



DECISION ON THE MERITS

Adoption: 22 March 2022

Notification: 22 April 2022

Publicity: 23 August 2022

Associazione Professionale e Sindacale (ANIEF) v. Italy

Complaint No. 159/2018

The European Committee of Social Rights, committee of independent experts established under Article 25 of the European Social Charter ("the Committee"), during its 326th session in the following composition:

Karin LUKAS, President
Eliane CHEMLA, Vice-President
Aoife NOLAN, Vice-President
Giuseppe PALMISANO, General Rapporteur
Jozsef HAJDU
Barbara KRESAL
Kristine DUPATE
Karin Møhl LARSEN
Yusuf BALCI
Tatiana PUIU
Paul RIETJENS
George THEODOSIS
Mario VINKOVIC
Miriam KULLMANN

Assisted by Henrik KRISTENSEN, Deputy Executive Secretary

Having deliberated on 22 January and 22 March 2022,

On the basis of the report presented by Kristine DUPATE,

Delivers the following decision adopted on the latter date:

PROCEDURE

1. The complaint lodged by *Associazione Professionale e Sindacale* (“ANIEF”) was registered on 12 February 2018.

2. ANIEF alleges that Italy has violated Articles 1§1, 1§2, 4§1, 4§4, 5, 6§4 and 24 as well as Article E in conjunction with each of the provisions concerned of the revised European Social Charter (“the Charter”) as regards the situation of some 50,000 teachers, who obtained primary school teaching certificates (“*diploma magistrale*”) during or before 2001-2002, *i.e.*, before stricter qualifications for teaching were required by law. ANIEF points out that even if these teachers have been regularly working as supply teachers in public preschool and primary school under fixed-term contracts, as of 1 September 2016 they cannot have their fixed-term contracts extended any longer beyond 36 months (as provided by Law No. 107/2015 at the time the collective complaint was lodged). ANIEF also points out that these teachers are not entitled to be registered in the eligibility ranking lists to be drawn upon exhaustion (henceforth “ERE lists”) from which teachers can be recruited under indefinite duration contracts, because their qualification was not recognised as sufficient by the Council of State (Judgment No. 11/2017 of the Council of State in Plenary Session, 20 December 2017).

3. On 3 July 2018, the Committee declared the complaint admissible, in accordance with Article 6 of the 1995 Protocol providing for a system of collective complaints (“the Protocol”).

4. In its decision on admissibility, the Committee invited the Government to make written submissions on the merits of the complaint by 13 September 2018.

5. Referring to Article 7§1 of the Protocol, the Committee invited the States Parties to the Protocol and the States having made a declaration in accordance with Article D§2 of the Charter, to notify any observations they may wish to make on the merits of the complaint by 13 September 2018.

6. Referring to Article 7§2 of the Protocol, the Committee invited the international organisations of employers or workers mentioned in Article 27§2 of the 1961 Charter to make observations by 13 September 2018.

7. No such observations were received.

8. The Government’s submissions on the merits were registered on 10 September 2018.

9. Pursuant to Rule 31§2 of the Rules, the deadline set for ANIEF'S response to the Government's submissions on the merits was 15 November 2018. ANIEF'S response was registered on 14 November 2018.

10. Pursuant to Rule 31§3 of the Rules, the Government was invited to submit a reply to ANIEF'S response to the Government's submissions by 7 January 2019. No such reply was received.

11. 15 Italian teachers requested and were granted the opportunity to submit observations on the complaint under Rule 32A§1 of the Rules. These observations were registered on 31 May 2021.

12. Pursuant to Rule 28§2 of the Rules, the President of the Committee invited the Government and ANIEF to submit, if they so wished, a response to the observations by these 15 Italian teachers. The responses of ANIEF and the Government were registered on 30 July 2021.

SUBMISSIONS OF THE PARTIES

A – The complainant organisation

13. The complaint concerns the situation of some 50,000 teachers who hold primary school teaching certificates received during or before the 2001-2002 academic year and have been regularly working as supply teachers in public preschool and primary school under fixed-term contracts.

