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COUNCIL OF EUROPE
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EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

31 July 2020

Case Document No. 7

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

SUBMISSIONS BY THE GOVERNMENT ON THE MERITS

Registered at the Secretariat on 22 July 2020

EUROPEAN COMMITTEE OF SOCIAL RIGHTS

COMITÉ EUROPÉEN DES DROITS SOCIAUX

COMPLAINT TO EUROPEAN COMMITTEE OF SOCIAL RIGHTS

Complaint Number: 180/2019

Government of Ireland's Submissions on the Merits of the Complaint
in response to request for submissions dated
the 13th May 2020.

1. INTRODUCTION

1.1 The Association of Secondary Teachers, Ireland (hereafter, "ASTI" or "the Complainant") submitted a complaint against Ireland pursuant to the Additional Protocol to the European Social Charter providing for a System of Collective Complaints ("the Protocol") alleging a violation of the Revised European Social Charter ("the Charter"). The Complaint was declared admissible by Decision dated May 13th 2020. Pursuant to Article 7§1 of the Protocol and Rule 31§1 of the Rules of the Committee, the Committee has now invited the Government of Ireland to submit written observations on the merits of the complaint.

1.2 The Government has the honour of making the following submission in response.

2. THE COMPLAINT

2.1 The ASTI complaint to the European Committee of Social Rights ("the Committee") states:

> *"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."*

2.2 Thus, ASTI alleges that the Government has given more favourable treatment to members of the Teachers Union of Ireland (TUI), as regards pay and increments. It is claimed that this has influenced the choice made by teachers as to which union they should join. This, it is argued, is an interference with the ASTI's right to organise pursuant to Article 5 of the Charter.

2.3 The Government submits that the ASTI's complaint is unfounded.

2.4 First, the Complainant fails adequately to set out the precise means by which it contends that the Government failed to comply with Article 5 of the Charter Second, the Complaint fails to address the Irish legislative framework and fails to analyse how it contends that the

consequences flowing from that legal framework, which it does not challenge, engage or are incompatible with Article 5 of the Charter.

2.5 In order to assist the Committee, it is appropriate in the first instance to set out the background to the complaint.

BACKGROUND TO THE COMPLAINT

3. PARTNERSHIP AGREEMENTS

3.1 Ireland places considerable emphasis on industrial relations and has provided a legislative framework for industrial relations processes for many decades. In this context it also has a long history of public service collective bargaining resulting in a succession of collective agreements, many of which pre-date the financial crisis. In fact, since 1987, engagement by public service unions with employers' representatives and government bodies to agree a series of pay and work reform agreements has become the overarching strategy of the trade union movement in Ireland. In that time, it has become an accepted principle of participation in the various partnership agreements, that in order to avail of the benefits of a collective agreement, one has to be a party to the agreement. Thus, it is well understood by the public service unions that being outside of a public sector agreement is likely to place their members at a financial disadvantage, since the very nature of national collective agreements is that there are no alternative routes to securing benefits which are equal to or greater than, those provided for such an the agreement.

3.2 The most important aspect of Ireland's partnership agreement model is that each national collective agreement is concluded under the aegis of the State's industrial relations machinery and, as such, is negotiated and ultimately agreed between public service unions, employers' representatives and the government. The model does not operate to allow the State to simply present participants with a series of options on a "*take it or leave it*" basis: instead, all parties negotiate the terms of such agreements and understand that compliance

with national collective agreements provides the exclusive route to achieving the benefits provided for by such agreements.

4. THE FINANCIAL CRISIS

4.1 Consequent on the global economic downturn, the Government was required to undertake a series of budgetary and fiscal measures to address the serious decline in the economic circumstances of the State. From 2007-2010 there was an 11% reduction in real GDP, a 23% decline in investment, a 7% reduction in personal consumption and an economic slowdown in major trading partners. Unemployment grew from 5% in 2008 to 15% in 2012. By end-2009, general government gross debt had reached 66% of GDP, reflecting the large deficits recorded in the intervening period. It was estimated that the ratio would be 95% of GDP at end 2010.

4.2 Such was the extent of the disturbance to the national economy that the Government had to avail itself of a financial assistance programme established by the European Union and the International Monetary Fund with funding provided by the European Financial Stabilisation Mechanism, the European Financial Stability Facility, bilateral lenders and the International Monetary Fund. As a condition of that financial assistance programme, and in order to reduce its indebtedness, it was necessary for the Government to achieve further significant savings in its expenditure on remuneration and in its expenditure on public service pensions as a contribution to the reduction of the national shortfall between revenue and expenditure.

4.3 The severity of the situation also required the introduction, by way of legislation, of a series of amendments to the terms of public service employment contracts which were unprecedented in the history of the State. This legislation comprised of a number of Acts of Parliament, initially the Financial Emergency Measures in the Public Interest ("FEMPI") Acts and subsequently, as part of a process of restoration of prior terms, the Public Service Pay and Pensions Act 2017 ("the 2017 Act"). The objective of the FEMPI legislation was initially to reduce State expenditure to maintain international confidence and protect credit

ratings as well as to take urgent steps to restore the State's competitiveness and make savings on both direct and indirect expenditure on remuneration.

