

**EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX**



Charte
sociale
européenne



5 June 2019

Case Document No. 1

Association of Secondary Teachers Ireland (ASTI) v. Ireland
Complaint No. 180/2019

COMPLAINT

Registered at the Secretariat on 26 April 2019

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



4th April, 2019

Re: Complaint to European Committee of Social Rights

Dear Mr Brillat,

I am the General Secretary of the Association of Secondary Teachers, Ireland ("ASTI") and am duly authorised to write to you to present this complaint.

ASTI is a trade union registered with Ireland's Registrar of Friendly Societies under the Trade Union Act 1871 and holds a negotiation licence issued under the Trade Union Act 1941. It represents some 18,000 secondary school teachers in Ireland and is affiliated to the Irish Congress of Trade Unions ("Congress"). The objects and aims of ASTI are to promote second-level education; to promote and protect teachers' interests; to maintain and improve teachers' conditions of employment; and, most relevantly in the context of this complaint, to unite and organise all secondary (being post-primary/second-level) teachers in Ireland.

A copy of the ASTI Rules and Constitution is attached hereto at Appendix 1 together with certified copies of its registration with the Registrar of Friendly Societies and its negotiation licence.

The intent behind this correspondence is to ask the European Committee of Social Rights to find that the situation in Ireland is not in conformity with Article 5 of the European Social Charter in that the government, by according favourable treatment to a rival trade union as regards pay and increments for its members, is interfering with the right to freedom of association guaranteed to teachers thereby.

Background

As you will be aware, it became obvious to the government in September 2008 that Ireland was facing a severe monetary crisis and austere fiscal measures were introduced in a series of Financial Emergency Measures in the Public Interest Acts (the "FEMPI" Acts) commencing in 2009. These involved, *inter alia*, reductions in public service pay (including that of teachers), the imposition of a pensions levy and the freezing of increments.

As the financial situation improved, the Irish government engaged in gradual pay restoration through a series of Public Service Agreements - the Public Service Stability Agreements 2013-2018 (being the "Croke Park Agreement" 2010-2014, the "Haddington Road Agreement" 2013-2016 and the "Lansdowne Road Agreement" 2013-2018) and the Public Service Stability Agreement 2018-2020 (the

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“PSSAs”) - and consequent amendments to the FEMPI Acts.

The FEMPI Acts 2009 (x2), 2010, 2011, 2013 and 2015 and the PSSAs are attached hereto at Appendix 2, as is the Public Service Pay and Pensions Act 2017 (“the 2017 Act”).

FEMPI Act 2013

As can be seen from the FEMPI Acts, the reductions in pay and the freezing of increments initially applied to all public sector workers (including teachers) regardless of which trade union the workers were members. However, by 2013 the FEMPI Acts were reflecting government cognisance of the fact that different unions might adopt different attitudes/approaches to FEMPI measures. Thus, the FEMPI Act 2013 differentiated as between public servants *“to whom a collective agreement relates”* and those to whom no such agreement relates, providing that the suspension of increments and pay scales for which that (FEMPI 2013) Act provided should apply to the former group *“only to the extent specified in the agreement or...with such modifications as are specified in the agreement”*.

Circular Letter 0030/2016 of 22 April 2016

As regards teachers, this distinction (as between public servants *“to whom a collective agreement relates”* and those to whom no such agreement relates) is first drawn in Department of Education and Skills Circular Letter 0030/2016 of 22 April 2016 (“CL 0030/2016”), attached hereto at Appendix 3. In circumstances where the Haddington Road Agreement had included measures which provided for various public sector increment deferrals (and no increment measures had been provided for under the terms of the Lansdowne Road Agreement), this Circular Letter (CL 0030/2016) announced the expiry of increment measures under the terms of that (Haddington Road) agreement, stating that no increment would be deferred beyond 1 July 2017 as a result of measures contained in that (Haddington Road) agreement. However, it (CL 0030/2016) went on to state that *“[i]ncremental progression may...be suspended for certain grades”* and announced the suspension of incremental progression for a further year, until 1 July 2018 *“for Grades not covered by the Public Service Stability Agreement 2013-2018 (Haddington Road Agreement/Lansdowne Road Agreement)”*. In that way and although no distinction was expressly drawn between members of different trade unions in CL 0030/2016, incremental progression was to resume on the 1st July 2017 for those teachers covered by the Public Service Stability Agreement 2013-2018, whereas, for those who were not, incremental progression was to be suspended until the 1st July 2018.

