



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

10 July 2023

Case Document No.5

**European Organisation of Military Associations and Trade Unions (EUROMIL)
v. Ireland**
Complaint No. 212/2022

**REPLY FROM THE GOVERNMENT
TO EUROMIL'S RESPONSE**

Registered at the Secretariat on 30 June 2023

EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

EUROPEAN ORGANISATION OF MILITARY ASSOCIATIONS AND TRADE UNIONS (EUROMIL)

**v
IRELAND**

Complaint no. 212/2022

REPLYING SUBMISSIONS OF THE GOVERNMENT OF IRELAND

30 June 2023

A. Introduction

1. These submissions are made in reply to the submissions of the Complainant dated 10 May 2023, transmitted to the Respondent on 26 May 2023. These submissions should be read in conjunction with the Respondent's submissions on the merits of this collective complaint, dated 15 March 2023.
2. These submissions will reply to the submissions of the European Organisation of Military Associations and Trade Unions (EUROMIL) ('the Complainant') in respect of each of the four Articles of the revised European Social Charter ('the Charter') invoked in turn, namely, Articles 2§1, 2§2, 4§1 and 4§2.
3. As a preliminary matter, the Respondent will address the request of the Complainant at para. 9 of its submissions of 10 May 2023 that the Committee ask the Respondent to provide a copy of correspondence presented to the Permanent Defence Forces Representative Association ('PDFORRA') and the Representative Association of Commissioned Officers ('RACO') of 26 September 2022 regarding proposed exemptions. The correspondence the subject of this request was provided to the representative associations as part of the ongoing discussions on the Working Time Directive¹ under a subcommittee of the Conciliation Council. Discussions under the Conciliation and Arbitration Scheme ('the C&A Scheme') are confidential to the parties concerned. This confidential material was compiled in conjunction with internal Governmental stakeholders and provided to the representative associations on a without prejudice basis under that process. The reference to this material in the present proceedings is a contravention of the spirit and principle of conciliation to which all parties to the talks under the C&A Scheme have agreed.
4. Discussions are ongoing with the representative associations in respect of the application of the Working Time Directive in the Defence Forces. Most recently, a two-day workshop took place on 22 and 23 May 2023, which was attended by RACO, PDFORRA and civil and military management. The Committee is requested to allow these confidential discussions to continue to their conclusion and for that reason to refuse this request of the complainant.

B. Observations

I. Alleged violation of Article 2§1 of the Charter

5. This Article requires parties to undertake to provide for reasonable daily and weekly working hours.
6. In respect of paragraph 4 of the Complainant's submissions of 10 May 2023, the Respondent has a de facto system in place for ensuring that members of the Defence

¹ Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ L 299, 18.11.2003, p.9 – 19.

Forces work typical hours, and that payroll pays them for this work. It further has a system in place to ensure that members who perform specialised duties for which particular allowances are payable are paid for those duties. The respondent is actively working to upgrade this system to put in place an electronic time and attendance ('T&A') recording system.

