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COUNCIL OF EUROPE
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EUROPEAN COMMITTEE OF SOCIAL RIGHTS
EUROPEAN COMMITTEE FOR SOCIAL RIGHTS

29 June 2021

Case Document No. 6

***Professional and Trade Union Association (*ANIEF) v. Italy**
Complaint No. 159/2018

OBSERVATIONS UNDER RULE 32A BY 15 ITALIAN TEACHERS (Original in Italian)

Registered at the Secretariat on 31 May 2021

European Committee of Social Rights (ECSR)

Strasbourg - *Act of signification and/or representation and/or intervention*

In relation to complaint no. 159/2018

For

the teachers Ms Luisa Sarnataro born in Naples on 3.9.1966 (CF: SRN LSU 66P43 F839T), Ms Rosalba D'Aviri born in Palagonia on 17.08.1964 (CF: DVRRLB64M57G253K), Ms Maria Barra born in Naples on 06.11.1966 (CF BRRMRA66S46F839P), Nunziata Gullotti, born in Ucria on 2.3.1964 (GLLNZT64C42L482V), Giuseppina Maria Mastropasqua, born in Naples on 12.12.1964 (MSTGPP64T54F839N), Anna Napolitano, born in Nola 11.6.1960 (NPLNNA60M51F924Q), Valeria Pane, born in Naples on 6.4.1967 (PNAVLR67D46F839Z), Mena Pagliuca , born 3.3.1972 (PGLMNE72C43I234F), Evira Puca, born in Sant' Antimo on 19.05.1971 (PCULVR71E591293L), Paola Salierno, born in Caserta on 18.7.1970 (SLRPLA70L58B963A), Anna Ponticello, born in S. Antimo on 15.1.1965 (PNTNNA65A55T293B), Adriana Russo, born in Naples on 13.8.1962 (RSSDRN62M53F839B), Maria Consiglia Vetromile, born in Naples on 24.11.1963 (VTRMCN63S64F839E), Teresa Maria Lombardi, born in Catania on 13.9.1974 (LMBTSM74P53C351), Mena Pagliuca, born on 3.3.3.1972 (PGLMNE72C43I234F), Giovanna Ronza, born in Sant'Antimo on 20.09.1970 (C.F. RNZGNN70PO60I293J) through the undersigned lawyers Roberto Scognamiglio (f.c.: SCG RRT 62L11 F839N e-mail address: and fax no. 08139E).*robertoscognamiglio@avvocatinapoli.legalmail.it* and fax no. 081.5608470), Angela D'Andrea (c.f.: DND NGL 80M47 F839Q e-mail address: *angeladandrea@avvocatinapoli.legalmail.it* and fax no. 081.3300213), Enrico Romano (fiscal code: RMN NRC 66P07 B696O pec address *enricoromano2@avvocatinapoli.legalmail.it* and fax no. 08118570375) by virtue of the powers of attorney issued in the proceedings before the Court of Cassation SS.UU. registered at N.R.G.

12238/2018 and concluded with order no. 19679/2019, as well as in the proceedings before the Council of State, in Adunanza Plenaria no. 5 of 27.2.2019, who ask, pursuant to art. 170 c.p.c. to receive any communication relating to this judgment at the following PEC and fax addresses: *robertoscognamiglio@avvocatinapoli.legalmail.it* fax no. 081.5608470 - *angeladandrea@avvocatinapoli.legalmail.it* fax no. 081.3300213 - *enricoromano2@avvocatinapoli.legalmail.it* fax no. 081.18570375 ;

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In the aforementioned complaint no. 158/2018 brought by the Association professional and trade union ANIEF against the Italian State for assumed transgression of the European Social Charter.

