EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

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Case Document No. 6

***Unione sindacale di base* (USB) v. Italy**
Complaint No. 208/2022

SUBMISSIONS OF THE GOVERNMENT ON THE MERITS

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AVVOCATURA GENERALE DELLO STATO

European Committee of Social Rights (ECSR)

Collective complaint n. 208/2022

Unione Sindacale di Base (USB) vs Italy

OBSERVATIONS OF THE ITALIAN GOVERNMENT ON THE MERITS OF THE COMPLAINT

Ct 16381/22

Proc. Andrea Lipari

I. Introduction

1. With the letter dated 2nd January 2023, the Secretariat of the General Directorate of the European Social Charter requested the Italian Government to make written submissions on the merits of the complaint by 15th February 2023.

2. In compliance with the Secretariat of the European Social Charter request, the Italian Government submit the following observations.

II. On the merits of the complaint

A) Preamble.

3. The complainant organisation claims that several provisions of Law no. 146 of 12th June 1990 are contrary to the European Social Charter.

4. In particular, according to the counterpart, the legal provisions on indispensable services (art. 2, paragraph 2), the obligation to give prior notice of the duration of the abstention (art. 1, paragraphs 1 and 5), the total duration of periods of notice and of the cooling-off and conciliation procedures, the obligation of rarefaction, exemption and prohibition of concurrence, the Commission's discretionary power (art. 13, lett. d) and e) on the identification of the essential public service, rarefaction, exemption, concomitance, discretionary power of the precepting authority (Article 8) would severely restrict the right to strike to the point of rendering it ineffective; consequently, there would be an infringement of Article 6, paragraph 4 (right to strike) and Article G (restrictions) of the European Social Charter.

5. Specifically, it is assumed that the notice periods and time limits imposed for the prior trial of the cooling-off procedures (Art. 2, paras. 1, 2, 5) are of excessive and unreasonable duration; the obligations to guarantee essential services (Art. 2, paragraph 2) during a strike are ultra vires to the purposes of protecting the fundamental rights provided for in Art. G of the Social Charter. The obligation to observe a minimum interval between strikes (Art. 2 § 2), coupled with the duty of exemption and the prohibition of concurrence make the exercise

of a strike difficult to the point of precluding it and reducing it to complete ineffectiveness, depriving it of its deterrent effect. Moreover, predictability, stability and legal certainty with regard to the limitations on the exercise of the right to abstain from work would not be guaranteed. This is because Law No 146 does not provide for any procedure to review the substance of the Commission's decisions, having regard to the interests of the proclaimers. It is also complained that the wide discretion granted to the administrative authority in the exercise of the power of precept under Article 8, even when there is no risk of injury to the rights and freedoms of others, precludes the exercise of the right to strike without guarantees of predictability, stability and legal certainty.

6. The grievances of the complainant are unfounded.

B. <u>On the merits</u>

7. Article 6 of the Charter, entitled 'right to collective bargaining', provides in paragraph 4 that 'in order to ensure the effective exercise of the right to collective bargaining, the Parties (...) recognise the right of workers and employers to take collective action in the event of conflicts of interest, including the right to strike, without prejudice to any obligations under collective agreements in force'.

8. It follows from the provision that the right to strike and lock-out is protected not as such, but as expressions of a conflict of interest between the social partners.

9. In particular, the Committee has made it clear[1] that strikes that relate to the violation of rights concerning, for example, the existence, validity or interpretation of a_collective agreement are not covered and that strikes of a political nature are likewise not covered.

10. A contrary reading of the above provision shows, in short, that forms of strikes that are not part of collective bargaining or called in reaction to violations of rights susceptible of

[1] Digest of the case law of the European Committee of social rights, Council of Europe, December 2018

protection before the competent judicial authority do not fall within the scope of the protection provided by the Charter.