Public Service Pay and Pensions Act 2017

The 2017 Act subsequently went on to draw a distinction between public servants who are covered by the Public Service Stability Agreement 2018-2020 (“covered public servants”) and those who are not (“non-covered public servants”), providing for restoration – further to restoration provided for under the FEMPI Act of 2015 – of the basic salaries of public servants (including teachers) which were reduced by the FEMPI Acts of 2009, 2011 and 2013. However, where a recognised trade union, such as ASTI, has not notified Ireland’s Workplace Relations Commission (“WRC”) in writing of its assent to be bound by the Public Service Stability Agreement 2018-2020, the members of that trade union (and those non-members who are in the same grade or category) are treated as “non-covered public

servants”: see section 3 of the 2017 Act.

Non-covered public servants secure the same pay progression as covered public servants but at a much slower rate. Moreover, such (non-covered) public servants will not receive any incremental increases for the duration of the Public Service Stability Agreement 2018-2020 (*i.e.* until 31 December 2020): see section 22 of the 2017 Act.

The Croke Park Hours

Under the Public Service Agreement 2010 – 2014 (the “Croke Park Agreement”) and continued under the Public Service Stability Agreement 2013 – 2016 (the “Haddington Road Agreement”), the Public Service Stability Agreement 2013-2018 (the “Lansdowne Road Agreement”) and the Public Service Stability Agreement 2018-2020, an additional 33 hours per annum was required of teachers to *“...facilitate, at the discretion of management, school planning, continuous professional development, induction, substitution and supervision (including supervision immediately before and after school times)”* (the “Croke Park hours”).

Industrial Action

In May of 2016, ASTI members voted *“not to fulfil the...Croke Park hours”* and a directive to engage in industrial action issued on foot of that ballot, when “ASTI members [were] directed not to fulfil the 33 Croke Park hours as set out in [Circular Letter] 0025/2011 and as amended in [Circular Letter] 0043/2014 with effect from 11th July, 2016” (the “Industrial Action”). By virtue of that Industrial Action, ASTI members were *“grades not covered by the Public Service Stability Agreement 2013-2018”* (“non-covered public servants” for the purposes of the 2017 Act), with effect from 11 July 2016.

Circular Letter 0045/2016 of 14 July 2016

Against the background of the above, an explicit distinction was drawn between ASTI members and those of the Teachers Union of Ireland (“TUI”) in Department of Education and Skills Circular Letter 0045/2016 of 14 July 2016 (CL 0045/2016), attached hereto at Appendix 4.

TUI is a registered trade union, also affiliated to Congress, which represents over 15,000 teachers and lecturers engaged in secondary, higher and further education, of whom around 8,000 are secondary school teachers.

By virtue of CL 0045/2016, only TUI members were to receive the payroll adjustments provided for in the Public Service Stability Agreements, 2013-2018 which included a gross additional payment of €1,592 integrated into salary and the restoration of incremental progression together with protection against compulsory redundancy. This is because TUI had agreed to be bound by the relevant Public Service Agreements and as such were deemed to be encompassed by its terms. However, insofar as ASTI members were concerned, incremental progression was suspended, they did not receive a “moiety” which was paid to teachers who were covered by the Lansdowne Road Agreement and they were deprived of alleviation measures which were applied to other teachers who lost pensionable salary both through the FEMPI Act 2013 pay reduction and the withdrawal of the Supervision and Substitution allowance under the Haddington Road Agreement, any beneficial measures introduced

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following a review of usage of the Croke Park hours to take place in the 2016/2017 school year, improved Fixed-Term and Part-Time arrangements which had been conferred on teachers in 2015, protection against compulsory redundancy and entitlement to “ex-gratia” payments in redundancy situations (per CL 0045/2016).

I draw your attention to a decision of Ireland’s Labour Court under Ireland’s Payments of Wages Act 1991 in which a representative of the Department of Education and Skills (the “Department”) informed the Court that CL 0045/2016 “*was issued in haste, four days following the rejection of the [Lansdowne Road] Agreement by ASTI*”: **Dublin and Dun Laoghaire Education and Training Board v Flynn PWD 1825**. The Labour Court decision also confirmed that non-TUI members (unless they were employed in a “TUI only school”) and ASTI members who had fully complied with the terms of the Lansdowne Road Agreement were prevented from benefitting from the provisions of CL 0045/2016. The Labour Court’s decision is attached hereto at Appendix 5.