7. Further to the Respondent's submissions in respect of typical working hours in practice of members of the Defence Forces at para. 35 of the submissions of 15 March 2023, a new system to record such hours officially will imminently be put in place. The Defence Forces have carried out a feasibility study for the purpose of introducing a time and attendance system for their members. The military authorities have confirmed that a Defence Forces Working Group has been established to examine options for capturing time and attendance details on the extant Defence Forces Personnel Management System software. The military authorities have advised that a 'Go Live' for the upgrade to the current Personnel Management System is expected to be later this year. The new system will be future proofed to enable compatible technological solutions for recording of T&A to be added to the system.
8. Further to paragraph 22 of the Respondent's submissions of 15 March 2023, in the context of the implementation of the Working Time Directive and its focus on health and safety protections for individuals, the Commission on the Defence Forces recommended the introduction of a non-financial labour budget. This recommendation has been accepted and is to be developed and implemented by the military authorities. The non-financial labour budget will be a key management tool for Commanding Officers and Non Commissioned Officers ('NCOs') in effectively managing the working time of members under their command. It will cover both those activities which are within the scope of the Directive and equally those activities which are deemed to be outside the scope of the Directive. In terms of timelines for developing and implementing this recommendation and in the context of the finalisation of the Commission on the Defence Forces Implementation Plan, the Department has underlined the importance of aligning this task with the implementation of the Working Time Directive and the introduction of a T&A system.
9. This non-financial labour budget aims to come to an appropriate balance between ensuring that the time of members of the Defence Forces is adequately valued and recognised on the one hand and ensuring the effectiveness of the work and training of those members on the other. In respect of paragraph 39 of the Complainant's submissions of 10 May 2023, the RACO comments in 2012, describing a situation whereby an exercise could hypothetically end abruptly before its natural conclusion owing to a rigid enforcement of working time rules, remain a concern for the Respondent. A non-financial labour budget was recommended by the Commission on the Defence Forces as a workable solution acknowledging this concern.
10. In general, members who undertake duties for which allowances are payable, periodically in the year, are subject to the same annual working hours as those who do not. In respect of the Complainant's assertion in paragraph 4 of its submissions of 10 May 2023 that military personnel openly and regularly work over 48 hours a week,

the military authorities ensure that appropriate compensatory rest periods are provided upon completion of special duties. There are some exceptions where, in highly specialised or skilled areas, for example Explosive Ordnance Disposal unit, members may be required to work more hours than the norm. This is counterbalanced by ensuring extended compensatory rest periods are provided upon completion of such duties.

11. The Defence Forces have undertaken significant work in examining the nature of the duties of the Defence Forces and how provisions of the Working Time Directive can be applied to its members. This review has determined that a high percentage of activities are compliant with the Directive and that a range of activities may also be deemed outside the scope of the Directive, due to their specific nature.
12. A sub-committee of the Defence Conciliation and Arbitration Council (comprising the representative associations, military and civil management) has been established to discuss matters relating to implementation of the Working Time Directive, where appropriate. Arising from previous discussions, amended practices regarding compensatory rest have been introduced. This builds upon existing work practices relating to compensatory rest which comply with the Directive.
13. Consultation with the representative associations through this sub-committee is continuing on the proposed management position for implementing the provisions of the Directive. The final management position will be fully aligned with EU case law on these matters, including the need to ensure that appropriate protections with regard to health and safety are fully embedded for members of the Defence Forces, while ensuring that the Defence Forces can continue to fulfil their essential state functions.

II. Alleged violation of Article 252 of the Charter

14. This Article requires parties to undertake to provide for public holidays with pay.
15. In accordance with paragraph 41 of Defence Forces Regulations A11 (enclosed as Annex A.5 to the Respondent's submissions of 15 March 2023), members of the Defence Forces receive three additional holidays over and above the public sector norms. These additional holidays are specific only to members of the Permanent Defence Force. Paragraph 41 (1) of the Regulations also provides that the Minister for Defence may specially authorise other days. It has been the custom and practice to grant two Christmas privilege days to Defence Forces personnel in addition to the Defence Forces Holidays provided by the Regulation.
16. Paragraph 41(3) of the Regulations provides that "where, owing to the exigencies of the service, a member is required to carry out normal duties or a ceremonial or special parade on a Defence Force holiday, such member shall be relieved of all normal duties on any day within 1 month after the Defence Force holidays concerned". This is in line with section 21(1) of the Organisation of Working Time Act 1997, which implements the Working Time Directive within Irish law (enclosed as Annex A.4 to the

Respondent's submissions dated 15 March 2023). The Respondent as employer has selected this choice among those set out in section 21(1).

17. If a member is not afforded any entitlement set out in the Regulations, they may submit a complaint and seek recourse in the normal manner through their chain of command and/or through the internal grievance process entitled the Redress of Wrongs process, as laid down in section 114 of the Defence Act 1954 (enclosed at Annex A.3 to the Respondents submissions dated 15 March 2023). In practice there is flexibility in relation to the one-month window to avail of a day in lieu if required to work on a bank holiday. Should the situation arise that an individual cannot avail of a day in lieu within a month of the day being accrued, Commanders, at all levels, are encouraged to show flexibility in ensuring an individual can avail of a day's leave in lieu.

