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Case Document No. 3

Nursing up v. Italy
Complaint No.169/2018

RESPONSE FROM NURSING UP TO THE GOVERNMENT'S OBSERVATIONS ON ADMISSIBILITY

Registered at the Secretariat on 11 December 2018

Nursing Up

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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 NO. 169/2018 – NURSING UP V. ITALY

With reference to the observations made on 17 September 2018 by the Italian Government on the admissibility of the collective complaint lodged by Nursing Up, a number of clarifications are first of all necessary.

Article 6 of the Additional Protocol to the 1995 Charter provides that "The Committee of Independent Experts may request the Contracting Party concerned and the organisation which lodged the

complaint to submit written information and observations on the admissibility of the complaint within such time-limit as it shall prescribe."

The Italian Government, in its observations, initially acknowledges that Nursing Up has the required level of representativeness pursuant to Article 43 of Legislative Decree No. 165/2001, confirming that one of the requirements for the admissibility of the complaint has been met. Subsequently, however, it not only highlights exceptions and/or conclusions in relation to whether other formal requirements have been met and, therefore, the admissibility of the complaint, it rather surprisingly goes into the merits of the case, making observations that are completely irrelevant and unrelated to the regulatory context in question.

Pursuant to Article 7 of the Additional Protocol to the 1995 Charter, only once the Committee of Independent Experts has decided that a complaint is admissible shall it "notify the Contracting Parties to the Charter through the Secretary General. It shall request the Contracting Party concerned and the organisation which lodged the complaint to submit, within such time-limit as it shall prescribe, all relevant written explanations or information, and the other Contracting Parties to this Protocol, the comments they wish to submit, within the same time-limit."

Accordingly the collective complaints system provided for by the Additional Protocol requires first of all that the Committee of Independent Experts decide on the admissibility of the complaint. Only after careful examination does it invite the Parties to submit their observations with regard to the merits.

The European Committee followed this procedure and sent a formal communication on 19 July 2018 to inform Nursing Up that the Italian Government had until 18 September 2018 to present written observations on the admissibility of the complaint and on the request for immediate measures.

However, as far as we are concerned, all the conditions of admissibility have been met in the collective complaint lodged by Nursing Up: it was submitted in writing, it included identifying information regarding the complainant organisation, it was signed by the person authorised to represent the complainant organisation and drafted by a national trade union organisation that has **the level of representativeness required** pursuant to Article 43 of Legislative Decree No. 165/2001. The complaint concerns one or more of the provisions of the Charter and is against a state where the Charter is in force and which has accepted the system of collective complaints.

With the admissibility of the complaint in question having been established, it is necessary for us to provide an appropriate response and clarifications relating to the arguments put forward by the Italian Government, with particular reference to the alleged intention of the legislature to ensure a binding link between national bargaining and supplementary bargaining, whereby the latter should be consistent and not call into question the national approach to concluding agreements. In essence, supplementary bargaining is claimed to be dependent upon national agreements. Consequently, the aforementioned agreement legally excludes trade unions that did not sign the NCLA, yet are legally representative, from decentralised bargaining.

Nursing Up did not raise any objections regarding the possible content of the supplementary agreement in question; rather it expressed grievances concerning its subjective nature, namely the identification of trade union bodies authorised to negotiate in decentralised bargaining, subsequently maintaining that the NCLA may not exclude from supplementary bargaining trade unions that are legally identified as representative, for the sole reason that they did not sign the national agreement, without any right to derogate therefrom. In this regard, it should be noted that at the Azienda Ospedaliera Niguarda, 1351 out of 2000 nurses are members of Nursing Up. Therefore, we do not understand how, in such a situation, Nursing Up, which represents an undeniable and significant number of members, is not able to participate in supplementary bargaining and make its own contribution at that establishment.

This is of paramount importance, since the issues relating to the subjective nature of supplementary bargaining should not be confused with those pertaining to its content, given that any contested violation of the obligations set out by the NCLA could also be a consequence of a supplementary agreement concluded solely by trade union organisations that had signed the NCLA.

Therefore, the agreement either respects or goes against the limits and/or obligations established by the NCLA, depending on its content and not the bodies that have signed it.

In this regard, however, it seems necessary to point out that if one looks at the issues dealt with in supplementary bargaining (working hours, mobility, ancillary remuneration and health and safety at work), it is easy to show how the regulations established by supplementary agreements could perform two separate functions.