Suspension of Industrial Action

On 10 June 2017, ASTI members voted to suspend the Industrial Action. Consequently, since that date (10 June 2017), ASTI members have been treated as “covered public servants”. Thus, as of that date and insofar as ASTI members were concerned, incremental progression was restored, as was the “moiety” which was paid to teachers who were covered by the Lansdowne Road Agreement and alleviation measures which were applied to other teachers who lost pensionable salary both through the FEMPI Act 2013 pay reduction and the withdrawal of the Supervision and Substitution allowance under the Haddington Road Agreement. Other beneficial measures introduced following a review of usage of the Croke Park hours to take place in the 2016/2017 school year, improved Fixed-Term and Part-Time arrangements which had been conferred on teachers in 2015, protection against compulsory redundancy and entitlement to “ex-gratia” payments in redundancy situations (per CL 0045/2016) were all implemented for/conferred on ASTI members. However, ASTI members are subjected to continuing disadvantage, insofar as their incremental dates are concerned.

Incremental Dates

In May of 2017 (prior to the June 10 Special Convention that suspended the Industrial Action), the Department of Education and Skills addressed “[a] specific question...raised in relation to increment payment dates in future years and specifically whether these would revert to a teacher’s original increment dates”. The Department noted the position which had been set out by ASTI representatives in a discussion at that time and stated that, “[w]hile the question [did] not fall to be considered at [that] point, it would fall to be considered in the context of the ASTI’s formal entry to the applicable collective agreement”. In other words - unless and until ASTI signed up to a national collective agreement, e.g., the Public Service Stability Agreement 2018-2020, nothing would be done to ameliorate the long-lasting effects of this extraordinary imposition.

In November 2017, a commitment was secured from the Department of Education and Skills to enter discussions on the issue of increments before any potential ballot that would formally draw ASTI into such an agreement. Therefore, ASTI members would know, while they are balloting, what the arrangements regarding the incremental dates would be if they accepted the agreement. However, it was abundantly clear that it would only be in the context of formal entry into an agreement such as the Public Service Stability Agreement 2018-2020 that the outcome of such negotiations would be

implemented. Recently, ASTI met with departmental officials to follow up on this commitment (the “Recent Meeting”). They stated that if ASTI were to ballot to enter the Public Service Stability Agreement 2018-2020, they would engage with us, but at this point could not give any promise that there would be any incremental date restoration for the duration of the Public Service Stability Agreement 2018-2020. They informed us that no more money would be made available during this agreement but that they were not ruling out final resolution of the issue, in the longer term. They followed up by issuing ASTI with a statement including the following:

“It must be noted that the Minister for Public Expenditure and Reform has explicitly stated that the only matters in respect of pay restoration which are being funded in the lifetime of the current [Public Service Stability Agreement] are those which are specified in the agreement. There is, accordingly, no provision under the Public Service Pay Agreement 2018-2020 to formally address the issue of incremental dates of ASTI members”.

Recent Developments

As stated above, I was informed at the Recent Meeting that there was no guarantee that there would be any incremental date restoration before 31 December 2020. This was subsequently reiterated in a departmental statement, a copy of which is attached hereto at Appendix 6, again singling out ASTI members.

The extent to which the Irish government sees fit to discriminate against particular trade unions such as ASTI is currently apparent, in the context of strike action by Irish nurses. During a radio interview on RTE (Ireland’s National Television and Radio Broadcaster) on 3 February 2019, Ireland’s Prime Minister (“Taoiseach”), Leo Varadkar, when asked as to whether that strike action gave rise to a breach of the PSSAs, stated:

“Technically it is if you look what the agreement says it’s a pay agreement that lasts up until 2020 signed up to almost all of the public sector unions including the INMO [a trade union of nurses]. It involves a 7% pay increase over that period, full pay restoration for anyone earning under €80,000, special pay increases for low paid staff, special pay increases for new entrants which would kick in in March and that’s the government’s side of the Agreement and we are delivering on that, its €450 million in extra pay this year alone”.

When the interviewer made the point to the Taoiseach that the government “have the capacity to consider stopping those pay increments effectively as sanction for the INMO going on strike” and asked “will you be doing that”, the Taoiseach stated: “We are not planning on doing that, the sense that we have in government is that that would be provocative and might make it harder to resolve this dispute”. When the interviewer reminded the Taoiseach that the government had penalised teachers (being ASTI members) by reason of industrial action, the Taoiseach acknowledged that the government “did it with the secondary teachers’ yes the secondary teachers pulled out of the agreement, went on strike and as a result of that they didn’t get the benefits of the pay agreement”. When the interviewer enquired as to “[w]hy are the nurses different”, the Taoiseach stated that:

“[a]t a certain point, we will have to treat the nurses the same as we treated the secondary teachers that wouldn’t be fair you know to treat the secondary teachers differently than the nurses but our judgement at the moment is that withdrawing the benefits of the agreement would be provocative, an escalation and might make it more difficult at this stage to resolve

this but whatever solution we come and I believe we can come to a solution on this and I want there to be solution you know and I understand that nurses feel very aggrieved about their pay and conditions and the conditions they have to work in sometimes, I know they have enormous public support and I don't think that public support will diminish over the next couple of weeks so government wants to resolve this and we can resolve it but it can only be resolved within certain parameters, first that it's fair to the tax payer and secondly that it's fair to all other public servants".