III. Alleged violation of Article 4§1 of the Charter

18. This article requires parties to undertake to recognise the right of workers to a remuneration such as will give them and their families a decent standard of living.

19. Paragraph 3 of the complainant's submissions of 10 May 2023 is denied. The respondent clearly addressed each of the articles of the Charter invoked by the complainant in its submissions of 15 March 2023. This was to ensure there was no conflation or confusion. It takes the same approach in these submissions.

20. The complainant states at paragraph 6 of its submissions of 10 May 2023 that it refutes any assertion that aspects of its submission are inaccurate or omit any aspect of remuneration. The Complainant in its complaint registered on 9 August 2022 claimed that special reviews have until now been conducted by review groups usually comprised of civil servants. This is at the very least misleading. The benchmarking body in 2002 was led by a senior counsel and included two former senior trade union officials. Only one member of the body was a former senior civil servant. The Public Service Pay Commission, which reported on recruitment and retention in the Permanent Defence Force in May 2019, was chaired by a former chair of the Labour Court who was previously a senior trade union official. The Commission was comprised of another former senior trade union official, persons from business, academia, and a former senior civil servant. These review groups have been independent in their structures and work.

21. Public service pay in Ireland is governed by a system of national agreements conducted between the Irish Government and public service trade unions and representative associations. Negotiations under these agreements have secured benefits to the staff side (trade unions and representative associations) in return for management requests. Members of the Permanent Defence Force have benefited in the past by reason of engagement under these agreements.

22. In respect of paragraph 8 of the Complainant's submissions, there are a number of factors impacting on recruitment and retention in the Defence Forces. The jobs

market remains strong, with many sectors being hit by labour shortages. This can be seen in recent data published by the Central Statistics Office (CSO), where the overall unemployment rate in Ireland was 4.1% in Quarter 1 2023, which is down from 4.8% in Quarter 1 2022. Using standard International Labour Organisation criteria, an estimated 2,608,500 persons were in employment in Quarter 1 2023, up 4.1% (102,700) from 2,505,800 in Quarter 1 2022.²

23. There are a variety of reasons for leaving the Defence Forces ranging from economic factors and pay to family circumstances, lifestyle and a desire for a change of career. A survey commissioned by RACO in 2019 highlighted factors other than pay and conditions as triggers for their members leaving the Defence Forces (see Figure 6 in the RACO Members' Survey Report, at Annex 1 to these submissions).
24. A range of financial and non-financial retention measures have been introduced by Government such as service commitment schemes in the Naval Service and for Air Corps pilots and the tax measures for sea-going members of the Naval Service. The service limits and mandatory retirement ages of Privates, Corporals and Sergeants recruited on or after 1 January 1994 have been extended allowing for their continuance in service until at least the end of 2024.
25. There has also been significant progress on pay. In May 2019, a newly qualified three star private could expect to earn €27,759 gross per annum (including military service allowance but excluding duty allowances). In May 2023, the starting salary for a newly qualified three star private (inclusive of military service allowance) was €37,147. This represents an increase of around 33.8% over that 4 year period. Current pay rates including Military Service Allowances for recruits on completion of their training, start at €37,147 in Year 1, rising to €38,544 in Year 2, and €39,832 in Year 3 of service. A school leaver Cadet on commissioning is paid €41,123. After 2 years they are promoted to lieutenant and their pay rises to €46,406. Where a graduate joins, the pay rate on commissioning begins at €46,406. Schemes have also been introduced to allow for the re-commissioning of former Officers and the re-enlistment of former enlisted personnel of the Defence Forces who wish to return to serve.
26. Paragraphs 11, 13, 23, 27 and 53 of the Complainant's submissions critique national public sector pay policy. The Complainant asserts at paragraph 53 that the failure to collectively agree a payments/allowance regime or to allow the representative associations within Ireland scope to agree on one due to public sector pay policy denies members of the Irish Defence Forces rights provided for under the Charter. This is denied. Both Defence Forces representative associations sought associate membership with the Irish Congress of Trade Unions ('ICTU') for the purpose of being involved in central public sector pay negotiations. As provided for in the Defence Acts, the Minister for Defence in 2022 conveyed temporary conditional consent, pending the enactment of legislative provision, to the Defence Forces representative