4.4 Parallel to the FEMPI and public service pay legislation, the changes required by the fiscal policy and structural reform measures in terms of public service pay were also progressed by collective agreements, being the Public Service Agreements 2010 - 2020. In the case of legislation enacted in 2013, 2015 and 2017, such legislation followed and reflected the terms of the relevant collective agreement. In effect, members of public service unions, such as ASTI, concluded a series of collective agreements with the Government. In recognition of the fact that these public service unions had positively engaged in a collective agreement with the Government (and where such an agreement was registered with the Labour Relations Commission, a body created by statute) members of the signatory public service unions were subject to more favourable terms and conditions than the baseline provisions included in the FEMPI legislation which applied to all other public servants.

4.5 In total, the Government and the public service unions (including ASTI) entered into a series of four sequential public service agreements effective from 2010 to 2020.

4.6 Taken together, the four collective agreements have had the effect of contributing to the improvement of the State's finances by both amending existing contractual arrangements by way of collective agreement and addressing the benefits associated with public service employment.

4.7 The four agreements are as follows:

(a) The Public Service Agreement 2010-2014 (the "Croke Park Agreement"), provided for the introduction and operation of pay rates and flexibilities in the delivery of public services in lieu of reductions in public sector pay rates amongst other provisions;

(b) The Public Service Stability Agreement 2013-2016 (the "Haddington Road Agreement"), subsumed the Croke Park Agreement and introduced a series of pay-related measures including a freeze on increments;

(c) The Public Service Stability Agreement 2013-2018 (the "Lansdowne Road Agreement") extended Haddington Road and commenced the process for the partial restoration of public service pay; and finally,

(d) The Public Service Stability Agreement 2018-2020 which again replicated the terms of earlier agreements and continued the process of restoring public service pay.

4.8 The Haddington Road and Lansdowne Road Agreements are attached as Appendix 2.8 and 2.9 to the Complainant's Complaint.

5. PUBLIC SERVICE STABILITY AGREEMENT 2013-2018 OR "THE LANSDOWNE ROAD AGREEMENT"

5.1 ASTI's complaint seems primarily concerned with the Public Service Stability Agreement 2013-2018 (termed 2013-2018 as it included the terms of the prior Haddington Road Agreement 2013-2016) or the Lansdowne Road Agreement.

5.2 The Lansdowne Road Agreement took effect in May 2015 and was a renegotiation of the existing Haddington Road Agreement.

5.3 While ASTI members did not accept the Lansdowne Road Agreement, because ASTI is a member organisation of the umbrella body the Irish Congress of Trade Unions ("ICTU"), which did vote to accept the Agreement, ASTI was initially covered by the Agreement's provisions and bound by ICTU's collective decision-making.

5.4 As part of the Croke Park Agreement, ASTI agreed to increase teachers' working hours by 33 hours per year without any change in remuneration (the "Additional Hours"). In contrast, the working hours of other public servants increased by an average of 101 hours.

It is important to emphasise that of course the Haddington Road Agreement in fact reflected a suite of pay and productivity measures to be implemented in order to achieve the necessary one billion savings in the cost to the State of funding of Public Service Pay and Pensions bill over the three years from 2013 to 2015. The Haddington Road Agreement did not address the position of teachers only. Rather, the pay and productivity measures identified in Haddington Road apply across the public sector and were implemented also by way of sectoral agreements appendixed to Haddington Road, dealing with the prison service, the defence sector, the police service, the civil service, the local authority sector, the health sector, in addition of course to the education sector.

5.5 As outlined above, the Public Service Agreements and legislative measures operated in tandem. Thus, in order to give effect to certain provisions of the Haddington Road Agreement, the Government introduced the Financial Emergency Measures in the Public Interest Act 2013 ("FEMPI 2013") (Appendix 2.1 to the Complainant's Complaint). FEMPI 2013 provided, in particular, in Section 7 for the application of an increment freeze and suspension of pay scales applying to public servants. However, Section 7(5) of FEMPI 2013 provided for the possibility of a collective agreement registered with the Labour Relations Commission operating to exempt public servants who fell within the scope of the collective agreement from that provision.

5.6 Further, the Haddington Road Agreement also provided for a mechanism to resolve disagreements. The parties recognised the importance of stable industrial relations and the maintenance of a well-managed industrial relations environment. They therefore agreed, that where a dispute arose it would be referred to the Labour Relations Commission ("LRC") or the Labour Court (or other agreed machinery). In particular, the parties agreed *not* to have recourse to strikes or other forms of industrial action in respect of matters encompassed by the Agreement. This approach was replicated in the Lansdowne Road Agreement which provided as follows in part 4:

> *"4. Mechanism to Resolve Disagreement*

4.1 The Parties reaffirm their commitments under paragraph 1.23 to paragraph 1.27 in the Public Service Agreement 2010 – 2014, and paragraphs 5.1 and 5.2 of the Public Service Stability Agreement 2013 – 2016 which oblige all parties to:

4.1.1. recognise the importance of stable industrial relations and maintain a well-managed industrial relations environment;

4.1.2 ensure that they have well developed communication channels;

4.1.3 week to resolve problems before they escalate into industrial disputes;

4.1.4 resolve disagreements where they arise promptly;

4.1.5 co-operate with the implementation of change pending the outcome of the industrial relations process conducted in a timely fashion; and

4.1.6 where the Parties involved cannot reach agreement within 6 weeks, refer disputes by either side to the LRC and if necessary to the Labour Court or, alternatively to other agreed machinery. Where a Conciliation or Arbitration Scheme applies, the issue will be referred within 6 weeks, to the Conciliation machinery under the Scheme and, if unresolved, to the Arbitration Board, alternatively, to other agreed machinery. The outcome from the industrial relations or arbitration process will be binding and final.