It is clear from the statements made by the Taoiseach, as set out above, that the Irish government is utilising the FEMPI Acts in an arbitrary and discriminatory fashion - not by reference to any objective criteria, rather, by way of threat to punish trade unions for exercising the right not be forced into agreeing to be bound by a national agreement - leaving in place/withdrawing benefits not by reference to fair and objective rules, rather, on the basis of the government's assessment of what "might make it more difficult" to "resolve" (from the government's perspective), a dispute with a trade union, at any given time.

I am advised that the freedom of a worker to choose which trade union to join is a right expressly laid down in Article 5 of the European Social Charter. I am further advised that any unfavourable treatment by public authorities, such as a government department, of a particular trade union would constitute an act of discrimination which might jeopardise the right of workers to establish and form organisations of their own choosing contrary to Article 2 of ILO Convention No. 87, see 363rd Report of the ILO Committee on Freedom of Association, Case No. 2850, para 872 (attached hereto at Appendix 7). ASTI is satisfied that the favourable treatment afforded to TUI is not based on any objective criteria other than a desire to punish ASTI for exercising its right not be forced into agreeing to be bound by a national agreement which we believe is inimical to the interests of teachers.

The ILO Committee on Freedom of Association has previously ruled that, where an advantage is granted to one trade union or an advantage is withdrawn from another, there is a risk that that trade union will be placed at an unfair advantage or disadvantage in relation to the other which would thereby constitute an act of discrimination contrary to Article 2 of ILO Convention No. 98, even if such is not the government's intention: see 342nd Report, Case No. 2317, para. 863 (attached hereto at Appendix 8).

By placing TUI at such an advantage to ASTI, the Irish government has influenced the choice of teachers regarding the trade union to which they intend to belong, since they would undeniably want to belong to the trade union they perceive as being best able to serve their interests even if their natural preference would have led them to join, or remain in, ASTI for occupational, political, social or other reasons. Traditionally, teachers were organised by either ASTI or TUI based on which one of the two main types of Irish secondary schools employed the teachers. Thus, ASTI traditionally organised teachers exclusively in "Voluntary Secondary Schools" (being predominantly secondary schools which are owned by religious congregations and are managed on behalf of those congregations by boards of management), while TUI traditionally organised teachers exclusively in "Vocational Schools" (being secondary schools which were established by the State from the 1930s to complement existing provision (mainly undertaken by the religious orders) and prepare pupils for the workplace by equipping them with appropriate vocational skills and administered by Vocational Education Committees up to 2013, when those Committees were dissolved and replaced by Education and Training Boards). Since the 1960s/1970s, other types of school have been providing secondary

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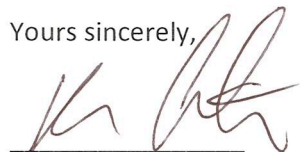
education to Irish pupils – Community Colleges, Community schools, Comprehensive schools and Educate Together schools - and both unions (ASTI and TUI) have organised teachers in those schools.

I am satisfied that, by according favourable treatment to TUI as compared with ASTI, as regards pay and increment restoration, the Irish government, through the Department of Education and Skills, influenced the choice of teachers as to the trade union they should join or in which they should remain contrary to the provisions of Article 5 of the European Social Charter.

There is ample evidence to support this. Between 1 January 2017 and 10 June 2017, 1,235 ASTI members resigned from membership of ASTI, at least 1,059 of whom sought, and were admitted into, membership of TUI. This led ASTI to write to Congress complaining that TUI had breached the terms of para 46 of the Constitution of Congress (a copy of which is attached hereto at Appendix 9). The motivating factor in such numbers leaving ASTI and seeking to join TUI was clearly the financial incentives offered in CL 0045/2016. ASTI's complaint was upheld by a Disputes Committee of Congress in Disputes Committee Report 01/18. TUI appealed against Disputes Committee Report 01/18. That appeal was rejected and the findings in Disputes Committee Report 01/18 were upheld in Disputes Committee Report 02/18. The Disputes Committee's Reports 01/18 and 02/18, are attached hereto at Appendix 10.

Please do not hesitate to revert if any further clarification or information is required to progress this complaint.

Yours sincerely,



Kieran Christie
General Secretary