² Central Statistics Office, Labour Force Survey, Quarter 1 2023, available at <https://www.cso.ie/en/releasesandpublications/ep/p-lfs/labourforcesurveyquarter12023/keyfindings/> (accessed 30 June 2023).

associations which enabled them to have associate membership of ICTU for the purpose of participation in the most recent public sector pay negotiations. This method of pay negotiation ensures consistency and fairness across the board of the public sector.

27. The Public Service Pay Agreements provide benefits to the staff side (trade unions and representative associations) in return for agreed commitments generally relating to increased productivity, compliance with the industrial peace provisions therein and, where any disputes arise, a commitment to adhere to the dispute resolution procedures set out in those agreements. Members of the Permanent Defence Force have received the benefits of these Agreements. The clause in the agreement precluding the initiation of cost increasing claims outside of the agreed increases in pay and allowances in the Agreements, applies equally to all signatories to the Agreement. Furthermore, the most recent national pay agreement – ‘Building Momentum’ – contained a ‘Sectoral Bargaining’ mechanism in order to provide a means of addressing pressure points as identified by trade unions and representative associations. Unions and associations in all sectors of the public service had an opportunity to pursue claims and issues via the allocated fund. In the Defence sector, PDFORRA progressed a number of claims using the fund for different membership cohorts. RACO opted, as was their prerogative under the agreement, to apply a general 1% increase for all members.
28. The parties to the C&A Scheme agreed at paragraph 70 of the Scheme to “the necessity to take account of the prevailing position in relation to any national policy on pay which may be agreed between the Social Partners from time to time”.

IV. Alleged violation of Article 4§2 of the Charter

29. This Article requires parties to undertake to recognise the right of workers to an increased rate of remuneration for overtime work, subject to exceptions in particular cases.
30. Unlike other areas of the public service, and due to the nature of the duties performed, overtime payments are not available to members of the Defence Forces. Comparisons with other areas of the public service must be cognisant of the unique role, structure, duties and working conditions of service, which are particularly unique to military personnel.
31. The non-standard time and attendance patterns of military personnel and the rates of remuneration associated with a wide spectrum of duties undertaken by such personnel can vary across the different branches of the Defence Forces. In that regard a Military Service Allowance (‘MSA’), which is designed to compensate for the special disadvantages associated with military life including long and unsocial hours, is paid to all ranks up to the level of Colonel. MSA is paid continuously whether additional duties are performed or not. MSA accrues pension entitlements, to address the claims made by the Complainant at paragraph 23.2 of its submissions.