11. Having thus circumscribed the scope of the forms of strike protected, the Committee has also specified that it is within the power of the contracting State to impose limits on its exercise as long as this does not result in prejudice to the very existence of the recognised right.

12. According to the Committee[2] , restrictions on exercise are legitimate if they meet the following conditions:

a. they must be provided for by law

b. they must pursue one of the purposes indicated in Article G;

c. they must in any event be proportionate.

13. These limitations acquire greater significance with reference to the sphere of essential public services.

14. According to the Committee, in fact, a limitation of rights and their exercise is not contrary to the Charter if there is a need to protect other interests, deemed equally deserving, that are in conflict with the former, which the Committee, by way of example, identifies as public order, collective security and public health.

15. This statement evokes a principle shared by the jurisprudence of Constitutional Court, according to which "no right is a tyrant": in fact, "[...] all the fundamental rights protected by the Constitution are in a relationship of mutual integration and it is not possible to identify one of them that has absolute predominance over the others, since if this were not the case, there would be the unlimited expansion of one of the rights, which would become a 'tyrant' against the other constitutionally recognised and protected legal situations, which constitute,

[2] European Trade Union Confederation (ETUC)/Centrale Générale des Syndicats Libéraux de Belgique (CGSLB)/Confédération des Syndicats Chrétiens de Belgique (CSC)/Fédération Générale du Travail de Belgique (FGTB), v. Belgium, Complaint No. 59/2009.

as a whole, an expression of the dignity of the person" (Constitutional Court, judgment no. 85 of 2013).

16. The Committee's consolidated guidelines contain a similar position[3] . Therefore, if, on the one hand, it is contrary to the Charter to prohibit sic et simpliciter the exercise of the right to strike in the sphere of the so-called essential public services, on the other hand, neither does it appear justified to excessively compress other fundamental rights.

17. In the Committee's view, it will therefore be necessary to strike a balance that inevitably results in [...] restrictions laid down by law and which are necessary, in a democratic society, to ensure respect for the rights and freedoms of others or to protect public order, national security, public health or morality" (Article G of the CSER).

18. Turning now to the national panorama in light of the above, the following can be observed.

19. The Italian legislator, with Law No. 146 of 1990, amended by Law No. 83 of 2000 (implementing Article 40 of the Constitution), wished to guarantee, even during the manifestations of collective labour conflicts, the chance to enjoy certain constitutionally protected personal rights and the availability of services considered as essential, within standards deemed socially adequate.

20. The list of 'personal rights' of constitutional importance included in paragraph 1 of Article 1 defines the area within which limitations on the exercise of the right to strike are legitimate (life, health, security, freedom of movement, communication, education, welfare and social security). That area is necessarily circumscribed with certainty in order to avoid the risk of a violation of Article 40 of the Constitution.

21. Article 1, paragraph 1, enshrines the spirit of the law because it provides an exhaustive list of personal rights of constitutional rank, to protect which limitations on the exercise of the right to strike are legitimate.

[3] Matica hrvatskih sindikata v. Croatia, Complaint No. 116/2015; Conclusions I (1969), Statement of interpretation on articole 6.4;

22. Unlike the list contained in Article 1, paragraph 1 of Law No. 146, the list of essential public services contained in the second paragraph of Article 1 can only be illustrative. In fact, the essential nature of a service is a historically changeable concept to be adjusted according to the evolution of organisational structures and social needs and in relation to the physiological changes in collective life.

23. However, the legal reservation contained in the first paragraph is safeguarded. The legislature, in fact, identifies the essential nature of the service on the basis of the general criterion consisting of the satisfaction of the rights of the person exhaustively listed.

24. The provision contained in Article 1 of Law 146/1990 is suitable *ex se* to demonstrate the groundlessness of the alleged violations. Indeed, the provisions of Article G of the European Social Charter[4] expressly introduce limitations and restrictions on the exercise of the rights enunciated. Limitations are those established by law and those which are necessary in a democratic society to ensure respect for the rights and freedoms of others or to protect public order, national security, public health or morality.

