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CONSEIL DE L'EUROPE

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

22 September 2023

Case Document No. 5

Associazione Sindacale Militari (ASSO.MIL.) v. Italy
Complaint No. 213/2022

**SUBMISSIONS OF THE GOVERNMENT
ON THE MERITS**

Registered at the Secretariat on 14 September 2023



*Ufficio dell' Agente del Governo
davanti alla Corte europea dei diritti dell' uomo*

AVVOCATURA GENERALE DELLO STATO

European Committee of Social Rights (ECSR)

Collective complaint n. 213/2022

ASSOCIAZIONE SINDACALE MILITARI (ASSO.MIL.) C. ITALY

**OBSERVATIONS OF THE ITALIAN GOVERNMENT
ON THE MERITS**

Ct 36664/2022
Proc. Adele Berti Suman

1. By decision of 23 May 2023, the European Committee of Social Rights declared the complaint of the *Associazione Sindacale Militari* (ASSO.MIL.) admissible and requested the Italian Government to present its observations on the merits of the collective complaint n. 213/2022, submitted by ASSO.MIL. by 31 July 2023.

2. In compliance with the request, the Government will proceed to the following observations on the merits of the complaint.

- I -

Subject Matter of the Complaint

3. The complaint of the ASSO.MIL. Association seeks a declaration of violation of Article 12 of the European Social Charter in connection with Article E of the Charter by reason of the Italian State's failure to set up complementary pension funds in favour of civil servants belonging to the Armed Forces with military status, as provided for by Legislative Decree No. 124/1993 and other relevant legislation. The complainant argues that there has been an initial compression of the social and economic rights of military personnel with the non-establishment of supplementary pension funds, aimed at compensating for the economic loss resulting from the application of the contributory pension scheme, which exposes workers to a considerable difference in economic availability compared to that which they had at their disposal during the receipt of their salary, as compared to the previous scheme retributive regime. In addition, Asso.Mil. claim that there has been a further compression of the economic rights of the same due to the failure to compensate for the damage thus caused.

-II-

Articles concerned.

4. The complainant association seeks a declaration of infringement of Articles 1(1) and (2) (right to work), Article 15 (right of persons with disabilities to independence, social integration and participation in the community), and Article E of the European Social Charter, social integration and participation in the life of the community), and Article E of Part Five of the Charter (non-discrimination), as well as Part One of the preamble to the Charter.

- III -

Merits of the complaint

5. The complaint should be rejected.

6. The complainant alleges that there has been an initial compression of the social and economic rights of military personnel by the failure to establish supplementary pension funds, aimed at compensating the economic loss resulting from the application of the contributory pension scheme, which exposes workers to a significant difference in economic availability compared to that which they had when receiving their salary, as compared to the previous salary scheme. Moreover,

Asso.Mil. contends that there has been a further compression of its patrimonial rights due to the failure to compensate for the damage thus caused.

7. In order to show that the opponent's arguments are unfounded, it should first be pointed out that the establishment of supplementary social security is subject to a complex plurilateral procedure, the completion of which depends on both the trade union and the public counterpart.

8. The structural reforms of the pension sector have been undertaken in recent decades, and a system based on the following so-called '3 pillars' has been established:

a. compulsory public pensions;

b. complementary social security, which envisages the transition from severance pay (TFS) to severance pay (TFR) and the activation of pension funds, managed according to the capitalisation system, with the aim of ensuring higher levels of social security coverage, in terms of pension income. This 'pillar' has not been activated for the Defence-Security Sector, which benefits from the TFS;

c. supplementary private pension provision, through discretionary and individual forms of savings.

9. In order to proceed with the activation of the supplementary pension scheme, the Defence Staff ("Stato Maggiore della Difesa") concerned the Civil Service ("*Dipartimento della Funzione Pubblica*"), which, considering this matter as falling within the scope of the negotiation and concertation procedures provided for by Legislative Decree No. 195 of 12 May 1995, deemed that the issue should be dealt with within the negotiating table.