4.2 The Parties reaffirm that:

4.2.1 there will be no cost-increasing claims for improvements in pay or conditions of employment by trade union. Garda and Defence Force association or employees during the period of the Agreement;

4.2.2 they continue to be committed to promoting industrial harmony; and

4.2.3 strikes or other forms of industrial action by trade unions, employees or employers are precluded in respect of any matters covered by this Agreement, where the employer, trade union or staff association are acting in accordance with the provisions of this agreement."

5.7 Accordingly, once a representative organisation, such as ASTI, engaged in industrial action in respect of a matter encompassed by the Agreement and failed to apply the dispute resolution procedures provided for in the relevant Public Service Stability Agreement, then members of that organisation were considered to have breached the Agreement and were no longer eligible to benefit from it. Any preferential regime envisaged by the Agreement no longer applied to them.

6. INDUSTRIAL ACTION

6.1 In May 2016, following rejection of a number of opportunities to engage in negotiation of matters in dispute with the Department of Education and Skills ("DES") and other employer representatives, ASTI members voted to stop providing the Additional Hours as of the 1st of July 2016. As a result of the threatened industrial action, in July 2016 DES and the Department of Public Expenditure ("DPER") officials met with ASTI and offered to delay the implementation of the measures associated with their withdrawal from the Agreement in order to allow ASTI further time and space to consider its position and for further engagement on the issue. This offer was rejected and ASTI reiterated its decision to withdraw from the Agreement. Nonetheless, throughout August 2016 DES and DPER officials repeated their offer to ASTI representatives for the union to suspend its decision to withdraw from the provision of the Additional Hours and proposed that the DES would suspend the implementation of the measures in dispute. In fact, throughout May and June 2016, the Minister for Education reiterated his invitation to ASTI to discuss issues of mutual concern on several occasions, including via the parliamentary process, by correspondence and at meetings between the parties. The Minister again repeated this offer

in correspondence to the ASTI President in September 2016. Yet again, however, these repeated offers were refused and ASTI proceeded with industrial action.

6.2 As appears from the above, at all times ASTI was notified by the relevant government departments of the implications of its decision and the fact that the envisaged industrial action would result in the loss of benefits accruing under the Public Service Agreement in force. Specifically, DES and DPER officials, including the Minister for Education, provided comprehensive information on the implications of a withdrawal from the public service agreements. This included publishing comprehensive details on the DES website in May 2016 and in the address of the DES Secretary General to the Joint Managerial Body for Voluntary Secondary Schools at its annual conference in April 2016. Thus, the State did all within its ability to ensure that the ASTI executive had a clear understanding of the consequences of its decision to repudiate the terms of the relevant Public Service Agreement.

6.3 Notwithstanding the attempts by the State to appeal to ASTI, ASTI issued a directive to its members to cease providing the Additional Hours with effect from 11th July 2016. Given the position adopted by ASTI, the Department of Public Expenditure and Reform wrote to the Workplace Relations Commission (the successor body to the LRC) advising that since ASTI had not confirmed that its members would cooperate with the Lansdowne Road Agreement, they were taken to have ceased to operate within the agreement as of 1st July 2016 and as such, would default to the provisions of Section 7(1) of FEMPI 2013, which, it will be recalled, prescribed an increment freeze for all public servants not covered by a collective agreement. The relevant correspondence referred to above is attached as Appendix 4.

6.4 On 14th July 2016, the DES issued a Circular 0045/2016 ("the Circular", Appendix 4 to the Complainant's Complaint) outlining the benefits arising from the Lansdowne Road Agreement and related reform measures which would no longer apply to ASTI members who had withdrawn from the Public Service Agreements.

6.5 ASTI suspended its industrial action on the 10th June 2017 and, thereafter, ASTI members were considered once again to be in compliance with the provisions of the Lansdowne Road Agreement. Thus, ASTI members could enjoy the benefits of the Public Service Agreements from that date onwards.

THE COMPLAINT

7. DISCRIMINATION

7.1 As set out at §2.1 above, ASTI asserts in its complaint to the Committee that:

> *"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."*

7.2 From its submission, it appears that the principal contention in ASTI's complaint is that members of the Teachers' Union of Ireland ("TUI"), a rival union, received preferential treatment from the Government in relation to the Lansdowne Road Agreement. However, beyond its generalised assertions of favouritism, the ASTI submission fails to provide any adequate analysis of the obligations and responsibilities Article 5 imposes on the Government thereby giving rise to an allegation that their freedom to organise was impaired.

7.3 Article 5 of the Charter provides for the right to organise and states as follows:

> *"Part I: "All workers and employers have the right to freedom of association in national or international organisations for the protection of their economic and social interests."*
>
> *Part II: "With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this article shall apply to the police shall be determined by national laws or regulations.*

The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations."

