EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

27 February 2020

Case Document No. 6

Nursing Up v. Italy
Complaint No. 169/2018

FURTHER RESPONSE BY THE GOVERNMENT ON THE MERITS

Registered at the Secretariat on 2 January 2020

REPUBBLICA ITALIANA

Ufficio dell'Agente del Governo italiano

davanti al Comitato Europeo dei Diritti Sociali

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Avvocatura Generale dello Stato

European Committee of Social Rights (ECSR)

Collective complaint n. 169/2018

Nursing up vs Italy

REPLY OF THE

ITALIAN GOVERNMENT

TO THE OBSERVATIONS OF NURSING UP

Roma, 23 December 2019 Ct. 54020/2019

(Avv.Fiandaca)

1. Replies from Nursing Up

1. On 24 October 2019 acknowledging the observations filed by the Italian Government, the complaining trade union considered them unfounded for the following reasons:

   a. the R.S.U. does not represent the trade union organization, in the absence of an organic relationship;

   b. only the R.S.A. represent the union;

   c. failure to sign the national contract prevents union representatives from participating in the supplementary bargaining of trade union.

2. The position of the Italian government

2. The trade union limited itself to acknowledging the contents of internal regulations, without however explaining what the alleged violations of articles 5, 6, 21 and 22 as well as of letters E and G of the Social Charter consisted of.
3. In particular, the Italian government did not state in its defence that the r.s.u. represent the union, in the sense that the complainant endorses of necessary existence of an organic relationship.
4. The Italian government rather highlighted that if the trade union is not a signatory (by its choice) of the national collective agreement, it can still be present in the supplementary bargaining through its elected representatives in the r.s.u.
5. The latter are indeed a unitary staff representative body, but are set up also on a separate initiative by trade unions.
6. In particular, art. 42, § 4, of legislative decree 165/2001 provides that

   «The right to present lists must be granted, in addition to organizations that, according to the criteria of art. 43, are admitted to negotiations for the signing of collective agreements, also to other trade union organizations, provided that they are established in association with their own statute and provided that they have adhered to agreements or collective agreements ruling the election and functioning of the body».

7. The r.s.u. certainly constitute a unitary body of a multi-trade union nature and therefore they are not the result of the summation of individual members as representatives of the associations that presented the lists in which they were elected and the agreements concluded by the R.S.U. are not also agreements concluded by the trade union organization just because a member elected as a component in their lists belonged to the R.S.U.: only in this sense direct representation can be excluded.
8. Indeed, even if there is no mandate bond between the trade union organization that presents the lists and the person elected within the RSU, coming from that list, it is undeniable that the elected person is an expression of a unitary centre of interest, which belongs to the union that presented the list and that does not even have to be a signatory of the national contract.
9. As recently reaffirmed by the jurisprudence of legitimacy (Civil Cassation, labour section, 8 February 2018, n. 3095),

   «while entrusting to national collective bargaining the definition of the modalities of constitution and operation," art. 42 cited "prescribes general principles that set external limits to bargaining, providing for an elective system based on the pure proportional criterion (unlike the one provided for by the agreement of the interconfederation of 20.12.1993 which reserves one third of the seats to the trade union organizations stipulating the collective agreement)».

10. The rule then establishes that

    «trade union organizations that do not have the representativeness requirements for participation in the national collective bargaining must also be admitted to the competition, provided that they have their own statute and have adhered "to the collective contracts and agreements governing the election and functioning of the body».

11. In this way, the internal system guarantees a union representation as pluralistic as possible.

12. The alleged violation of art. 5 and 6 of the Charter is then inexplicable, given that the system grants the parties the right to freely associate, and the choice whether to sign or not the national collective agreement is free, as the one of presenting the lists for the election of the r.s.u.
13. The provisions of art. 6 then protect the right to "negotiate collectively", a right that was granted to the complainant association at national level, through participation in the negotiations for the stipulation of the collective agreement, which the association then did not choose to sign, and then locally, through the indirect, mediated, but in any case existing representation of the r.s.u. elected from the list presented by the association.
14. As for points sub b) and c), it is necessary to reiterate that the association participated in collective negotiations, choosing not to enter into the contract.
15. This resulted in the exclusion of trade union delegates from supplementary bargaining, with a choice of the legislator largely justified by the necessary consistency of the supplementary contract with the national contract, to which the former cannot derogate on the basis of art. 40, § 3 bis, of legislative decree 165/2001. This rule provides that