25. In the Italian legal system, the right to strike is a constitutionally guaranteed right. However, in line with EU law, its exercise may be restricted or limited where overriding interests of a general nature are issued.

26. In other words, the restriction or sacrifice of a constitutional right or interest such as the right to strike may be justified by the need to guarantee and implement another right or interest of a higher rank.

27. In this sense, with a view to safeguarding pre-eminent interests of a general nature, Law No. 146 also contains rules aimed at giving absolute prevalence to the general interest

[4] *Restrictions. 1 The rights and principles set out in Part I, when effectively implemented, and the effective exercise of those rights and principles as set out in Part II, shall not be subject to any restrictions or limitations not specified in Parts I and II except those which are established by law and which are necessary in a democratic society to ensure respect for the rights and freedoms of others or to protect public order, national security, public health or morality. 2 The restrictions made, by virtue of this Charter, to the rights and obligations recognised herein may be applied only for the purposes for which they were intended*

of continuity of service, disregarding any conciliation with the collective interest of the strikers (precepts) (Art. 8).

28. The collective interest of workers may in fact manifests itself in forms that are irremediably incompatible with the interest of users in the continuity and regular provision of essential public services; therefore, the need has emerged to safeguard first and foremost, at least in part, the fundamental rights of these subjects even during collective self-defence actions.

29. And in fact, the experience of regulation, even prior to Law 146/90, has always been based on the balancing of the interests at issue: both in the version of the high substitution of the Constitutional Court, in the absence of regulation, and in the case of the so-called self-regulation by the trade unions.

30. The ratio of Law 146/90 is to balance two constitutionally relevant guarantees: on the one hand, the exercise of the right to strike by those working in essential services; on the other, the safeguarding of citizens' fundamental rights, which naturally the strike of these categories ends up damaging.

31. In particular, the Italian legislature has provided that, in the context of public services essential to the enjoyment of personal rights, the right to strike is exercised in compliance with measures aimed at enabling the provision of essential services. To this end, certain obligations such as minimum notice and predetermination of duration (Article 2, § 1 and § 5) are already defined by law, while the other measures are almost entirely deferred to collective bargaining.

32. In the exercise of legal reservation contained in Article 40 of the Constitution, the legislator, in the matter of strikes in essential public services, has limited its rules to the bilateral self-regulation of the conflict. In this way, interested parties are enabled to avoid the danger of arbitrary regulation of the exercise of the right to strike, through the participation of their representatives in the processes of shaping the rules aimed at limiting the exercise of the right to strike (Article 2, paragraph 2).

33. The legislature has therefore entrusted the social partners. with the priority task of determining by agreement the indispensable services, the modalities and procedures for providing them and the other measures aimed at balancing constitutionally guaranteed goods, when it is necessary to sacrifice the exercise of the right to strike in order to protect a right or interest of a higher rank (Article 2, par. 2 Law 146/1990).

34. And in fact, in the system outlined by Law No. 146 of 1990, the identification of specific rules to balance the exercise of the right to strike with the interests of users is entrusted to collective agreements for employees and to self-regulatory codes for self-employed workers.

35. The legislator, therefore, intended to favour the recognition of the value of bargaining and the role of the trade union in a context of conflict regulation informed by an ethics of consent, identifying the collective source (the trade union agreement for employees) as the privileged instrument for defining the rules that must specify or supplement the content of the legal precepts.

36. The preference given by the legislator to collective autonomy is linked to a twofold need: on the one hand, its greater suitability to meet the objectives of balance, taking into account the specific nature of the public service provided; on the other hand, the greater social consensus that confers a good degree of effectiveness on the discipline.

37. However, the function of institutional guarantor of the fair balance between the right to strike and constitutionally protected personal rights was recognised by the legislature in the hands of the Commission[5] established "*for the purpose of assessing the suitability of the measures aimed at ensuring the reconciliation of the exercise of the right to strike with the enjoyment of constitutionally protected personal rights*" (Art. 12 § 1).