7.4 ASTI rely on Article 5 to argue that the favouring of a trade union which does not engage in industrial action over a trade union which does, impairs the freedom of workers to choose which trade union to join. It is contended that the Irish Government influenced the choice of teachers in this manner, contrary to the provisions of Article 5 above. For the reasons outlined in this submission, this argument is misconceived. FEMPI 2013 reflected the commitment to, and benefit of, collective bargaining. FEMPI 2013 did not discriminate between unions but provided a generally applicable legislative framework that unions could avail of.

7.5 It is, of course, necessary to consider in further detail how the FEMPI legislation operated. The legislative framework is not addressed by ASTI. As outlined above, the FEMPI measures were in fact a suite of measures commencing in February 2009 and designed to deal with the decline in the economic circumstances of the State at the time and the need to cut exchequer spending substantially in order to demonstrate to the international financial markets that public expenditure was being significantly controlled by the State so as to ensure continued access to international funding and to protect the State's credit rating and reverse the erosion of the State's international competitiveness. FEMPI 2009 put in place mechanisms to allow the Government to reduce pay and entitlements across the public service general and in certain other sectors, such as the Health Sector, funded by the State.

7.6 FEMPI 2013 operated to give effect to further reductions including reductions in pay for members of the Houses of the Oireachtas, of the judiciary and certain other office holders. However, FEMPI 2013 also provided for the possibility of the suspension of pay scale increments and this is the provision particularly at issue in this complaint.

7.7 Section 7(1) of FEMPI 2013 provided as follows:

> ***"7.*** *— (1) Subject to the provisions of this section and section 8 , for the period of 3 years beginning on 1 July 2013—*
>
> *(a) no increment shall be awarded to a public servant; and*
>
> *(b) the operation of the pay scale that applies in respect of a public servant shall stand suspended,*
>
> *and with the effect that—*
>
> *(i) the point on that pay scale that shall be applicable in respect of a public servant on 1 July 2016 shall be that which was applicable on 1 July 2013 in respect of him or her, and*
>
> *(ii) the operation of that pay scale, on and from 1 July 2016, shall be by reference to service of the public servant on and from 1 July 2016, but this is subject to subsection (2)."*

7.8 However, exemptions were provided from the effect of Section 7(1).

7.9 Section 7(5) of FEMPI 2013 provided for such an exemption as follows:

> *"(5) Notwithstanding anything in the preceding subsections of this section, subsection (1) shall—*
>
> *(a) apply to a public servant only to the extent specified in the agreement, or*
>
> *(b) apply to a public servant with such modifications as are specified in the agreement,*
>
> *to whom a collective agreement relates and which agreement—*
>
> *(i) for the time being stands registered with the Labour Relations Commission for the purposes of this section, and*

(ii) provides for the application to such a public servant of subsection (1) in the manner described in paragraph (a) or (b), as the case may be."

7.10 Thus, Section 7(5) exempted public servants to whom a collective agreement related from the obligations imposed by FEMPI 2013 and, in particular, the imposition of a freeze on the payment of increments. It follows that when organisations fall outside the scope of the relevant collective agreement, they necessarily fall outside the scope of exemptions provided for by FEMPI legislation. This fundamental fact is not acknowledged by ASTI.

7.11 In the context of the submissions made on admissibility, the Government of Ireland sought to emphasise that the parameters of the complaint were unclear. In particular, the Complainant had failed to identify in its Complaint the precise nature of the legislative or Governmental action that, it was contended, breached Article 5 of the Charter. In its letter of November 14th 2019, ASTI sought to address this by stating that:

> *"The ASTI complaint centres on the Department of Education and Skills Circular 0045/2016 of 14 July 2016 which drew an explicit distinction between ASTI members and those of the TUI."*

7.12 ASTI went on to contend that "ample evidence" existed that, by affording favourable treatment to TUI as compared with ASTI Ireland, through the DES "*influenced the choice of teachers as to the Trade Union they should join or in which they should remain.*"

7.13 From this letter it is apparent that the Complaint has now been refined and it is clear that it is the Circular which, it is claimed, gives rise to the breach of rights. However, it is not apparent whether it is contended that the Circular itself is contended to be unlawful. In truth, it seems that the Complaint is focused on the consequences flowing from the adoption of the Circular.

8. THE CIRCULAR

8.1 The Circular was adopted on July 14th 2016. It was adopted by DES. Its purpose, as is clear from the introduction was to notify the managerial bodies of secondary schools of the changes to the salaries of teachers arising from FEMPI 2013 and the collective agreement. No complaint is made, it would appear, in relation to FEMPI 2013 itself (or any of its amendments) or the collective agreements themselves.