    *«The supplementary bargaining agreement takes place **on the subject-matters, with the constraints and within the limits** established by the national collective agreements, between the subjects and with the negotiation procedures that the latter provide for; it can have a territorial scope and concern several administrations. National collective agreements define the end of negotiation sessions in a decentralized session».*

16. Art. 40, § 3, of the decree provides that

    «The clauses of the supplementary collective agreements not in conformity are void and cannot be applied. From this dependence of the decentralized bargaining on the higher levels of negotiation, the doctrine attributes a "real effectiveness" placed in defence of the contractual order to the provisions of the latter».

17. Hence the need not to allow a delegation that refused the stipulation of the national collective agreement to participate in the stipulation of the supplementary agreement that the former must respect and develop, just taking into account the needs *in loco*.
18. If a treating party has refused a certain set of interests, it will tend to understand it in a restrictive sense, to call it into question, limiting the scope of operation of the supplementary contract.
19. With a **harmful consequence**, because there is a waste of legal means, with the risk that the centrally expressed refusal will reverberate on the contents of the supplementary contract.
20. Then this outcome **is not necessary**, given that the party still has the opportunity to convey a contribution through the R.S.U., even in the absence of delegation.
21. Furthermore, pursuant to art. 42 of d. lgs. 165/2001, even in the absence of the signing of the national collective agreement, the representative unions, including the Association, enjoy the union rights and prerogatives provided by law 300/1970 ("Workers' Statute"), by national collective agreements framework and other previous collective bargaining agreements entered into by ARAN (assembly, notice board, premises, permits for the fulfilment of the mandate, permits for participation in statutory management bodies, secondments, union expectations and permits, unpaid expectations and so on).
22. Hence the conclusion, supported by the Italian Government, according to which the regulatory framework is consistent with the allegedly violated provisions of the Charter, which do not in any way require that company union representatives participate in supplementary bargaining in the event of failure to sign the national contract but they grant a participation.

23. In any case, the violation of articles 21 and 22 of the Charter does not exist also because the prerogatives listed therein refer to *"workers"* and not to trade union associations; on the contrary, by granting a unitary representation of the workers, and not a direct representation of the unions, the r.s.u. better allow the full realization of the right to information and consultation of "all" workers, together with the right to participate in the determination and improvement of the conditions of work.

24. Nor can the alleged violation of the principle of "non-discrimination", pursuant to article "E" of the Charter, be made out, given that due to self-evident circumstances the complainant Association:

a) was admitted to negotiation for the national collective agreement;

b) freely refused to sign this contract;

c) presented the lists for the election of the r.s.u.

2.1. In particular: the absence of discrimination.

25. Therefore discrimination does not exist with respect to the signatory associations of the collective agreement, which indeed contributed to the establishment of the regulatory framework within which supplementary bargaining must enter by law.

26. Discrimination could be made out in the event of exclusion from the negotiations of an association which presents the representativeness requirement provided for by law (see page 4 of the observations of the Italian Government), certainly not when the association chooses not to share a set of interests, but then claims to contribute to the development of the same interests at a territorial level as a more incisive measure than the participation of the R.S.U. to bargaining.

27. In relation to the alleged discrimination with respect to employment relationships not dependent on public administrations, please refer to what is deduced in pages 3 and 4 of the written observations.
28. In any case, letter G) admits restrictions of rights which are: **i.** provided by law; **ii.** necessary to protect the public interest.
29. Even if we want to believe that there is a restriction of rights, it is clear that the same is provided for by law (art. 42 of the decree) and is necessary to protect the public interest, consisting of the necessary respect of the national contract from the supplementary contract.
30. Moreover, the sanction of nullity provided for the dissimilarity is precisely an indication of the existence of a significant public interest, given that the nullity, according to the teaching of the United Sections of the Court of Cassation (Civil Cassation, joint section, 12 December 2014, n 26242) is the most serious pathology that involves the non-classification of a case in dependence on the violation of a superindividual interest.

3. Conclusions

31. In conclusion, the Italian State requests that the adverse claim be declared unfounded, as there are no alleged violations of the Charter and therefore there are no behaviours to be removed.

drafted by

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