32. At paragraphs 7 and 34, the Complainant draws analogies with the position of members of An Garda Síochána (the Irish police service). The report of the Commission on Remuneration and Conditions in the Defence Forces (July 1990, enclosed at Annex C.7 to the Respondent's submissions of 15 March 2023) reported the great majority of military personnel and Gardaí are engaged in duties which are quite dissimilar. The essence of the comparability principle is that the work should be broadly comparable in most aspects. This is not so as between the Gardaí and the military (para 3.7.27). The Commission advised that regimental pay is only one component of the total pay of Defence Forces personnel. Allowances and other additions to pay must be seen as an integral part of the total remuneration of Defence Forces personnel. Taking regimental pay in isolation and as a totally separate component and disregarding the various allowances and additions to pay is very misleading. While the Commission would, in general, caution against making comparisons between remuneration in the Defence Forces and other employments (because of the uniqueness of military duties), regimental pay and MSA must together be seen as constituting what in other employments would be seen as the standard weekly or monthly pay (para 3.2.10).
33. The Commission noted that claims for increases in pay and allowances were based on the contention that Defence Forces pay should broadly equate with the pay of comparable employments but, at the same time, there was an unwillingness to accept that non-pay conditions could be of considerable value and form part of an overall remuneration package (para 3.7.16). In this regard, the Defence Forces receive a number of non-pay benefits which are not available to other public servants including members of An Garda Síochána. Arising from a commitment in the Programme for Government, the Department of Defence has recently secured sanction to extend the provision of private secondary healthcare for all Defence Forces personnel, in line with the services that were previously available only to Officers. This means that all ranks in the Permanent Defence Force will be able to avail of referrals to private hospitals and consultants, as deemed clinically necessary by an examining Medical Officer. This is a benefit which is not available to any other category of public servant.
34. In respect of the Complainant's argument that allowances are flat rated at paragraphs 37, 42 and 43 of its submissions, in the lists of allowances annexed to the Respondent's submissions of 15 March 2023, it is clear that some are paid on a weekly basis and some are paid on a daily basis. There are also distinctions between rates of allowances for members and officers. The Respondent confirms that where a member works less than a week, the full weekly allowance would nevertheless be paid. Where a member works less than a day, the full daily allowance would nevertheless be paid.
35. There is a wide spectrum of duties undertaken by military personnel which vary across the different branches of the Defence Forces. A wide spectrum of allowances is payable to reflect the diversity of duties. Comparisons with other areas of the public service, as urged by the complainant from paragraphs 17 to 22, must be cognisant of the unique role, structure, duties and working conditions of service which are particular to military personnel.

36. In addition to basic pay and MSA, certain positions in the Defence Forces also attract specialist and technical pay and a range of duties also attract additional allowances. Where members of the Defence Forces acquire technical qualifications and/or fill technical appointments, there is associated technical pay. Defence Forces personnel also receive tax free payments for certain overseas deployments and duties.
37. In response to the Complainant's claims at paragraph 44 of its submissions, in general, members who undertake duties periodically in the year, for which allowances are payable, are subject to the same annual working hours as those who do not. So, while their working hours do not follow the typical working hours, their annual hours are similar taking into account compensatory rest periods.
38. At paragraph 5 of its submissions of 10 May 2023, the Complainant submitted that the Respondent did not specifically address the complaints made regarding the specific areas of work referenced within their complaint, namely personnel at sea, members of the Army Ranger Wing (Special Forces), Explosive Ordnance Disposal (EOD), and members undertaking duties in Portlaoise prison. The allowances payable for these and other duties were set out in detail from paragraphs 65 to 78 of the Respondent's submissions of 15 March 2023. Further to those submissions, Annex 2 to the present submissions sets out working examples of annual pay in respect of each of these areas of work. To address the submissions of the complainant at paras. 22, 30 and 38, these working examples notably include a working example in respect of personnel at sea.
39. The calculations at para. 38 of the Complainant's submissions are indicative of basic rates. Annex 2 to the present submissions is illustrative of figures where appointments attract additional allowances.
40. Paragraph 26 of the Complainant's submissions of 10 May 2023 contends that the C&A Scheme explicitly prohibits discussions regarding overtime. This is correct. The Complainant omits to acknowledge that the C&A scheme for members of the Permanent Defence Force operates on the basis of a signed agreement between the Official/Management side (comprising the Department of Defence, Defence Forces and the Department of Public Expenditure, NDP Delivery and Reform) and the staff side (that is RACO and PDFORRA). It should also be noted that the Scheme was reviewed as recently as 2020, following which amendments to the Scheme were agreed by the parties.
41. All parties agreed at paragraph 23(1) of the agreed Scheme that claims for overtime payments may not be entertained. However, paragraph 23 of the C&A scheme expressly provides that matters appropriate for discussion include pay and allowances. The rates of certain allowances were increased through this mechanism in the past resulting in agreements for improved rates of pay and allowances. This is not acknowledged in the claims of the complainant at paragraphs 23.3, 24, 26 or 45 of its submissions.
42. Paragraph 28 of the Complainant's submissions of 10 May 2023 claims that agreements made through the C&A Scheme are not legally enforceable. The

Complainant earlier refers to the case of *Mc Kenzie v. Minister for Finance* [2010] IEHC 461 at paragraph 13 of its submissions. In that case, the High Court held that the defendant Department was entitled to reduce public sector pay across the board without consulting PDFORRA in the special circumstances of the economic crisis existing at the time. The High Court did find, however, at paragraph 5.5 of its judgment, that “in normal circumstances the Government would be expected to have recourse to it”. The Court did not rule out that the doctrine of legitimate expectation could arise if the Department represented to a distinct category of persons that it would take certain action. If this arose from a communication under the C&A scheme, the persons to whom the representation was made could legally enforce such a communication.