38. The Guarantee Commission is an independent administrative authority with regulatory powers and powers to supervise the correct application of the law.

[5] *Commissione di garanzia dell'attuazione della legge sullo sciopero nei servizi pubblici essenziali*

39. The role and powers of the Commission (Articles 12 and 13) were conceived by the legislature as being of a public nature, due to the functionalisation of these powers in order to guarantee minimum essential services in the interest of users and the exercise of their fundamental rights.

40. The Guarantee Commission is excluded from the phase of negotiation and consensual determination of the rules on the exercise of the right to strike. The Commission intervenes after the conclusion of the contract to ascertain the congruity and compatibility of the contractual rules with the principles of balancing laid down by law.

41. If the agreements are lacking or if they are judged unsuitable, the Commission "*adopts, in the form laid down in Art. 13 § 1 (a), the provisional regulation*" (Art. 2, paragraph 2).

42. Faced with a situation of impasse in negotiations, the authority intervenes to cover the regulatory void by directly exercising its regulatory power, dictating rules on indispensable services in the transitional phase and autonomously assessing what are the essential contents of the rights of the individual to be safeguarded (art. 13, paragraph 1, a).

43. Also from the regulatory standpoint, the Commission's powers find in the same law precise parameters of reference that allow for safeguarding the principle of legality.

44. And in fact, Article 13 paragraph 1, lett. a), in identifying the limits and powers of the provisional regulation (50% of the services normally provided, strictly necessary quotas of personnel not exceeding an average of one-third of the personnel normally used, time bands of total guarantee of the service) makes "particular cases" safe and expressly provides for "*possible derogations by the Commission, for particular cases*" that are "*adequately motivated with specific regard to the need to guarantee levels of operation and security strictly necessary for the provision of services, so as not to compromise the fundamental requirements set forth in Article 1*."

45. In the application phase, the provision requires giving absolute precedence to unquestionably general and primary goods of constitutional importance (life, health, safety) over the position of the employee exercising the right to strike.

46. The consideration of the fundamental primary status of the protected goods with which the exercise of the right to strike comes into conflict, allows for limits to be placed on the exercise of the right to strike, even to the exclusion from strike action of certain professional figures.

47. The law provides appropriate instruments to guarantee the right of defense and judicial protection of rights that may be affected by the authority's measures (Art. 24 Const.).

48. The sanctioning activity of the Commission (Art. 13, paragraph 1, lett. i) falls under the control of the Labour Judge (Art. 20-bis). The administrative judge (TAR of Lazio and Council of State) intervenes for the control of legitimacy of the measures not having a sanctioning nature (Art. 13, paragraph 1, lett. a, b, c, d, e)

49. In this respect, the guarantees of cross-examination and participation in the procedure of the interested parties, which are expressly regulated in Article 4, paragraph 4-quater and which contribute to strengthening the right of defence, are also relevant.

50. The balancing of rights in this matter has often been dealt with by the Court of Cassation which, without prejudice to the right to strike, has identified the following limits to the exercise of the right in question: the right to life, health and personal safety and, more generally, the entrepreneur's right to the continuation of the activity or the integrity of the company's assets (Judgment No. 711 of 1980).

51. The Court of Cassation, in its aforementioned Judgement No. 711/1980, identifies the following limits to the exercise of the right to strike: the right to life, health and personal safety, the right to the integrity of the employer's property and that of third parties and, more generally, the entrepreneur's right to the continuation of the business activity, or the integrity of the company's assets.

52. Furthermore, Article 28 of the Charter of Fundamental Rights of the European Union, "Right of collective bargaining and action" specifies that the right to collective action, including strike action, is recognised "*in accordance with Union law and national laws and practices*".

