European Social Charter | Charte sociale européenne

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

27 February 2020

Case Document No. 4

Unione sindacale di base (USB) v. Italy
Complaint No. 170/2018

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. 170/2018
Unione Sindacale di Base (USB) vs Italy

REPLY
OF THE
ITALIAN GOVERNMENT
TO THE OBSERVATIONS OF USB

Roma, 23 December 2019 Ct. 32893/2019
(Avv.ti Garofoli and Fiandaca)

1. Inadmissibility of the replies presented by the USB

1. Rather than answering the precise observations of the Italian government regarding the absence of the alleged violation of art. 1, 4, 5, 6, 12 and 24, together with art. E of the European Social Charter, as well as of art. 45 TFEU, the USB focuses its attention on the applicability to the present case of the framework agreement annexed to directive 1999/70 and directive 2003/88.
2. In short, the party asks the European Committee of Social Rights to interpret the concept of worker relevant for the aforementioned Community rules; which obviously goes beyond the competence of the Committee, because a preliminary reference to the Court of Justice is required.
3. As is well known, indeed, the Preamble of the European Social Charter shows that under the ECHR and its protocols,

"*the member States of the Council of Europe have agreed to guarantee their populations the civil and political rights and freedoms specified* ***in <u>these</u> instruments".***

4. The use of the demonstrative adjective "these" reiterates and at the same time defines the scope of protection provided by the Charter and, consequently, the competence of the Committee to know of the relative violations.

2. The concept of 'worker' relevant for the purposes of the safeguards guaranteed by the Charter

5. In the replies, the USB once again insists on the existence of an employment relationship.
6. In the complainant's opinion, indeed, this concept must be examined in the light of the jurisprudence of the Court of Justice; it then recalls a precedent of the Court (C 270/2013) concerning the qualification of the employment relationship of the president of the Port Authority of Brindisi, which in the prospect of the complainant would be superimposable to the one of its cause.

7. In particular, in the opinion of the USB there would be a notion of a European-style worker that would be relevant to identify the field of application of the community legislation referred to and automatically also to determine the protections provided by the European Social Charter.
8. Except that to affirm this the complainant approaches profoundly different cases both in situations of fact and in applicable legislation and related purposes.
9. Under the first aspect, the two work relationships are profoundly different.
10. The socially useful work is a relationship equated with a model of a North American matrix defined as workfare, based on the idea that social protection for the unemployed constitutes a right conditional on an "off-market" work performance in socially useful activities, as well as the duty to take personal action to get out of assistance.
11. This is an institute downstream of the so-called social safety nets as it represents an innovative tool to deal with especially (but not exclusively) youth unemployment, with a markedly social security-welfare connotation.
12. The cause of the contract under examination is different, due to its social security and welfare matrix, the employment purpose, the insertion within the framework of a program that uses public contributions, and it is evidently more complex, than the one of the employment relationship, characterized by the exchange between work and pay.
13. It is a contract that belongs to social legislation, which aims to protect the worker from the risks resulting from impairment or loss of his working capacity due to predetermined events independent of his will, as in the case of loss of work for market-related causes.
14. The president of a Port Authority is instead designated among very high profile technicians, his work relationship is exclusive, the minister wields penetrating powers of revocation and of disciplinary nature over him.

15. The purpose of the rule pursuant to art. 45 TFEU is the negative one of excluding discrimination in order to implement the free movement of workers, and therefore one of the four fundamental freedoms on which the European Union is based. However it cannot be superimposed on norms that move in the different perspective of fully protecting the workers who already have an existing relationship in their civil rights.
16. Indeed, the same sentence recalled by the party shows that similar conclusions cannot be reached if the activity is characterized by greater autonomy and flexibility.
17. Moreover, the USB values the performance of work in exchange for a fee as constituent component of a work relationship; it neglects to dwell on a relevant aspect, constituted by the "existence of a subordination bond between the worker and his employer", which "must be assessed case by case in consideration of all the elements and all the circumstances that characterize the relationships between the parties "(Court of Justice, Grand Chamber, 20 November 2018, C 147/2017).
18. To this end, the remarks in the observations on the lack of the subordination requirement are recalled.
19. In any case, it is necessary to point out that, just in terms of socially useful workers, the Cassation has recently stated that

«Fixed-term employment contracts, aimed at stabilizing the subjects employed in socially useful jobs, stipulated by a P.A. on the basis of rules of regional law, ***cannot be excluded, in principle, from the application of the Framework Agreement on fixed-term work, attached to Directive n. 1999/70 / CE of the Council,*** *as well as of the legislative decree n. 368 of 2001 which implemented it, considering, on the one hand, the scope of general application referred to in point 1 of clause 2 of the Agreement, and on the other, the scope of the right of exclusion that point 2 of the same clause assigns to the Member States and / or to the social parts, so that the judge of the merit cannot argue from the needs of political-social nature based on the contracts in question, nor from the peculiar purpose they pursue, but must proceed to the examination of the contract and of the actual connotation of the relationship with respect to the discipline that provides for the excluded legal cases ».*

20. Therefore in some cases, to be examined on the basis of the circumstances of the specific case, the jurisprudence extends the protections set by the directive 1999/70 and by the related framework agreement to socially useful workers.
21. What cannot be affirmed is that this should be the rule, leaving aside the concrete ways of carrying out the relationship.
22. In other words, the complainant would like to create a rule, *id est* the application of the community legislation provided for workers even to socially useful workers, modelled on an exceptional hypothesis.
23. The argument is not consistent with the exceptional nature of the hypotheses in which there is a relationship structured as subordinate, but above all it is not necessary, given the recognized possibility, in such circumstances, of applying the protections asked for by the complainant.

3. Internal case law concerning the application of art. 2126 c.c.

24. The party complains about the lack of acknowledgement of a substantial notion of worker, such as to include also relationships that are qualified differently from a formal point of view, as the one of a socially useful worker, but in fact that meet the typical requirements of an employment relationship.
25. The Italian State observes that as recognized by the party the internal case law believes that socially useful workers are not subordinate workers, but that if in actual fact the relationship takes on the specific characteristics of subordination, the protections of art. 2126 of the Civil Code are applied.
26. Indeed the ruling of the Court of Cassation of **27 October 2017, n. 25672** stated that

"To be able to qualify an employment relationship effectively established in a public administration employment, the worker is to be effectively integrated in the public organization and used for a service falling within the institutional purposes of the administration", being irrelevant in the opposite sense either the absence of a

formal nomination act, or that it is a temporary relationship, or that the relationship is affected by nullity for violation of the mandatory rules on the prohibition of new engagements".

27. Art. 2126 of the Civil Code, established to regulate the hypotheses of ascertaining pathologies of the employment relationship, which do not hinder the recognition of the right to remuneration, was therefore also applied in the cases of so-called substantial subordination, in order to reappraise the relationship on the basis of substance.
28. However, the party complains that such a reappraisal would not be to all effects, because of the exclusion of social security provisions.
29. The statement is inaccurate on the basis of what has already been stated in the observations submitted by the Italian state regarding the alleged violation of art. 12, commitment 1 of the Charter, which show the mechanism by which the legislator clearly assured the social protection of socially useful workers depending on the time in which the relationship took place.

4. Conclusions

30. In conclusion, the Italian State requests that the replies filed by the USB are declared inadmissible or subordinately unfounded as the commitments envisaged by the Charter whose alleged violation has been reported are not violated.

drafted by

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