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Reason for the collective complaint - "... judgment no. 11/2017 of 20 December 2017 of the Council of State in plenary session, with which the highest body of administrative justice has suddenly changed the established orientation of the jurisprudence of the same Council of State - VI Section on the suitability of the qualification of "diploma magistrale" achieved within the school year 2001/2002 for access to the provincial graduatorie ad esaurimento (c.d. "gae"), useful for the annual substitute fixed-term (from 1 September to 31 August of the following year) and for those until the end of teaching activities (from 1 September to 30 June of the following year), pursuant to art. 4, paragraphs 1 and 2, of Law no. 124/1999, but also for recruitment pursuant to art. 399, paragraphs 1 and 2, of Legislative Decree no. 297/1994".

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Done

1. With the complaint of 20 January 2018 and its annexes, the association ANIEF after transcribing and interpreting the broad regulatory reference framework (European,

constitutional, legislative, ministerial and contractual) relating to the context in *question*, exposed the actions of the Italian State, considered, on several occasions, an obstacle to the recognition of the enabling value of only the qualification of diploma magistrale achieved within the school year 2001/2002. In fact, according to him, on the assumption that this value would be recognized by law, the only qualification, would assume sufficient validity for the recognition of the requirement, as an alternative to the competition, for the purposes of recruitment for teaching in primary schools and childhood or access to the third and second band of the rankings, respectively, exhaustive and institute.

2. The complainant then went on to expand on the grounds for censure, to the point of inferring that there was a more general lack of job security among public workers, with reference to the role assumed by the Italian State in implementing Directive 1999/70/EC in the specific school sector.

3. In particular, he argued with reference to the intervening European jurisdictional evolution regarding the abusive use of fixed-term contracts in the private and public sectors, and in relation to the school sector, he identified the "*Mascolo*" judgment of the E.U.C. of 26.11.2014 that declared incompatible with Directive 1999/70/EC, the system of recruitment of substitute teachers in public schools, aggravated by the prolonged absence of the recruitment channel of the ordinary competition.

4. The trade union association complained about a presumed first orientation of the Italian State, assumed, according to it, incontrovertible, in favour of the sanctioning protection of employment stability also of precarious public workers, provided only for private workers, in case of succession of employment contracts.

5. In addition and in any case, in the total absence of evidence, he exposed that the government would have hidden tens of thousands of chairs on vacant and available positions by transforming them into "*de facto*" chairs to prevent the stabilization of precarious workers.

6. The complainant, with regard to the remedies, according to him unsuitable, prepared by the Government, deduced in order to the introduction of Law No. 107/2015 cd. "*Good School*" by which the administration had provided for an extraordinary plan of permanent recruitment starting from the school year 2015/2016, considered unfair to have recruited workers from the GAE who, according to him, would have long abandoned the project of teaching in the public school.

7. The complainant association, in the following, focused on the jurisdictional *excursus on* the "*only*" teacher's diploma as a qualifying value, introduced by the original recognition of the opinion No. 3813/2013 made during the Extraordinary Appeal to the President of the Republic. The aforementioned judicial recognition was never acknowledged by the school administration since the ministerial decree no. 235/2014 updating the GAE, as well as seven subsequent judgments of the Council of State (hereinafter CDS) in 2015, regarding judicial challenges to the non-inclusion of their clients in the GAE, did not result in the annulment of subsequent periodic ministerial decrees updating the GAE.

8. Finally, the complainant, in order to protect the employment interests of its members, concluded by invoking the intervention of the European Committee of Social Rights to ascertain the violations by the Italian State of the European Social Charter, recommending its removal. The grievances raised by the Association in connection with the articles deemed to have been violated are set out below:

9. article 1 commitments no. 1 e 2: *"… to recognise, for tens of thousands of teachers holding a teaching diploma awarded under the old system by the end of the 2001/2002 school year and qualified to teach in primary and infant schools, as one of its main objectives and responsibilities, the achievement and maintenance of the highest and most stable level of employment possible with a view to the achievement of full employment, and to commit itself to effectively protecting the right of such workers to earn their living by means of work freely undertaken, while instead*

making work precarious in the threefold role of legislator, judge and employer'; 10. Article 4(1) and (4): '*since the Italian State has failed, as an employer, to fulfil its commitment to tens of thousands of teachers holding the diploma magistrale (master's degree) obtained under the old system before the 2001/2002 school year, qualified to teach in primary and infant schools, to receive sufficient remuneration to guarantee them and their families a decent standard of living, by requiring the plenary assembly of the Council of State - in judgment No 11/2017 and to safeguard the professional progression of the judges who composed the highest body of administrative justice - the discriminatory change and without objective reasons of the principles of law set out in seven previous judgments of the same Council of State, thus allowing MIUR the immediate termination for n.50.203 teachers with magistral diplomas of their respective permanent contracts or fixed-term contracts until 31 August 2018 or 30 June 2018 or with temporary substitutions, entered into by virtue of precautionary or non-final measures of the TAR or the Council of State that were cancelled by the ruling of the plenary assembly";*

11. Article 5: *because the Italian State has not guaranteed the freedom of school workers to set up national organisations such as ANIEF to protect their economic and social interests and to join such organisations, since national legislation has undermined this freedom and acted through the courts of the Council of State and the Court of Cassation in such a way as to undermine it, even nullifying the judgments of the Council of State and the rules of law and collective agreements which recognise workers' rights;*

12. Article 6, commitment no. 4; '*because the Italian State, through its legislation and its jurisdiction, has not in fact recognised the right of diplomaati magistrali to take collective action through the complainant ANIEF in the event of conflicts of interest, because the collective action exercised, through its lawyers, in individual proceedings before ordinary and administrative national courts, in the EU Court of Justice and in the Constitutional Court, has been deprived of*

its effect of protecting rights, which has been denied by the Council of State and the Court of Cassation';

13. art. 24: "*because the Italian State, as an employer and through its legislation and jurisdiction, for tens of thousands of teachers with magistral diplomas hired on an indefinite or fixed-term basis on vacant posts on the establishment plan , has not recognised either the right not to be dismissed without a valid reason relating to their aptitudes or conduct or based on the requirements of the functioning of the organisation of public offices or of the service, or the right of the aforementioned workers dismissed without a valid reason to reasonable compensation or other appropriate redress, while also preventing the right of appeal before an impartial body*";

14. Article E with reference to the assumption that: "*Each of the violations of the European Social Charter referred to above was committed in conjunction with the violation of Article E of the European Social Charter and the Italian State's commitment not to discriminate against teachers with a magistral diploma, qualified to teach in primary and infant schools, to be placed on permanent status in the public school administration, compared to teaching staff with magistral diplomas, already substitute enrolled in the GAE and hired on an indefinite basis with legal effect from 1 September 2015 with the extraordinary plan of placing in the role referred to in art.1,* That said, it should be noted that the current exponents and interveners are precarious teachers "*historic*" primary school / childhood, in possession of the diploma achieved by the school year 2001/2002 as well as subsequent qualification and eligible for ordinary competition in the school of childhood / primary is included in full capacity in the GAE.

The respondents also participated in the civil proceedings referred to in the order issued by the Court of Cassation, United Sections, No. 19679/2019 with which the appeal of the magistral graduates within the school year 2001/2002 against the ruling of the Plenary Assembly of the Council of State No. 11/2017 was declared inadmissible.

It should be noted that with the aforementioned ruling of the Plenary Assembly of the Council of State No. 11/2017 (also confirmed by the subsequent ruling A.P. CDS No. 5 of 27.2.2019) stated that only the teacher's diploma achieved within the school year 2001/2002 is devoid of qualifying value ex se and is insufficient for the purpose of inclusion *pleno jure* in the graduatorie provinciali ad esaurimento (GAE).