53. The definition of the concept of strike (which may take varying forms in the different trade union experiences), as well as the determination of the limits within which the right is recognised, thus remain entrusted to the domestic law of the Member States. Therefore, reference to national laws and practices is necessary, since competence to regulate the matter is reserved to the States themselves.

54. Also the jurisprudence of the European Court of Human Rights itself, on the subject of strikes, recognises that "*the right to strike is not absolute*" (Enerji Yapi-Yol Sen v. Turkey, 21st April 2009, Application no. 68959/01, §32); it may be subject to certain conditions and restrictions if they are provided for by law and directed towards the pursuit of ends relating to national security, public safety, the prevention of offences, the protection of health and the rights and freedoms of others.

55. The openness towards balancing the interests of individuals against the interests of the community as a whole is not new in international law in Union law.

56. Indeed, within the framework of Union law it is well known that the Court of Justice of the European Union widely balances even the right to strike and economic freedoms. In this sense, cf. for example the well-known ruling on the Laval case (CJEU (Grand Chamber), 18th September 2007, C-341/05), which gave priority to economic freedoms when balancing the right to collective action).

57. The Laval ruling is part of a 'quartet' of cases decided in quick succession by the European Court of Justice along similar lines, consisting of C-341/05 Laval un Partneri [2007]; C-438/05 The International Transport Workers' Federation and The Finnish Seamen's Union [2007]; C-346/06 Rüffert [2008]; and C-319/06 Commission vs

Luxembourg [2008] (the Laval quartet is also referred to as Laval, Viking, Rüffert and Luxembourg).

58. In the Italian legal system, the right to strike enjoys a higher level of protection than that guaranteed by Union law summarised in the so-called Laval Quartet.

59. With reference to the other grievances, the following is submitted.

60. Article 2 § 2 of Law No. 146 of 1990, as amended by Law No. 83 of 2000, establishes that in the regulation of each essential public service <<*cooling and conciliation procedures, compulsory for both parties, must be carried out before a strike is proclaimed*>>.

61. The legislative, contractual and regulatory provisions on the subject of the preventive trial of the cooling-off and conciliation procedures respond to the need to verify the possibility of averting a collective abstention from work, attempting a mediation work in the conflict between the social partners, in the exclusive interest of the users to normally enjoy the essential public service.

62. In other words, the provision of specific clauses on the compulsory trial, for both parties, of the conciliatory procedures "*before the proclamation of the strike*", accompanied by the formal commitment to refrain from unilateral actions liable to compromise the regular functioning of the services, configures a procedural arrangement capable of satisfying the interests protected by the legislature in the balancing of the exercise of the right to strike with the enjoyment of constitutionally protected personal rights.

63. The prior notice (Article 2, § 1 and 5) is a measure of an instrumental nature that fulfils a function connected with safeguarding the rights of users and the provision of indispensable services. In particular, an adequate period of notice enables the companies/administrations providing essential public services to take the necessary measures to provide essential services, to facilitate the conduct of any attempts at conciliation, and to enable users to make use of alternative services.

64. The <<*other measures*>> identified by the parties <<aimed at enabling the fulfilments>> referred to in paragraph 1 of art. 2 (art. 2, paragraph 2): the maximum duration

of abstention from work identifies in temporal terms the threshold of tolerability of the strike for the users of the service (four hours, eight hours, one day or two continuous days in relation to what is specifically provided for in the agreements of each sector); the exemption excludes the carrying out of strikes in periods in which the blocking of the service produces particularly prejudicial effects for the users in relation to the periods characterised by the need for greater use of the service (summer holidays, Christmas, electoral consultations, etc.).

65. The indispensable services represent the minimum guarantee limit of the service below which the right cannot be compressed, under penalty of impossibility of its enjoyment. Article 2, paragraph 1, provides that strikes must be exercised <<*in compliance with measures aimed at enabling the provision of indispensable services*>> with a minimum notice period of ten days and an indication of the duration of the abstention from work. This is to ensure <<*the effectiveness*>> of the rights of the individual <<*in their essential content*>>. In relation to this, the legislature entrusts the social partners with the task of defining in agreement the thresholds of tolerability of the conflict, making direct reference to <<strictly necessary quotas of personnel>> and pointing out the modalities in which they are to be identified and subjected to periodic disbursement (Article 13, paragraph 1, lett. a), in relation to the services affected by the strike.