8.2 In effect, the Circular recognised the different positions that TUI and ASTI respectively were in by mid-July and stated as follows at paragraph 6:

> *"6. The financial emergency measures in the Public Interest Act 2013 and '15…will apply to teachers employed in voluntary secondary schools [where ASTI generally represented teachers]. Recognising the fact that TUI has accepted the Lansdowne Road agreement and that members of TUI are entitled to the benefits and protections associated with the Agreement, the position to TUI members in voluntary schools will be the subject of further guidance and a further clarification will issue shortly in relation to such teachers.*
>
> *7. The Lansdowne Road Agreement…will apply to teachers employed in designated community colleges and community and comprehensive schools who are TUI members. The financial emergency measures in the Public Interest Act 2013 and '15…will apply to all other teachers employed in such schools."*

8.3 The Circular then went on to deal with the precise manner in which the FEMPI Act reductions would apply to those who were not covered by Lansdowne Road, i.e. ASTI, and the manner in which the pay levels flowing from the collective agreements would apply to TUI teachers.

8.4 In particular, attached to the Circular was appendix 2 setting out the existing incremental salary scale for teachers covered by FEMP 2013 and not covered by Lansdowne Road on the one hand and the revised preferential scale for teachers covered by the Lansdowne Road Agreement.

8.5 Thus, it can be seen that ASTI seeks to take issue with the consequences flowing from the ASTI action while not alleging discrimination in respect of the valid legislative framework and industrial relations framework put in place to deal with the financial crisis which provided the basis for the Circular in the first place. For this reason, the Government contends that the Complaint is entirely misconceived.

8.6 The Government's twin-track approach to the financial crisis was, on the one hand, to introduce legislation designed to reduce public sector pay while, on the other hand, negotiating collective agreements which conferred a preferential regime on those public sector organisations that agreed to be bound by the public service agreements, in exchange for committing their members to enhanced productivity measures and dispute resolution mechanisms designed to ensure industrial stability. Accordingly, the benefits of the Public Service Agreements are only available to those compliant with the relevant agreement.

8.7 ASTI's claim is that a union which does not embrace a collective agreement should not as a result be at any disadvantage. If this proposition were correct, the State's entire collective bargaining regime would be rendered ineffective. It is a proposition which simply does not fall within Article 5 of the Charter.

8.8 Insofar as ASTI appears to suggest that there is a material difference in wording between FEMPI 2013 and the Department of Education and Skills Circular 0045/2016 of 14 July 2016 ("the Circular") in respect of which it now complains, this is misconceived. The Circular referred to "covered" grades. However, the Circular clearly referred to the extent to which a public servant was "covered" by a collective agreement and, in particular, by the relevant collective agreement in being at the time, being the Lansdowne Road Agreement. There is no material distinction between the language of FEMPI 2013

addressing public servants "to whom a collective agreement relates" and the reference in the Circular to "covered grade".

8.9 ASTI asserts that its members are 'subjected to continuing disadvantage' (page 4 of the Complaint). This statement is not entirely understood but it seems to be predicated on an assumption by ASTI that its members should receive retrospective benefits for a period when they were outside the Lansdowne Road Agreement which gave rise to such benefits. In particular, the case appears to be made that ASTI members should have their entitlement to increments retrospectively adjusted in order to discount the period from June 2016 to June 2017 when ASTI members fell outside the Lansdowne Road collective agreement and, accordingly, did not benefit from any exemption from FEMPI legislation, and in particular Section 7 of FEMPI 2013 which operated to freeze increments. However, it must be acknowledged that ASTI does not expressly formulate its complaint in this way and, critically, fails to acknowledge the legislative landscape or the impact of falling outside the scope of the Lansdowne Road Agreement.

8.10 What is notable in this aspect of ASTI's argument is that it entirely fails to acknowledge that engaging in industrial action was a *breach* of the relevant collective agreement, being the Lansdowne Road Agreement. Therefore, while it is true that a distinction was drawn by the Circular between public servants (in this instance, teachers) who engaged in lawful industrial action and those who did not, this is because ASTI, by electing to choose the route of industrial action, knowingly brought its members outside the scope of the collective agreement.

8.11 Ultimately, ASTI's complaint is that it lost members to TUI because it chose to take itself outside the Lansdowne Road agreement, and accordingly lost the benefit of the collective agreement. This is not an action that can be attributed to the Government. No direct or indirect attempt was made by the Government to influence the trade union choice of worker. Further, even if FEMP 2013, by reflecting the legitimate objective of the legislature to afford benefits to those covered by collective agreements, operated to put in place a difference in treatment, such a difference in treatment is readily capable of being

of objectively justified by reason of the significance given to collective action in the context of industrial relations and, in particular, in the context of addressing the position of public servants against a backdrop of the financial crisis in the State.

8.12 The Government observes that Irish law of course ensures that trade union members are protected from any detrimental consequences that their trade union membership or activities may have on their employment, particularly any form of reprisal or discrimination because they belong to a trade union or engage in trade union activities. Furthermore, Ireland provides comprehensive legal remedies or sanctions for practices which unduly obstruct the freedom to form or join trade union organisations in accordance with the fundamental freedom secured by Article 5 of the Charter. ASTI does not suggest otherwise.

9. UNFOUNDED COMPARISON WITH OTHER TRADE UNIONS GIVEN BY WAY OF "EXAMPLE"

9.1 In an attempt to support its complaint, ASTI originally sought to conflate an entirely separate and unique industrial relations dispute involving the Irish Nurses and Midwives Organisation ("INMO") with ASTI's decision to resile from the Lansdowne Road collective agreement in 2016.