16. The complainants, having learned by chance from the *website* of the ANIEF Association of the news of the filing of the complaint in question, present and intervene, insofar as necessary, in support of the regularity of the Italian State's actions, contesting the deductions and conclusions of the complaining professional association and trade union ANIEF.

Therefore, in relation to the aforementioned complaint, the present complainants hereby highlight, in any case, as far as they are concerned, the groundlessness of the complaint and the correctness of the Italian State's actions, stating the following.

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17. *First of all*, it should be noted that, in addition to ruling no. 11 of 20 December 2017 of the Plenary Assembly of the CDS, which rejected the recognition of the qualification value of "*only*" the educational qualification, the main reason for today's collective complaint, following the submission of allegedly unprecedented reasons for censure by the complainant's clients, the CDS has again ruled on the subject reiterating what was already stated in 2017, resetting in a final way any procedural and substantive conflict.

18. In fact, with the new judgment No. 5 published on 27.2.2019, the highest court of the Council of State, confirmed the total lack of foundation of the interpretation hinged on the full and exclusive sufficiency *ex se of* the enabling value, absolute, of the teacher's diploma, achieved within the s.y. 2001/2002 for the purpose of inclusion *pleno jure* in GAE.

19. At the same time, noted the orientation favorable to the expectations of teachers cd. "*precarious history*" as the intervener today, included in the GAE as a result of the legitimate

teaching qualification in kindergarten and primary schools, acquired as a result of the profuse effort to participate in appropriate procedures for the acquisition of a qualified qualification, further, to the mentioned degree such as passing a competition for qualifications and examinations or a reserved session of examinations.

20. In particular, the SSC reiterated that the request for appeal violated fundamental principles of the administrative process, such as the starting *point* for challenging the damaging act, which the appellant mistakenly traced back to the pronouncement of a sentence that ascertained the illegitimacy of the damaging act, rather than to full knowledge of it, with the effect of putting the interested parties who had remained acquiescent back on time.

21. Moreover, the SSC did not overlook the fact that the appellant's erroneous assumption that the sixty days from the publication of the judgment annulling the ministerial decree updating the GAE, considered hostile, in so far as it did not authorise the inclusion of the appellants, had also been far exceeded.

22. A further aspect was the legal nature of the challenged ministerial act Ministerial Decree no. 235/2014. The Plenary Council had definitively established the lack of an intrinsic normative nature, since it lacked the essential elements that made it up, i.e. abstractiveness, generality and innovativeness, and consequently the non-effectiveness *erga omnes* of the first-born judgment no. 1973/2015 which had ordered its partial annulment.

23. In particular, the aforementioned judgment, had annulled the Ministerial Decree No. 235/2014, insofar as it did not allow, to teachers in possession of the qualifying teacher's diploma (obtained within the school year 2001/2002), the registration also in the GAE.

24. Well, the SSC correctly adopted particular rigidity when it reiterated that the seven previous dissimilar rulings, of the Sixth Chamber of the SCC, could not have generalised application but the constraint of the decision was confined solely and exclusively to the claimants in the individual proceedings.

25. The CDS, therefore, clarified the validity of the interpretation of the legal value of the teacher's diploma obtained *prior to the* 2001/2002 school year with the introduction of the degree in science of education, stating that only the procedures suitable for the acquisition of a qualified qualification, additional to the aforementioned qualification such as passing a competition for qualifications and examinations or passing a reserved session of examinations, remained suitable to overcome the new limit of access to teaching constituted by the absence of a degree in science of education.

26. In addition, Order No. 19679/2019 of the Court of Cassation declared inadmissible the appeal of the appellants magistral graduates within the school year 2001/2002 against Judgment No. 11/2017 of the CDS in plenary composition.

27. The Supreme Court, meeting in United Sections in chambers, has not seen, in fact, any excess of judicial power in the syndicate of the highest court of the CDS, on the contrary, considered extrinsic within the normal activity of interpretation of the rules.