66. The principle of rarefaction introduced by Law 83/2000 is aimed at avoiding the excessive prejudice caused to users of the essential service by strikes that are too close together. Indeed, an excessive thickening of the number of strikes could result in the objective impairment of "*the continuity of the public services referred to in Article 1*". The obligation of subjective and objective rarefaction operates independently of the proclaiming trade unions, their degree of representativeness, and without any need to examine the possible presumptive impact on the services affected by the abstentions. The immediately preceptive scope of the rule excludes any *ex-ante* assessment of the concrete impact of the strikes on the final service, since the legislature's objective is to protect the constitutionally protected rights

of service users, who cannot tolerate a detrimental clustering of strikes merely because each strike is proclaimed by a different trade union.

67. Consequently, the union that is most prompt in proclaiming a strike prevents other unions from proclaiming and carrying out close strikes affecting the same final service or the same catchment area.

68. According to the principle of rarefaction, the parties to the sector agreements are obliged to identify "*minimum intervals to be observed between the carrying out of one strike and the proclamation of the next*". It is up to the Guarantee Authority to verify whether the measures determined by agreement are suitable for graduating the fulfilment of the different interests underlying the constitutionally guaranteed rights referred to in Article 1 § 1 of the law, in order to balance the same rights with the exercise of the right to strike (Article 13 § 1, lett. a). In services where strikes have a high degree of vulnerability on users, due to the technical peculiarities of the service itself, to the conflictual nature of the service and in consideration of the company organisation, the Commission has intervened and provided for diversified discipline even within the same sector.

69. With specific reference to the Local Public Transport service, due to the growing conflict in the sector, the Commission considered the 10-day interval between strike actions, prescribed by the previous regulations, no longer suitable for a useful balancing of the interests at stake, and assessed as insufficient the 13-day interval (3 days between the carrying out of a strike and the proclamation of the next one plus 10 days minimum notice) proposed by the parties. Therefore, in order to avert the serious prejudice to the right to free movement of citizen-users, it intervened heteronomously by dictating more stringent rules on rarefaction by providing for a mandatory twenty-day interval between strikes (Resolution No. 18/138 of 23rd April 2018). This measure was considered to be suitable for proportionally graduating the impact of increased conflict on users of the local public transport service.

70. In the event that agreements are lacking or are assessed to be unsuitable, the Commission's measure is in fact necessary for the necessary protection of users' constitutional rights.

* * *

71. It follows from the foregoing that the complaint is unfounded for the following reasons.

72. The regulation of the exercise of the right to strike in the essential public services introduced in the Italian legal system respects the reservation of the law provided for by Article 40 of the Constitution and Article G of the European Social Charter. Indeed, both these rules expressly provide for the possibility of introducing limitations and restrictions to the exercise of the enumerated rights as long as this is done by law and when it is necessary in a democratic society to ensure respect for the rights and freedoms of others, public order, national security, public health and morality.

73. Law No. 146 introduces stringent regulatory parameters in order to ensure a fair balance of constitutionally guaranteed rights. It provides for corrective measures to avoid arbitrary conduct on the part of all the organisations (social parties and the Guarantee Commission) that contribute to supplementing the legislative regulations.

74. Therefore, the counterparty's complaint should be rejected.

* * *

CONCLUSIONS

75. In light of the present observations, the Italian Government insist for the rejection of the complaint.

Rome, 15th February 2023

Drafted by

Andrea Lipari –Procuratore dello Stato

The Agent of the Italian Government

Lorenzo D'Ascia – Avvocato dello Stato