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

3 April 2024

Case Document No. 7

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

**REPLY FROM THE GOVERNMENT
TO ASSO.MIL. RESPONSE ON THE MERITS**

Registered at the Secretariat on 5 March 2024



REPUBBLICA ITALIANA

Ufficio dell'Agente del Governo italiano
davanti al Comitato Europeo dei Diritti Sociali

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Avvocatura Generale dello Stato

European Committee of Social Rights (ECSR)

Collective complaint n. 213/2022

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

REPLIES OF THE ITALIAN GOVERNMENT ON THE MERITS

Rome, 5 March 2024

Ct 36664/2022

Proc. Adele Berti Suman

1. By decision of 15 December 2024, pursuant to Rule 31§3 of the Rules of Procedure of the European Committee of Social Rights, the President of the Committee invited the Government to submit a reply to the observations on the merits of the collective complaint n. 213/2022 submitted by ASSO.MIL, by 15 February 2024. This deadline was then extended to 15 March 2024.

2. In compliance with the request, the Government will proceed to the following replies.

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3. The complainants turned to the CEDS to request a finding of violation of Article 12 of the European Social Charter, in connection with its Article E, by reason of the Italian State's failure to establish supplementary pension funds in favour of civil servants belonging to the Armed Forces under military order, and to charge the Italian state, accordingly, with the costs and fees arising from the activated procedure.

4. ASSO.MIL. complains that the Administration has not shown that it has ever attempted to initiate procedures for the definition of supplementary pension institutions.

5. Regarding the attribution of responsibility for the failure to activate the supplementary pension scheme, which, according to the complainant, would fall entirely on the State Administrations, it is worth representing that the Administrative Court has already excluded the existence of such responsibility for some time, noting that *"the delay in the procedures cannot be ascribed to the inertia of the Ministries called upon to act, but rather to the slowness of a consultation roundtable at which trade union representatives of the labour categories concerned are also members"* (among others, T.A.R. Lazio, Roma, Section I bis, 25.06.2019, no. 8286).

6. In this regard, reference is also made to the ruling of T.A.R. Lazio, Section IV, no. 05068/2022 published on 26/04/2022 in which similar claims were declared inadmissible *"The College intends to recall the principles on the subject of actions brought pursuant to articles 31 and 117 of the c. p. a. with reference to the non-implementation of supplementary welfare, most recently affirmed in the ruling of the Council of State, Sec. II, 20 December 2021, no. 8440. The Conseil d'État observed that "the supplementary social security system was fully subject to the procedures of negotiation and consultation, with the result that the Administrations today's appellants have no independent obligation to provide for it, since they cannot unilaterally regulate the matter, nor, moreover, are there any deadlines within which said supplementary pension scheme must be implemented"*. From the provisions

governing the matter “it is clear that there is no independent obligation to provide for the Public Administrations, in the absence of the definition of the matter in collective bargaining and, in the case of the military, of the specific consultation procedures, pursuant to Legislative Decree 195 of 1995”, since the Administration cannot substitute itself for the trade unions in determining the content of the agreements. “Hence the groundlessness of the request for the ascertainment of the obligation to provide proposed by the military personnel of the Guardia di Finanza and, consequently, of the claim for damages, since there is no delay on the part of the defendant Administration and since the employees do not have any immediately protectable position vis-à-vis the Administration, but the entire discipline of the negotiating activity remains within the scope of union representation”. It follows from the absence of any obligation to provide that, on the notice forwarded by the applicant trade union organisations, there was no silence that could be challenged pursuant to Articles 31 and 117 of the Code of Civil Procedure; it follows that the relative action, aimed at declaring its illegitimacy, must be declared inadmissible”.