14. ANIEF alleges that Article 1§131 of Law No. 107/2015 as of 1 September 2016 prohibits the future appointment of the abovementioned teachers in schools administered by the State once said teachers have completed 36 months' service.

15. ANIEF further alleges that holders of primary school teaching certificates received during or before the 2001-2002 academic year were not granted any opportunity to achieve stable tenured status under Law No. 107/2015, as no exceptional recruitment plan had been provided for in respect of such teachers.

16. Finally, ANIEF alleges that by not considering the primary school teaching certificates received during or before the 2001-2002 academic year as sufficient for the inclusion in the ERE lists, Judgment No. 11/2017 of the Council of State gave rise to discrimination between, on the one hand, more than 2,600 holders of primary school teaching certificates who have benefited from a definitive judgment acknowledging the right to inclusion on the ERE lists and the resulting right to the granting of tenured status, and, on the other hand, 50,203 holders of primary school teaching certificates who only obtained an interim order from the Council of State or the Regional Administrative Court accepting the request for inclusion on the ERE lists. These 50,203 holders of primary school teaching certificates were dismissed by the Ministry of Education, Universities and Research ("MEUR") from their permanent (6,669 teachers)

or fixed-term (43,534 teachers) employment because of Judgment No. 11/2017 of the Council of State.

17. In view of this, ANIEF asks the Committee to find that the situation in Italy is in breach of Articles 1§1, 1§2, 4§1, 4§4, 5, 6§4, and 24, as well as Article E in conjunction with each of the provisions concerned of the Charter.

B – The respondent Government

18. The Government states that by Judgment No. 11/2017 the Council of State held that in the light of the legislation enacted over time, in order to regard the mere possession of primary school teaching certificates received during or before school year 2001-2002 as a sufficient basis for inclusion in the ERE lists, it would have been necessary for the holders of these teaching certificates: (i) to have obtained a further qualification establishing accreditation, and (ii) to have challenged in good time the administrative measures precluding their inclusion in the ERE lists.

19. Furthermore, it states that Decree-Law No. 87/2018 (“Urgent provisions on the dignity of workers and undertakings”), converted with amendments into Law No. 96/2018, made provision for specific measures with the aim of resolving the issue affecting teachers holding primary school teaching certificates received during or before the 2001-2002 academic year that had arisen following Judgment No. 11/2017 of the Council of State.

20. The Government accordingly requests the Committee to find the complaint unfounded in all respects.

OBSERVATIONS OF 15 TEACHERS

21. The 15 teachers (hereinafter “the interveners”) point out that they are also holders of primary school teaching certificates awarded during or before school year 2001-2002 and a subsequent qualification establishing accreditation. They further point out that they are eligible to participate in ordinary competitions for nursery/primary schools and are fully included within the ERE.

22. The interveners state that they were parties in the civil proceedings that resulted in Order No. 19679/2019 issued by the Joint Divisions of the Court of Cassation, which ruled inadmissible the challenge brought by holders of primary school teaching certificates awarded during or before school year 2001-2002 against Judgment No. 11/2017 of the Council of State in plenary session.

23. The interveners further remark that in Judgment No. 5/2019, the Council of State in plenary session upheld Judgment No. 11/2017 and confirmed as entirely unfounded the interpretation that primary school teaching certificates awarded during or before school year 2001-2002 were sufficient to establish absolute accreditation for the purposes of automatic inclusion in the ERE lists.

24. The interveners finally point out that Italy has adopted new specific legislation to provide redress by means of alternative pathways to ordinary recruitment

competitions, known as “reserved” and “non-selective” competitions establishing access to tenured positions (cf. Decree of the Director General No. 1456/2018; Decree of the Director General No. 497/2020 – Decree of the Director General No. 510/2020), which retained the sole prerequisite of a three-year period of service.

RELEVANT DOMESTIC LAW AND PRACTICE

A – Constitutional principles concerning access to indefinite duration contracts in the public sector

25. Constitution of the Italian Republic of 1 January 1948

Article 97§4

“Employment in public administration is accessed through competitive examinations, except in the cases established by law.”