10. Article 24 of Presidential Decree No. 255 of 16 March 1999 (concerning the "*Transposition of the concertation measure for the Armed Forces concerning the four-year period 1998 - 2001 and the two-year period 1998 - 1999*"), provides that "*the negotiation and concertation procedures activated, for the first application, pursuant to Article 26, paragraph 20, of Law No. 448 of 1998, shall define:*

- *the establishment of one or more national supplementary pension funds for the personnel of the Armed Forces and the Civil and Military Police Forces, pursuant to Legislative Decree No. 124 of 1993, Law No. 335 of 1995, Law No. 449 of 1997 and subsequent amendments and additions, also verifying the possibility of unifying it with similar funds established pursuant to the aforementioned regulations for civil servants;*

- *the percentage share of the contribution payable by the Administrations and that payable by the worker, as well as the remuneration used to determine the shares;*

- *the modalities for transforming severance pay into severance pay, the salary items useful for severance pay provisions, and the portion of severance pay to be allocated to supplementary pensions".*

11. In the context of the inter-ministerial technical roundtable, a ‘specificity package’ of proposals was drawn up for inclusion in the Budget Law for the year 2022.

12. In this context, there was a strong consensus, with trade union organisations (“*Organizzazioni sindacali*”) and military representatives (“*Rappresentanza militare*”), on the willingness to turn every effort to measures of a pension nature, alternative to the ‘complementary pension’, through the establishment of a special fund aimed at adopting the above-mentioned compensatory measures.

13. With reference to the opposing claims, it should be noted that the provisions of law empower the Administration to initiate the complex procedure that can lead to the activation of the supplementary pension scheme, but do not establish ***no obligation*** on the part of the Administration itself, not even with regard to the commencement of the negotiation process, which, *inter alia*, cannot take place without the concurrence of the representatives of the indicated parties and the translation of the same into a regulatory act.

14. In fact, Article 26, paragraph 20, of Law No. 448 of 23 December 1998, merely provides that the negotiation and concertation procedures referred to in Legislative Decree No. 195 of 12 May 1995, may, therefore, not define the rules governing severance pay, and thereafter, supplementary pensions (see, most recently, TRGA Trento, decisions No. 17 -18 dated 16 February 2021).

15. Article 26(20) of Law No 448 of 23 December 1998 provides, in fact, that: “*For the purposes of harmonisation with the general regime of severance pay and the establishment of forms of supplementary social security for civil servants, the negotiation and concertation procedures provided for by Legislative Decree No. 195 of 12 May 1995. 195 of 12 May 1995, may define, for the personnel referred to therein, the rules on severance pay within the meaning of Article 2(5) to (10)(8) of Law No. 335 of 8 August 1995, as amended, as well as the establishment of forms of supplementary pension schemes, as referred to in Article 3 of Legislative Decree No. 124 of 21 April 1993, as amended. For the first application of the provisions of the preceding sentence, the negotiation and concertation procedures will be activated, by way of derogation from the provisions of Article 7, paragraph 1, of the aforementioned Legislative Decree No. 195 of 1995*”. At the time of its first application, Article 26, Paragraph 20 of the above-mentioned Law, while permitting derogation from the specific procedural discipline provided for by Article 7, Paragraph 1 of Legislative Decree No. 195/1995, nevertheless refers to the activation of “*negotiation and concertation procedures*”.

16. Article 3(2) of Legislative Decree No. 252 of 5 December 2005, which laid down the rules governing supplementary pension schemes, also follows the same line. It provides that, for the personnel referred to in Article 3(1) of Legislative Decree No. 165/2001, supplementary pension schemes “*may be established in accordance with the rules of the respective regulations or, failing that, by means of agreements between the employees themselves promoted by their associations*”.

17. In the light of the above, it should be noted that **there is no provision in the regulations of the Security and Defence sectors that allows the unilateral establishment and implementation of supplementary pension schemes by the employer's administration.**

18. In this regard, as established by administrative case law (ex multis, T.A.R. Lazio-Rome, sect. I bis, nos. 2122 and 2123 of 2014) the activation of supplementary social security is a matter reserved for consultation-contractual negotiations, pursuant to of the aforementioned provisions of Articles 26, para. 20, 1. no. 448/1998 and 3, para. 2, legislative decree. No 252/2005, and therefore, since it is not possible to initiate nor - *a fortiori* - to conclude the administrative procedure on the initiative of the Administration party to the contract, it is clear that there is no profile of responsibility attributable to it.