9.2 In its Complaint, ASTI states that:

> *"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'*

9.3 ASTI then asserts 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 [to] 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."*

9.4 However, the INMO situation was not comparable to ASTI's situation. ASTI resiled from the Lansdowne Road Agreement without operating the dispute resolution procedure included in that Agreement.

9.5 By contrast, the INMO did not resile from the Public Service Stability Agreement 2018-2020. Rather, it co-operated with the dispute resolution procedure included in that Agreement. As noted by the Labour Court in its recommendation (LCR 21900, Appendix 1):

> *"The Trade Union has also made clear to the Court its acknowledgement that the resolution to the within dispute must be found within the framework of the PSSA."*

Accordingly, insofar as ASTI's claim is to the effect that it has been discriminated against when compared with the manner in which the Government has treated members of the INMO, this complaint is entirely misconceived and unsubstantiated. The INMO, at all times, progressed its dispute within the framework of the dispute resolution procedures provided for by the Collective Agreements. This was reflected in the recommendation of the Labour Court (Rec. No. LCR21900). In contrast ASTI resiled from the Lansdowne Road Agreement without operating the dispute resolution procedure provided for by the Collective Agreements, thereby bringing the ASTI Industrial Action outside the scope of those Agreements. Simply put, ASTI chose not to comply with the relevant agreements and consequently were not entitled to benefit from the more generous provisions provided for in the agreements.

9.6 This difference in approach was critical and explains and justifies any difference in treatment between ASTI members and INMO members. As a result of ASTI's Action, ASTI members became subject to FEMPI 2013 and, in particular, the generalised regime in respect of suspension of increments provided for by Section 7 of FEMPI 2013. By contrast, as the resolution of the INMO dispute took place within the Public Service Stability Agreement therefore members of the INMO never had applied to them the generalised and less preferential provisions of relevant public pay legislation. ASTI fails

to compare like with like and fails to provide the relevant factual and legal framework within which its complaint of discrimination properly falls to be considered.

9.7 Ultimately, ASTI has acknowledged in the context of the admissibility application that reference in the complaint to the INMO were "*provided merely for the purposes of giving context to ASTI's specific complaint…*" (see letter of November 14th 2019). ASTI's letter of February 17th 2020 again states that:

> *"The references in the complaint to the dispute involving the INMO were provided merely for the purpose of giving context to ASTI's specific complaint herein, namely that the relevant government departments are specifically targeting ASTI by declining to treat INMO members as "non-cover" public servants and thus subjecting them to the same disadvantages as ASTI members."*

9.8 Therefore, it appears that the claim to the effect that ASTI is being treated differently to the INMO is not the focus of the Complaint but merely an illustration or example of the consequences of the complaint. While this position is not entirely clear, it seems that ASTI is focusing only the difference in treatment as between ASTI and TUI and seeks to draw upon any alleged difference in treatment between ASTI and INMO as illustrative, but extraneous, to the Complaint. It is of course the case that the Circular which has been clarified as the focus of the ASTI complaint nowhere addresses INMO members who are not subject to circulars issuing from DES.

10. CASE-LAW

(i) ECSR and Convention authorities

10.1 It is noteworthy that the authorities relied upon by ASTI do not in fact support its complaint. On the contrary, such authorities as there are lead inexorably to the conclusion that ASTI's complaint must be dismissed as the effect of the Complaint is to seek to undermine the right and effect of collective bargaining.

10.2 Article 6 of the Charter, of course, recognises the right to bargain collectively providing as follows:

> *"With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake:*
>
> *a. to promote joint consultation between workers and employers;*
>
> *b. to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements;*
>
> *c. to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes; and recognise:*
>
> d. *the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into."*

10.3 In the ECSR decision of *The Federation of Finnish Enterprises v Finland, Complaint No. 35/2006*, the complaint alleged that Finnish legislation at issue had violated the right to organise since it contained stricter provisions for employers not belonging to an employers' organisation compared to those belonging to such an organisation. The ECSR concluded there was no violation of Article 5, stating:

> *"28. In order to determine whether the rules relating to the effects of collective agreements are compatible with Article 5 of the Charter it is essential to interpret the provisions of Article 5 taking into account Article 6 of the Charter. It follows from this that it is legitimate in principle that the legal rules applicable to working conditions be the result of collective bargaining. Such a system implies that employers may be treated differently depending on whether or not they are members of an organisation.*
>
> *Such a conclusion may of course lead to an incompatibility with Article 5 but only if it were to affect the very substance of the freedom of association (see judgment of the European Court of Human Rights in Gustafsson v Sweden of 25 April 1998)"*

10.4 As appears from the above, the Committee in the *Finnish Enterprises* case correctly drew support from the case-law of the European Court of Human Rights on Article 11 of the Convention and, in particular, made reference to the ruling in *Gustafsson v. Sweden*, 25 April 1996, Reports of Judgments and Decisions 1996-II.

10.5 In *Gustafsson*, at issue was the complaint brought by a Swedish restaurant owner who was not a member of either of the two associations of restaurant employers which had entered into a collective labour agreements with restaurant employees. Mr. Gustafsson refused also to enter into any "substitute agreement" citing his right *not* to associate. He was the subject of industrial action taken by restaurant workers. He brought proceedings requesting the Government to prohibit the unions from blockading his restaurant to taking sympathy action. The issue before the ECtHR was the extent to which his right not to associate as guaranteed by Article 11 of the Convention had been violated by Sweden given it did not take action against the union boycott and blockage of his business.

