



**EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX**

12 October 2020

Case Document No. 8

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

RESPONSE BY ASTI TO THE GOVERNMENT'S SUBMISSIONS ON THE MERITS

Registered at the Secretariat on 25 September 2020

Mr Henrik Kristensen
Deputy Executive Secretary of the European Committee of Social Rights
Directorate General of Human Rights and Rule of Law
Department of the European Social Charter – Collective Complaints
Council of Europe
67075 Strasbourg Cedex,
France

By email to DGI-ESC-Collective-Complaints@coe.int

Ref: 132/2020 HK/KOG

25th September 2020

**Re: Complaint to European Committee of Social Rights
ASTI Response to the Government of Ireland's Submissions on the Merits of the Complaint**

Dear Mr Kristensen,

I refer to your letter dated 31 July 2020, regarding the above matter and set out below ASTI's Response to the Government of Ireland's Submissions on the Merits of the ASTI's complaint under the Charter.

The Government of Ireland's Submissions maintain that the ASTI's complaint under the Charter, notwithstanding that it has been declared admissible, is "unfounded" in that it fails both to address the Irish "legislative framework" (collectively referred to as "FEMPI") and to analyse the consequences thereof. Unfortunately, these submissions are based on an entirely erroneous assumption as to the nature of the ASTI's complaint. Accordingly, much of what is contained therein is largely irrelevant to the matter that must be considered by the Committee.

This complaint is not about whether ASTI members should receive retrospective benefits or have their increments retrospectively adjusted. Those issues are the subject of separate and distinct plenary proceedings before the Irish High Court against the Minister for Education and Skills and Ireland, bearing Record No. 2019/3532P, in which *inter alia* Declarations are sought that FEMPI confers no discretion on the Minister to treat ASTI members unequally from INMO members and Orders that the Minister treat ASTI members equally to INMO members.

Copies of the Statement of Claim and the Defence in those proceedings are attached hereto. As the Committee will note, these pleadings make it clear that there is a dispute as to whether the Government has been "entirely objective" in its application of FEMPI, as is maintained throughout the Government of Ireland's Submissions. There is abundant material in which the relevant Ministers state that the INMO would be in breach of the Public Service Stability Agreement were industrial action to be taken by its members. See, for example, the following inserts:

<https://www.rte.ie/news/health/2018/1119/1011969-inmo-ballot/>;

<https://www.kildarestreet.com/debates/?id=2019-02-07a.5>;

<https://merrionstreet.ie/en/News-Room/Releases/STATEMENT MINISTER FOR HEALTH NOTES DECISION OF THE EXECUTIVE OF THE IRISH NURSES AND MIDWIVES ORGANISATION.html>;

<https://www.gov.ie/ga/preasraitis/e40e46-statement-from-the-minister-for-public-expenditure-and-reform-pascha/>.

Similarly, and in relation to an unrelated issue, the TUI took industrial action earlier this year and again there was no FEMPI action taken against that union. See, for example, the following inserts:

<https://www.tui.ie/news/tui-members-to-take-strike-action-on-tuesday-4th-february-over-failure-to-eliminate-pay-discrimination.13672.html>;

<https://www.irishtimes.com/news/education/government-to-consider-sanctions-for-striking-teachers-1.4144595?mode=sample&auth-failed=1&pw-origin=https%3A%2F%2Fwww.irishtimes.com%2Fnews%2Feducation%2Fgovernment-to-consider-sanctions-for-striking-teachers-1.4144595>;

<https://www.irishtimes.com/news/ireland/irish-news/hundreds-of-schools-face-closure-on-tuesday-due-to-teacher-strike-1.4157609?mode=sample&auth-failed=1&pw-origin=https%3A%2F%2Fwww.irishtimes.com%2Fnews%2Fireland%2Firish-news%2Fhundreds-of-schools-face-closure-on-tuesday-due-to-teacher-strike-1.4157609>.

In any event, ASTI is not asking the Committee to adjudicate on the issue of whether the Government has applied FEMPI objectively or otherwise. That is a matter on which the Irish High Court will rule in due course.

This complaint raises a very different issue and one which the Government of Ireland in its Submissions singularly fails to address. The Committee will note that nowhere in the High Court pleadings is any reference made to the TUI and/or the loss of membership subscriptions from those ASTI members who left to join the TUI or from those teachers who decided to join that trade union in preference to ASTI, following the Departmental instruction to school managerial bodies concerning the changes to the salaries of teachers depending on whether they were members of the ASTI or the TUI.