43. The Committee should note that PDFORRA have a number of claims in the Irish Legal system pursuing payments recommended at the adjudication stage of the C&A Scheme covering a period from 2006 to 2018. These payments, similar to a number of recommended awards across the public service, were not paid at the time due to the state of the public finances during an economic crisis in the State. At that time, public service pay and allowances were reduced under emergency legislation. As the legal proceedings taken by PDFORRA are ongoing and the outcome is not known, the Committee should disregard the contention of the Complainant that agreements made through the C&A Scheme are not legally enforceable.
44. Furthermore, in that case the High Court highlighted that under section 97 of the Defence Act 1954, the Minister for Defence could act alone in making certain regulations and for others, the Minister for Defence was required to obtain the consent of the Minister for Finance (paragraphs 2.21 and 2.22). This is to address the point made in paragraph 13 of the Complainant’s submissions.

D. Conclusion

45. In respect of the complaint under Article 2§1 of the Charter, typical working hours for members of the Defence Forces are 40 hours per week. For duties beyond these hours, allowances are processed by recording the duty on the Personnel Management System, approved by military management and then uploaded into payroll. The various allowances payable reflect the range of specialised duties carried out by different member of the Defence Forces. Retaining flexibility for these duties, with oversight of military management in every case and the possibility for members to raise issues under the C&A scheme is proportionate to the legitimate objective sought to be achieved, in accordance with Article G of the Charter.
46. In respect of the complaint under Article 2§2, the Defence Force Regulations, A. 11 set out a list of Defence Force public holidays, which exceed public holidays in Ireland. When required to work on a public holiday, a member of the Defence Forces will be paid their basic wage, plus MSA, plus any allowance payable at a higher rate than normal. In addition, they will be entitled to compensatory time off on any day within 1 month after the Defence Force holiday concerned. If a member is not afforded any entitlement set out in the Regulations, they may submit a complaint and seek recourse

in the normal manner through their chain of command and/or through the internal grievance process.

47. In respect of the complaint under Article 4§1, public service pay in Ireland is governed by a system of national agreements conducted between the Irish Government and public service trade unions and representative associations. Both representative associations have associate membership of ICTU for the purpose of participation in public sector pay negotiations. Members of the Permanent Defence Force have benefited in the past by reason of negotiations under these agreements. This method of pay negotiation ensures consistency and fairness across the board of the public sector.
48. In respect of the complaint under Article 4§2, there is a wide spectrum of duties undertaken by military personnel which vary across the different branches of the Defence Forces. A wide spectrum of allowances is payable to reflect the diversity of duties. In the lists of allowances annexed to the Respondent's submissions of 15 March 2023, it is clear that some are paid on a weekly basis and some are paid on a daily basis. There are also distinctions between rates of allowances for members and officers. The Respondent confirms that where a member works less than a week, the full weekly allowance would nevertheless be paid. Where a member works less than a day, the full daily allowance would nevertheless be paid. The annex to the present submissions sets out working examples of annual pay in respect of a number of specialised duties for which allowances are payable. In general, members who undertake duties periodically in the year, for which allowances are payable, are subject to the same annual working hours as those who do not, as they are given compensatory rest periods.
49. The Respondent submits that there has been no violation of Articles 2§1, 2§2, 4§1 and/or 4§2 of the Charter.

Annexes

1. Representative Association of Commissioned Officers ('RACO') Member's Survey Report (Amárach Research)
2. Working examples of annual pay in respect of personnel at sea, members of the Army Ranger Wing (Special Forces), Explosive Ordnance Disposal (EOD), and members undertaking duties in Portlaoise prison.