28. Therefore, within the limits of national law, the affirmed non-existence of the right of the complainant association's clients to be included in the third band of the GAE becomes definitive, with the preclusion of Ministerial Decree no. 235/2014, limiting access to only the second band of the school rankings, in adherence to the opinion of the CDS no. 3813/2013 transposed by the Presidential Decree of 25.3.2014 and accepted by the Ministry with Ministerial Decree no. 353/2014, which provided for the updating of the school or circle rankings for the three-year school period 2014/2017.

29. With regard to the stabilization of the employment relationship, the issue raised was resolved in national law before the Supreme Court with Sentence no. 392/2012, which in accordance with paragraph 5 of art. 36 of Legislative Decree no. 165/2001, sanctioned the prohibition of stabilization of the worker and the possible only compensation for damages, however, to be demonstrated by each individual employee.

30. The subsequent Order no. 16226/2016 of the Court of Cassation, intervened again on the issue and in particular, if reaffirmed the right of the worker to compensation for damages arising from the performance of work in violation of mandatory provisions, at the same time, revisited in part the orientation on compensation for damages, in fact, sanctioned the exemption of the burden of proof to the extent and within the limits of Article. 32 paragraph 5 of Law No. 183 of 4.11.2010.

31. On the contrary, the aforementioned new ruling, confirmed that where the employee had been the victim of the unlawful precariousness of the employment relationship, he was not entitled to reinstatement in the roles, in accordance with strict compliance with the constitutional principle of paragraph 3 of art. 97, taken to protect the good progress and impartiality of the public administration, given that the recruitment in the roles of staff is not characterized by being so-called "*reserved*" but "*open*" with the typical mode of competition.

32. Therefore, the prohibition to convert "*abusive*" fixed-term employment relationships into open-ended contracts was *ascertained, in relation to* which, however, the Italian State has also provided for specific regulatory relief with Law no. 107/2015, the so-called "*Good School*", with which the administration has implemented an extraordinary plan of open-ended recruitment, for over one hundred thousand positions, starting from the 2015/2016 school year.

33. In conclusion, the Italian State has not failed to meet its commitments, in fact, there is no assumed discriminatory treatment of teachers with only a teacher's diploma obtained under the old school system before the 2001/2002 school year, given that the erroneous principles of law set out in the previous judgments of the SSC, have been revisited in plenary session and based on objective reasons, also to protect the public interest in the context of a broader evolution of the regulatory sector aimed at recruiting increasingly qualified staff.

34. In any case, in considering correct the dismissals occurred on the basis of the signing of contracts provided with the affixing of the termination clause, as a result of the negative

outcome of the judgment of merit, and the consequent removal from the GAE, the Italian State has provided new specific regulatory interventions of compensation with alternative routes to ordinary recruitment competitions, so-called "*reserved*" and "*non-selective*", for access to the roles (*c.f.r.: D.D.G. n. 1456 of 7.11.2018; D.D.G.*

No. 497 of 21.4.2020 - D.D.G. 510 of 23.4.2020), which safeguarded only the requirement of three years of service largely held by the assistants of today's complainant.

35. Finally, the claims of the complainant regarding the alleged limits placed on the organisation, representation and defence of the collective rights of school workers in defence of their economic and social interests exercised through the complainant association ANIEF, denied by the SSC and the Court of Cassation, are of no direct relevance to the interests of the current representatives and interveners.

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In view of the foregoing, in acquiring the procedural documents of the present petition and/or the complainants and/or interveners, we conclude that, *contraris rejectis*, the European Committee of Social Rights should reject the collective complaint of the association ANIEF.

Attached are:

1. ANIEF collective complaint dated 28.1.2018;
2. CDS Ad. Plen. no. 5 of 27.2.2019;
3. Order No. 19679/2019 Court of Cassation United Sections;

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Lawyer Roberto Scognamiglio

Lawyer Angela D'Andrea

Lawyer Enrico Romano