7. Lastly, it necessary to point out another relevant ruling of the T. A. R. Lazio, Section VI, no. 06592 of 18 May 2022 published on 21/05/2022 that *“In underlining, further to what has been previously highlighted, how also under this aspect the presence of a constant jurisprudential orientation can be found (see, ex multis, T.A.R. Veneto, Sec. I, 1 April 2022., no. 525; T.A.R. Lombardy, Milan, Sec. III, 26 January 2022, no. 174), what has been stated above in the repeated judgment of Section II of the Council of State (no. 8440/2021) must be reiterated, according to which the “complementary social security system to the negotiation and consultation procedures” there is no obligation” on the part of the administrations concerned to take action, since they cannot unilaterally regulate the matter; “nor, moreover, are there any deadlines within which the supplementary pension scheme must be implemented”.*

8. Also recently (see, T.A.R. Lazio, Section V, No. 3023 published on 14/2/2024), therefore, the Administrative Judge has ruled out the administration’s liability for the pecuniary damage suffered by employees following the failure to set up the supplementary pension scheme, and this on the grounds that the compensation action brought is based on an allegedly unlawful conduct which, on the contrary, the Council of State has repeatedly declared to be non-existent, stating that *“it is clear from these rules that there is no independent obligation on the part of the Public Administrations to provide for the matter, in*

the absence of the definition of the matter in collective bargaining and, in the case of the military, of the specific consultation procedures, pursuant to legislative decree no. 195 1995. lgs. 195 of 1995” (Council of State, II, 2593/2022)

9. Moreover, the reference made by ASSO.MIL. to the judgment of the United Sections of the Supreme Court No. 22807/2020 is not useful, both because that decision concerned the identification of the competent judge (the administrative judge, in the present case), and also because the Supreme Court did not in any event state therein that the obligation claimed by the plaintiffs was incumbent on the administrations, but merely stated on the competence jurisdictional in reference to the specific claims of the plaintiff.

10. Therefore, there is no delay attributable to the proceeding administration, considering the involvement of the trade unions themselves and the fact that there are no deadlines within which supplementary pension provisions must be implemented.

11. On this point, it is important to clarify that, in the face of the provisions of Law 234/2021, through which the allocation of resources was provided for the introduction of compensatory measures of the pension treatment for personnel in service, as well as supplementary pension for future enlisted personnel, to date, it has not been possible, for reasons not attributable to the public party, to initiate negotiation negotiations.

12. In this regard, it is recalled that negotiation activity constitutes the mandatory tool through which the current regulatory framework provides for the activation of supplementary pension plans for the defense and security sector.

13. Specifically, the inability to initiate the necessary negotiation phase is a direct consequence of the changed regulatory framework regarding representation; with Law No. 46 of 2022, on “Regulations on the exercise of trade union freedom by personnel of the Armed Forces and Police Forces with military regulations, as well as delegation to the Government for regulatory coordination,” professional associations with a trade union character among military personnel (hereinafter APCSM) were established.

14. By Legislative Decree No. 206 of 2022, about “*Provisions for the adjustment of bargaining procedures for personnel of the Armed Forces and the Police Forces with military regulations, as well as for the establishment of the relevant negotiating areas for executives, pursuant to Article 16, paragraph 1, letters d) and e), of Law No. 46,*” the negotiation procedures for non-managerial personnel of the Armed Forces and Military-ordered Police Forces were amended by providing, for both, the stipulation of a union agreement between a

public party delegation and a union delegation composed of representatives of APCSMs recognised as representative and identified by decree of the Minister for Public Administration, pursuant to Article 13 of Law No. 46 of 2022.

15. With Article 12 of Decree Law No. 132 of 2023, converted by Law No. 170 of, 2023, the deadline in Article 13, Paragraph 1, of Law No. 46 of 2022 (now provided for in Article 1478, Paragraph 1, of the Code of Military Order), regarding the survey of proxies and the Effective Force of the individual Armed Force and Military Armed Police Force required for the purpose of ascertaining the union representativeness of APCSMs, was extended to January 31, 2024.

16. The survey as of January 31, 2024, assumes particular relevance because it is aimed at identifying the nationally representative APCSMs that are members of the negotiating union delegations in the negotiation procedures and entitled to the use of union detachments and permits within the limits of the quotas that will be determined in the bargaining process.

17. Thus, within this regulatory framework, the establishment of the aforementioned APCSMs among military personnel results in the overcoming of the military representation system based on COCERs' participation in negotiations.

18. Taking the above into account, in the case at hand, there was an objective impossibility of initiating negotiations for supplementary pension plan negotiations, given the indeterminacy of the legitimised trade union counterpart.

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CONCLUSIONS

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

Rome, 5.3.2024

Drafted by

Adele Berti Suman – Procuratore dello Stato

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