19. The Council of State, in its ruling no. 2593 dated 8 April 2022 affirmed that:

- with regard to the initiation of supplementary pension schemes, employees do not have a concrete, current and directly protectable interest in the initiation and conclusion of the relevant negotiation procedures, which belong exclusively to the trade unions and COCERs

- the legitimacy to assert any failure to comply with the obligation to adopt administrative measures, also by challenging the silence breach, belongs in a general way only to the persons holding the concrete and current interest

- the Administrations, since they cannot unilaterally regulate the matter nor, moreover, since the time-limits within which the supplementary pension scheme must be implemented are laid down, are under no obligation to act and, therefore, the claim for damages is unfounded.

20. The Council of State clarified that the supplementary social security system was entirely subject to the procedures of negotiation and consultation, with the result that the Administrations have no independent obligation to provide for it, since they cannot unilaterally regulate the matter nor, moreover, are there any deadlines within which that supplementary social security system must be implemented; with the consequent groundlessness of the claim for the assessment of the obligation to provide and consequently of the claim for damages, since there is no there is no delay on the part of the defendant administration and the employees do not have any immediately protectable position vis-à-vis the Administration, remaining the entire discipline attributed to the activity negotiation within the framework of trade union representation (*ex multis*, Council of State, n. 2593/2022).

21. This was also confirmed by the Court of Auditors' case law, which reiterated that Administrations, since they cannot unilaterally regulate the matter, have no obligation to provide.

22. The Court of Auditors ("*Corte dei Conti*"), with sentence no. 73 dated 5 March 2021, in the appeal to the Apulia Regional Administrative Court sentence no. 207/2020 pointed out that:

- disputes brought by employees fall under the exclusive jurisdiction of the administrative judge, as, moreover, stated by the Joint Sections of the Court of Cassation in sentence no. 22807/2020, declaring the lack of jurisdiction of the accounting judge and referring the activation of supplementary social security to the concertation table
- the activation of supplementary pensions is a matter reserved for concertation;
- upholding the appeals and reforming judgment no. 207/2020, the Court of Auditors' lack of jurisdiction.

23. With regard to the alleged damage that would have resulted from the failure to activate the supplementary pension system, the Administrative Court has long since ruled out the existence of damage, noting that *“the delay in the procedures cannot be ascribed to the inertia of the intimated ministries, but rather to the slowness of a technical roundtable of which the trade union representatives of the labour categories concerned are also part”* (see TAR Lazio, Rome, I bis, 25 June 2019, no. 8286).

24. Therefore, this is not a delay attributable to the proceeding administration alone, as the ASSO.MIL. claims, since the table also provides for the involvement of the trade unions themselves.

25. Moreover, the recognition of the liability of the P.A., requires not only the ascertainment of the violation of the terms of the procedure, the ascertainment that the failure to observe the procedural deadlines is attributable to the fault and wilful misconduct of the administration itself, that the damage is a direct and immediate consequence of the delay, and of the delay, as well as proof of the damage complained of (ex multis T.A.R. Campania, S ez I, 27 September 2019, S ent. no. 4634). In the present case there is no obligation not only to act but also to conclude in the sense sought by the ASSO.MIL.

26. In confirmation of all the foregoing regarding the inadmissibility and groundlessness of the complaint, it should also be noted that Law No. 234 of 30 December 2021 on the State Budget for the financial year 2022 and the multi-year budget for the three-year period 2022-2024 (in particular, paragraphs 95 and 96 of Article 1), which provided for the establishment of a fund for the implementation of equalisation measures of a social security nature for the personnel of the Armed Forces, the Police Forces and the National Fire Brigade Corps aimed at the adoption of regulatory measures aimed at the progressive equalisation of the relevant social security system through the introduction of compensatory measures with respect to the effects deriving from the liquidation of their treatments as well as supplementary/alternative measures of supplementary pension schemes.

27. The above considerations lead to the conclusion that the counterparty complaint should be rejected.

* * *

CONCLUSIONS

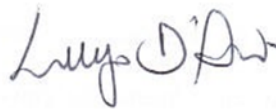
In light of the present observations, the Italian Government insists for the rejection of the complaint.

Rome, 14 September 2023

Drafted by

Adele Berti Suman – Procuratore dello Stato

The Agent of the Italian Government
Lorenzo D'Ascia – Avvocato dello Stato

A handwritten signature in black ink, appearing to read 'Lorenzo D'Ascia', is positioned below the typed name of the agent.