10.6 The ECtHR did not find in favour of Mr. Gustafsson holding, in the first instance, that states had a choice as to the means designed to give effect to Article 11 of the Convention and the ECtHR had recognised that the concluding of collective agreements might be one of the mechanisms availed of by the State. In view of the sensitive character of the social and political issues involved in achieving a proper balance between the relevant competing interests, and particular in assessing the appropriateness of State intervention to restrict union action aimed at extending a system of collective bargaining, and the wide degree of divergence between the domestic systems in the particular area under consideration, contracting states enjoyed a wide margin of appreciation in their choice of means to be employed (§45).

10.7 Any claim by ASTI that the Circular, reflecting as it does the legislative and policy choices made in FEMPI 2013, breaches the rights of unions choosing not to avail of a preferential regime provided by a collective agreement necessarily challenges the State's entitlement

to choose to negotiate by way of collective agreements. As appears from the above the right to bargain collectively is of course recognised not only by Article 6 of the Charter but also by Article 11 of the Convention. In *Demir and Baykara v. Turkey* [GC], no. 34503/97, ECHR 2008 the European Court of Human Rights recognised that the right to bargain collectively had become one of the essential elements of the right to associate recognised in Article 11 of the Convention. States are accordingly "*free to organise their system so as, if appropriate, to grant special status to representative trade unions*" (§154).

(ii) ILO Decisions

10.8 In support of its submission, ASTI cites two decisions of the ILO Committee on Freedom of Association. ASTI seeks to rely on these decisions (which of course relate to a different international organisation and a different international instrument) in support of its argument as to how the Charter should be applied in the instant case. While the Government acknowledges that the recommendation of the relevant ILO Committee may be of interest to this Committee, the decisions sought to be relied upon in fact provide no support for ASTI's complaint principally as they relate to situations which are readily and radically distinguishable on the facts.

10.9 The first decision cited by ASTI's submission is a complaint titled Government of Malaysia presented by the Malaysian Trade Unions Congress, Complaint 2850 of 2012 of the ILO Committee on Freedom of Association. There, the complaint was made that the relevant Minister registered an in house union to represent the same category of banking officials as represented by another union. Thus, the entire premise of this decision is entirely distinguishable from the present complaint.

10.10 The ASTI submission refers in particular to paragraph 872 of the *Malaysian Trade Union* complaint and the statement to the effect that:

> *"…any favourable or unfavourable treatment by the public authorities of a particular trade union as compared with others, if it is not based on objective pre-established criteria of representativeness and goes beyond certain preferential*

rights related to collective bargaining and consultation, would constitute an act of discrimination which might jeopardise the right of workers to establish and join organisations of their own choosing."

10.11 However, it is clear that the approach of the Government in the instant case at all times has been entirely objective. The Government treated ASTI while it was bound by the Lansdowne Road Agreement in the same way as any other union that committed to that Agreement. When it resiled from the Lansdowne Road Agreement, it was equally treated in the same way as any other non-party union and its members were treated in accordance with the provisions of the applicable legislation being FEMPI 2013. Furthermore, the Government did not treat more favourably the members of TUI over the members of ASTI. When ASTI unilaterally decided to resile from the collective agreement, it did so in the clear knowledge that the default position would be the application of Section 7 of FEMPI 2013 to reduce pay and related benefits for public servants. Accordingly, ASTI was fully aware that its unilateral step would result in its members no longer receiving the benefits prescribed by the relevant collective agreement in contrast to the TUI, whose members would continue to enjoy the benefits of that Agreement given that they remained subject to its terms.

10.12 As a simple proposition of industrial relations, it must be the case that those unions which choose not to comply with collective agreements are not entitled to benefit from the more generous provisions provided for in the agreements and contemplated by legislation which set the more restrictive default entitlements.

10.13 The ASTI submission also cites the ILO decision of Government of the Republic of Moldova presented by The Federation of Trade Unions of Public Service Employees (SINASP) and Others, Complaint No. 2317 of 2008. This case related to an alleged breach of Article 2 of ILO Convention No. 98, where it was claimed that the Government of Moldova threatened and intimidated trade union officials and that criminal complaints to the Moldovan public prosecutor brought no results. It is in this context that the ILO

criticised the Government of Moldova for its favouritism of a particular union and its attempts, directly or indirectly, to influence the trade union choice of workers.