By virtue of Part II, Article 5 of the Charter, Ireland has undertaken that its national law shall not be such as to impair, nor shall it be so applied as to impair, the right to Freedom of Association, which right includes the right of workers to join trade unions of their own choosing free from governmental incentives and/or inducements.

The issue in this complaint is whether the Government of Ireland influenced the choice of teachers as to the trade union they should join, or in which they should remain, in a manner contrary to its obligations under Article 5 of the Charter.

The Government of Ireland's Submissions do not dispute that, following the issue of Circular 45/2016, more than 1,000 teachers left the ASTI and joined the TUI, notwithstanding that the

acceptance of those teachers into membership was in breach of the Constitution of the Irish Congress of Trade Unions (“Congress”) - to which both the ASTI and the TUI are affiliated. Following the ruling of the Disputes Committee of Congress, only around 120 teachers have rejoined ASTI. The TUI has consistently maintained that it did not approach, solicit, encourage or offer inducements to ASTI members to leave and join the TUI - see extract from TUI News (March 2019) which maintains that the reason why so many ASTI members joined the TUI was because TUI members were not subject to FEMPI:

<https://www.tui.ie/fileupload/TUI%20News%20March%2019.pdf>

If that is so - that the reason why so many ASTI members joined the TUI was because TUI members were not subject to FEMPI - then the only incentive and/or inducement for teachers to leave ASTI membership, or not to join that trade union, arises from the fact that TUI members, but not ASTI members, could benefit from the available pay restoration and other measures. The Committee will note that these measures were denied to ASTI members notwithstanding that the industrial action in which they had engaged was perfectly lawful.

On this point, the Committee will note that, at paragraph 8.10 of the Government of Ireland’s Submissions, a distinction is drawn between those who engaged in “lawful industrial action” and those who did not; implying that ASTI members engaged in unlawful industrial action.

The status of the first of the four public service agreements referred to at paragraph 4.7 of the Government of Ireland’s Submissions – the Croke Park Agreement – arose in proceedings before the Irish High Court in *Holland v Athlone Institute of Technology* [2011] IEHC 414:

[https://www.courts.ie/acc/alfresco/e501a66f-cb21-48a4-bddd-a98af73d09c1/2011 IEHC 414 1.pdf/pdf#view=fitH](https://www.courts.ie/acc/alfresco/e501a66f-cb21-48a4-bddd-a98af73d09c1/2011_IEHC_414_1.pdf/pdf#view=fitH)

In this case, the judge invited both Congress and the Attorney General (on behalf of Ireland) to intervene in the proceedings should they wish to offer any views as to whether the Croke Park Agreement was “legally binding”. Congress declined to intervene but sent a letter to the Court indicating that it considered the Agreement to be binding “merely at a political and industrial relations level” and that it was not intended to create “justiciable rights enforceable at law”: see paragraph 25 of judgment. The Attorney General sent in written submissions which stressed that the Agreement was intended “principally to operate at the level of a political and industrial relations commitment”: see paragraph 26 of the judgment.

Consequently, as a matter of Irish law, none of the four public service agreements are legally enforceable and non-compliance therewith should have no legal consequences unless that non-compliance was either unlawful or illegal. As can be seen from Ireland’s Defence to the High Court proceedings, it is there being maintained that, although the four agreements are not themselves legally enforceable, they are not “devoid of legal effect” in that non-compliance/non-participation are actions which have “legal consequences” as provided for by FEMPI by virtue of its effect of unilaterally amending and/or varying the existing contractual terms of individual teachers. The Committee will note that Ireland was ultimately successful in persuading the Irish Supreme Court that the employer of teachers is not the Minister for Education: see *Minister for Education and Skills v Boyle* [2018] IESC 52:

[https://www.courts.ie/acc/alfresco/d63c2f51-b02e-41b4-9286-27791c390fc9/2018 IESC 52 1.pdf/pdf#view=fitH](https://www.courts.ie/acc/alfresco/d63c2f51-b02e-41b4-9286-27791c390fc9/2018_IESC_52_1.pdf/pdf#view=fitH)

Accordingly, ASTI requests the Committee to uphold the complaint.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Kieran Christie', with a stylized flourish at the end.

Kieran Christie
General Secretary

P.S. Inserted in this letter are links to documents/materials to which I refer in the body of the letter. If you would like me to furnish you with “hard” or “soft” copies of any/all of those documents/materials, please revert and I will be happy to oblige.