At times, these have an additional function in that they provide procedural guidelines for issues that have not previously been regulated in the NCLA. In such an event, assuming that the supplementary agreement fills the gap in the NCLA regulations, it is clearly important for the representative trade union to participate in supplementary bargaining to reach an agreement on procedures aimed at regulating issues not covered by, and therefore not dependent upon, the national agreement. In such a case, it is completely inappropriate to state that participation in supplementary bargaining requires, for alleged logical and legal reasons, the signing of the NCLA.

The above considerations are also relevant when the provisions of the supplementary agreement perform a function that is specifically executive, implementing the procedures set out by the NCLA.

In such a situation, it is unclear why a representative trade union would not be able to contribute to determining the detailed rules governing implementation of the procedures set out by the NCLA, even though it is not a signatory to the latter.

Equally unfounded is the conclusion made by the Italian Government that Nursing Up, even though it has not signed the NCLA and, therefore, is not able to take part in decentralised collective bargaining, is however able to participate through its elected representatives in the trade union representation bodies (RSUs).

In this regard, the government fails to point out that the RSU is a collegial body comprised of at least three members elected from lists of all trade unions that took part in the elections and not from one single trade union, such as Nursing Up, of which they may not be registered members. In essence, members of the RSU represent all workers and not the trade union on whose list they were elected. Each RSU member does not act individually, but rather as part of a collegial body.

It follows that the RSU does not have any capacity to represent the trade union, from whose activities it is completely separate and unrelated.

Trade union organisations are entitled only to present the lists and candidates for the RSU elections, but the RSU members, once elected, act autonomously and make their own decisions by majority vote within the body (Document 1). In addition to this, on account of the RSU's collegial nature, the RSU representative holds no power as an individual to make decisions or represent his or her trade union.

The RSU takes part in negotiations in its capacity as an elected single entity, which represents workers and, therefore, any reference to individual members within it is ruled out. It is the ARAN – the Agency for Representation in Bargaining with Public Administrations – which, in outlining its application guidelines, clarified that the RSU makes its own decisions by majority vote and the position of an individual member counts only within the body and not externally where the RSU operates as a single entity.

Consequently, the signature of only one of the members of the RSU – acting as an individual – is not valid for the purposes of signing the supplementary agreement, except where he or she has been given a specific mandate to represent the RSU as a single entity. (Document 2)

In this connection, contrary to what the government argues, it is not easy to appreciate how Nursing Up could be represented in negotiations if the RSU is comprised of members elected from a list of all the trade unions that participated in the elections and if none of its members – elected individually – has the right to represent the trade union Nursing Up on whose list he or she was elected, given that the RSU speaks as a collegial body.

It should also be noted that during supplementary bargaining for sectoral staff, the RSU – an elected representative body of staff – is, together with the representative trade union organisations that have signed the NCLA, one of the bodies necessary for the composition of the relevant negotiating delegation. Such a situation further confirms the complete and definite distinction – in law and in practice – between the RSU and trade union organisations, which can be seen in that both are able to present distinct and separate bargaining platforms that it will be the task of the administration to evaluate. (Document 3)

It should be pointed out once again that the trade unions in this category have no authority; they can intervene with regard to neither the composition and functioning of the RSU, nor the latter's relationship with the trade union organisations that have signed the NCLA participating in the negotiations. Similarly, it is the RSU's exclusive responsibility to take note of the resignations of its own members and find replacements (Document 4). In addition, as the hours of paid leave allocated to the RSU are different from those allocated to representative trade unions, the trade union is not entitled to claim or account for those hours as it is an exclusive right for the RSU as a collegial entity. (Document 5)

This inevitably leads to the conclusion that the elected RSU member is not inextricably linked to the trade union through the list, since there is an electoral system strongly connected to workers at grassroots level and there is no question of the RSU being a trade union body representing its members on a par with corporate-level representation bodies (RSAs).

It can be observed that, despite the fact that Article 5, paragraph 1, of the National Collective Framework Agreement of 1998 provides that the "RSUs shall replace RSAs", there is in fact no complete identification of these bodies, given that the latter are appointed by the trade union and therefore are subject to all the related consequences in terms of representativeness and dependence on that union's policies.

Accordingly, in the light of the groundless nature of the arguments put forward by the Italian Government, the measures requested by Nursing Up are legitimate and should be granted.

The following documentation is appended:

1. ARAN memorandum RS 145
2. ARAN memorandum RS 41
3. ARAN memorandum RS 35
4. ARAN memorandum RS 134
5. ARAN memorandum RS 101

Rome, 12 October 2018

Prof. Antonio De Palma, as legal representative of Nursing Up,

Counsel Anna Mastrella