B – General legal framework concerning use of fixed-term contracts in the public sector

26. Legislative Decree No. 165/2001 (entry into force on 24 May 2001) – Consolidated Act on Public Sector Employees – as amended

Article 36§2 (as amended, from 12 January 2006) provides that “*Public administrations may only conclude [fixed-term contracts of employment] (...) on the basis of documented requirements that are exclusively temporary or exceptional in nature*”.

Article 36§5 provides (as from 24 May 2001) that: “*At all events infringement of binding provisions on the recruitment or employment of workers by the public authorities cannot serve to justify the establishment of employment relationships of indefinite duration with those public authorities, without prejudice to any liability or sanction. The worker concerned is entitled to compensation for damage incurred as a result of working in breach of binding provisions. The authorities must recover any sums paid in that connection from the managers responsible, whether the infringement is intentional or the result of gross negligence. Any directors acting in breach of the provisions of this Article shall also bear liability (...). Consideration shall be given to such violations within the assessment of the director’s performance (...)*”.

Article 36§5 *quater* declares null and void fixed-term employment contracts entered in breach of this Article.

Article 70§8 (as from 24 May 2001), confirms that Legislative Decree No. 165/2001 does not affect “*the procedures governing the recruitment of staff in schools, under Legislative Decree No. 297/1994 of 16 April 1994, as amended*”.

27. Legislative Decree No. 81/2015 (entry into force on 25 June 2015) - Consolidated provisions on employment contracts and review of the legislation on the duties of workers - as amended

Article 55§1b of Legislative Decree No. 81/2015 repealed and replaced Legislative Decree No. 368/2001 (in force from 24 October 2001 to 24 June 2015) which implemented in Italy Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP. Under Legislative Decree No. 368/2001 it was initially provided (pursuant to Article 5§4bis, as from 1 January 2008) that in case of successive fixed-term contracts (...)

exceeding a total period of thirty-six months (...) the employment relationship would be deemed to be permanent. The payment of a salary supplement to the worker and, in some cases, the conversion of the fixed-term contract into a permanent contract was also provided in other cases of breach of the conditions attached to the use of fixed-term contracts. Clauses introduced in 2011 and 2012 (Articles 10§4-bis and 10§4-ter) explicitly excluded respectively public education teaching and non-teaching (ATA) staff and healthcare staff working for the National Health Service from the scope of this Decree to the effect that under no circumstances these categories of workers could be granted a permanent contract in case of successive extensions and renewals of their fixed-term contracts.

As regards public sector staff, Article 29 of Legislative Decree No. 81/2015 maintains restrictions to the use of fixed-term contracts equivalent to those initially set in Legislative Decree No. 368/2001, notably as regards the maximum overall duration of 36 months (Article 19, as still applicable to public sector). These restrictions however do not apply notably to public education teaching and non-teaching (ATA) staff and healthcare staff working for the National Health Service, as specified under Article 29. Furthermore, Article 29 confirms that, as provided by Article 36 of Legislative Decree No. 165/2001, the conversion of fixed-term contracts into indefinite duration contracts does not apply to the public sector in case of breach of the conditions attached to the use of fixed-term contracts.

28. Legislative Decree No. 75/2017 (“Madia reform”) (entry into force on 22 June 2017) as amended

Article 20 allows public administrations to appoint under indefinite duration contracts staff who have been in service with them under fixed-term contracts for at least three years, with or without interruptions, over the past eight years.

Workers fulfilling these conditions can be appointed either:

- directly, until 31 December 2021, provided that they had already been recruited through competitive recruitment procedures for the same activities (§1), priority being given to the staff currently in service (§12) or
- through competitive recruitment procedures to be launched in 2018-2020, which shall reserve up to 50% of the available posts to them (§2). Pending the conclusion of the competition procedures, the flexible contracts of the candidates can be prolonged (§8) and the public administrations are prohibited to issue new flexible contracts for the posts at issue (§5).

