ministry even by the "auxiliaries" to which this complaint relates (who it should be recalled are classified under professional category 1), have all been classified under category II, with the result that it is therefore possible to perform tasks corresponding to that category with the proper recognition of the level of professionalism accumulated over time and the possibility of advancement within the category, increasing their remuneration through the pay increases periodically secured under collective bargaining.

42. This means that the following provisions of the Social Charter have been violated:

- **Article 1,** commitment no. 2 as the Italian state has failed to honour the commitment to recognise as one of its principal objectives and responsibilities in respect of hundreds of public sector workers carrying on the institutional activity of the Ministry of Justice the realisation and maintenance of levels of professionalism as well as the commitment to protect effectively the right of such workers to earn a living through work freely undertaken, thereby forcing them to perform tasks for which appropriate professional remuneration is not provided, in its threefold status as legislator, judge and employer, and to control the application of EU law in Italy;
- **Article 4,** commitment no. 4 as the Italian state has failed as employer to honour the commitment to recognise in respect of hundreds of employees of the Ministry of Justice the possibility of recognition and career advancement notwithstanding that such employees are forced to perform tasks of a higher level than those that they should perform according to their formal classification;
- **Article 6,** commitment no. 4 as the Italian state has *de facto* failed to recognise through its legislation and courts the right of "auxiliary" workers of the Ministry of Justice to take collective action through the complainant USB insofar as the Italian courts refuse to order the Ministry to implement the trade union agreements freely signed by the Ministry;

- **Article 10** as the Italian state as employer and through its legislation and courts has denied hundreds of “auxiliary” employees of the Ministry of Justice the possibility of professional development by “pinning them down” within a professional band that provides for the performance of tasks that are obsolete and largely non-existent as a result of technological innovation over the last twenty years.

43. Each of the violations of the European Social Charter highlighted above was committed in parallel with the violation **of Article E of the European Social Charter** and the commitment by the Italian State **not to discriminate** against workers by recognising the professionalism accumulated by them in relation to the tasks requested from them and performed by them along with the possibility of career advancement, which is by contrast recognised to all other workers who have transited to the Ministry in recent years from other public bodies and who have been classified directly under professional category II on the grounds that they shall be performing the tasks specified in the declarations of professional status for that band.

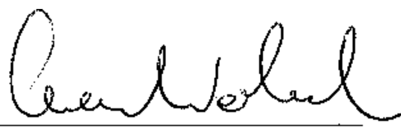
*

The following documentation, referred to in the substantive submission, is appended to the complaint:

STUDIO LEGALE GALLEANO

1- Statutes of the USB;
2- Declaration by the ARAN concerning the representative status of the USB
3- 1998-2001 NCLA for the employees of Italian ministries
4- 2000 Supplementary NCLA for the Italian Ministry of Justice
5- Judgment of 18 September 2014 of the *Tribunale di Verona*.
6- Trade union agreement concluded on 5 February 2000
7- Trade union agreement from February 2001
8- Trade union agreement concluded on 10 May 2001
9- Internal selection procedure for grade B1
10- Trade union agreement concluded on 9 February 2006
11- Declaration by the *Tribunale di Milano* of 16 September 1997
12- Declaration by the *Tribunale di Milano* of 20 March 1997
13- Declaration by the Milan Office of the Public Prosecutor of 11 November 2005
14- Justice of the Peace Service Note of 12 September 2012
15- Justice of the Peace Service Note of 26 June 2014
16- Justice of the Peace Service Note of 15 October 2014
17- Judgment no. 2893 of 2002 of the *Tribunale di Milano*
18- Judgment no. 2613 of 2002 of the *Tribunale di Milano*
19- 2006-2009 NCLA for the employees of Italian ministries
20- Supplementary NCLA for the Ministry of Justice
21- Trade Union Agreement concluded with the Ministry of Justice on 26 April 2017
22- Judgment of the *Tribunale di Roma* of 22 December 2016
23- Judgment no. 1412 of 2011 of the Regional Administrative Court for Lazio
24- Judgment no. 1598 of 2015 of the Regional Administrative Court for Lazio
25- Judgment no. 826 of 2016 of the Florence Court of Appeal

Rome, 10 July 2017

Daniela Mencarelli 

Sergio Galleano

Ersilia De Nisco

Federico D'Elia