10.14 ASTI seeks to assert that its members have been treated in an identical fashion to the Moldovan workers insofar as it asserts that the Government is guilty of according favourable treatment to the TUI over ASTI. In its submission ASTI states:

> *"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."*

10.15 Clearly, the circumstances of ASTI's complaint are entirely different to the facts in the Moldovan case. Also, it cannot be maintained that the Government has acted in anything but an entirely objective manner. Rather, the legislative framework provided by the FEMPI Acts, and in particular FEMPI 2013 is generally applicable and not directed at any particular union. Similarly, the Public Service Pay Agreements provide a framework which public sector unions can agree to opt into. Legislation provides for the generally applicable consequences of opting into such a collective agreement. Neither the legislation at issue nor the collective agreements themselves can be contended to constitute either a direct or indirect attempt to influence workers in their choice of a particular trade union. It is noteworthy that ASTI does not seek to make this case. Rather, what it appears to wish to contend is that the negative consequences for ASTI members of ASTI's decision to opt out of the Lansdowne Road Agreement constitute a form of inappropriate direct or indirect Government influence in the choice of trade union. This claim is entirely misconceived. No direct or indirect discrimination arises in the instant case. No direct or indirect attempt to influence trade union choice of workers arises save insofar as the Government has put in place a framework that provides benefits to the members of unions who opt into that framework. This is clearly a legitimate objective of the Government and, insofar as it operates to discriminate between public service unions who opt into the preferential public

service pay agreements and those who do not, it is a difference in treatment readily capable of being objectively justified having regard to the significant financial crisis that the Government faced, the choices made by the legislature and the sophisticated industrial relations framework put in place first to protect the public finances and subsequently to seek to provide for the restoration of public service pay.

10.16 Accordingly, it is submitted that because collective bargaining is expressly provided for in the Charter and because states are under an obligation to promote consultation, any consideration of the of FEMPI legislation and of the applicability of Article 5 to ASTI complaint, must also include consideration of Article 6 of the Charter for the right to bargain collectively.

10.17 It is submitted that the State's collective bargaining system would be rendered ineffective if it were the case that a participant union would not be at a disadvantage should it choose to not embrace a collective bargaining agreement. In the present circumstances, the right of ASTI freely to associate has not been impaired. At all material times, ASTI was free to embrace the collective agreement or to reject it. While the Union elected to exclude itself from the collective agreement, it did so in full knowledge of the consequences of that action.

11. DUTY OF FAIRNESS TO OTHER PUBLIC SERVANTS

11.1 ASTI appears to seek the retrospective application of increments to its members to put them in the same position as those public servants who agreed to abide by the terms of the public service agreement *ab initio.* Thus, ASTI demands the same benefit as that due to those public servants who complied with the full terms of the relevant public service agreement and who, at all material times, accepted those additional obligations placed upon them, including the working of additional hours under the agreements. However, such an approach of treating ASTI members as if they were at all times compliant with the relevant collective agreement and, in particular, had worked the Additional Hours when they did

not, would be unfair and would in effect undermine the State's ability to engage effectively with trade unions in the context of collective bargaining as non-compliant and compliant unions and their members would wrongly be treated in like manner.

11.2 It is respectfully submitted that any difference in treatment between ASTI and those other unions and their members who at all times engaged with the public service agreement, is entirely due to the decision of the members of ASTI to resile from the Agreement that they had already agreed to and instead, to subject themselves to the provisions of Section 7 of FEMPI 2013. That decision to resile from the relevant agreement has had the consequence that ASTI members are not placed in exactly the same position as those other public service union members who at all times acted in good faith, accepting the obligations required of them by virtue of their full acceptance of the terms of the agreement.

11.3 This approach is entirely consistent with relevant authorities. In *Schmidt and Dahlstrom v Sweden*, 6 February 1976, Series A no. 21 the European Court of Human Rights determined that members of a striking union who were denied benefits awarded to non-striking unions, did not have an entitlement to retroactivity of benefits.

11.4 As such, the conscious and fully informed rejection of the collective agreement on the part of ASTI is what placed its members at a financial disadvantage and same was not caused by any capricious or partisan action on the part of the State.

12. CONCLUSION

12.1 The Complainant has now clarified that this complaint focuses on the Circular. The Circular reflects administrative action designed to give effect to FEMPI 2013 which, in turn, provides benefits for unions covered by collective agreements. The Complaint does not take issue with FEMPI 2013 itself nor does it argue that the Circular misrepresented the provisions of FEMPI 2013. Its case is accordingly misconceived as the Circular merely reflects the legitimate policy choices made by FEMPI 2013 designed to address what was, at the time, the dire financial situation in which the State found itself in. The State was

entitled to confer preferential status on union members who brought themselves within the scope of a collective agreement. This approach is designed to further harmonious industrial relations and is a permissible exercise of State discretion as to how best to achieve stability within the public service.

12.2 The Complainant fails to provide any adequate analysis of the obligations and responsibilities Article 5 imposes on the Government and more fundamentally fails to acknowledge the Irish legislative framework the validity of which it accepts.

12.3 The position ASTI complains about flows from its own actions. ASTI refused to engage with the dispute resolution process within the Lansdowne Road collective agreement and unilaterally resiled from that agreement, thereby subjecting its members to the provisions of the FEMPI 2013. While ASTI is now again compliant with Public Service collective agreements, it has not identified any basis for its contention that it is or was somehow discriminated against in a manner that constitutes a breach of Article 5 by reason of the fact that, for a given period it did not benefit from the preferential regime provided for by the agreement it had resiled from.

12.4 At all material times, it was the conscious and fully informed rejection of the collective agreement on the part of ASTI that placed its members at a financial disadvantage and same was not caused by any capricious or partisan action on the part of the State. Thus, those unions which chose not to comply with the agreements consequently were not entitled to benefit from the more generous provisions provided for in the agreements

12.5 Accordingly, ASTI's complaint should be dismissed.