These provisions do not apply to the recruitment of teaching and non-teaching (ATA) staff of public education sector (§9). Specific provisions also apply in respect of AFAM, Research and National Health System sectors, as well as in respect of outsourced (temporary agencies) workers (§§9-10, 11bis).

C – Main rules concerning recruitment of public education staff

29. National Collective Labour Agreement (NCLA) for the Education and Research Branch of 19 April 2018

The 2018 NCLA, which was signed after the introduction of the complaint, provides that fixed-term contracts in the Schools Branch for teaching and non-teaching (ATA) staff shall indicate a term (Article 41). While the part concerning specifically the University Branch includes (Article 53§2-3) restrictions to the use of fixed-term contracts, notably a maximum duration of 36 months, as well as provisions allowing for the periods spent under fixed-term contracts to be

taken into account in the recruitment to permanent posts or after such recruitment (Article 54), no similar provisions apply to the Schools Branch.

The NCLA for the Schools Branch of 29 November 2007, which applied when the complaint was submitted, provided for the teaching staff (Article 25§3) that "*The individual permanent or fixed-term employment relations of teaching and educational staff in institutions and schools administered by the state of every type and level shall be established and regulated by individual contracts, in accordance with statutory provisions, Community legislation and the applicable national collective agreement.*" and that (Article 40§4) "*A fixed-term employment relationship may be transformed into a permanent employment relationship as a result of specific legislative provisions.*"

30. Law No. 341 of 19 November 1990, on the reform of university teaching regulations

Article 3§2 of Law No. 341/1990 provided for the establishment of a degree course offering two alternative specialisations, one for nursery school and the other for primary school, as a qualification establishing eligibility for participation in competitions for teaching posts.

Article 3§2 of Law No. 341/1990 was enacted by Inter-Ministerial Decree of 10 March 1997. Article 1 of Inter-Ministerial Decree of 10 March 1997 abolished the previously existing three- and four-years studies for nursery and primary School. Article 2 of Inter-Ministerial Decree of 10 March 1997 provided that "*Academic qualifications obtained following completion of the three-year and four-year experimental courses at vocational secondary schools and experimental four-year and five-year courses at vocational colleges that were started during or before school year 1997-1998 or otherwise obtained during or before school year 2001-2002 shall permanently retain their current legal status and establish entitlement to participate in the sessions for the granting of accreditation to teach in nursery schools, as provided for under Article 9§2 of Law No. 444/1968, as well as in ordinary competitions based on qualifications and examinations for teaching positions in nursery schools and primary schools, in accordance with the provisions of Articles 399 et seq of Legislative Decree No. 297 of 1994*".

31. Legislative Decree No. 297/1994 (entry into force 3/06/1994) - Consolidated Act of Legislative Provisions applicable to Education in relation to Schools of every Type and Level - as amended

This text lays down the main reference provisions governing access to fixed-term or tenured posts in public education (nursery, primary and secondary schools).

As regards access to indeterminate duration (tenured) teaching posts:

Article 197§1 of Legislative Decree No. 297/1994 provided, in conjunction with Article 531 of Royal Decree No. 1054 of 6 May 1923 (Gentile reform), for the recognition of the primary school teaching certificate as a qualification establishing accreditation for teaching in elementary schools. With effect from 24 September 1998, it was repealed and replaced by Article 15§7 of Decree of the President of the Republic No. 323 of 23 July 1998.

Article 399§1 provides that "*50% of teaching positions in nursery, primary and secondary schools, including art high schools and institutes of art shall be filled out of the positions eligible for allocation each year for that purpose by competitions based on qualifications and examinations, while the remaining 50% shall be drawn from the permanent eligibility ranking lists [graduatorie permanenti] established pursuant to Article 401*".

Article 401§1 provides that the [pre-existing] "*eligibility ranking lists for competitions based solely on qualifications to recruit teaching staff in nursery, primary and secondary schools, including art high schools and institutes of art, shall be transformed into permanent eligibility*

ranking lists, which shall be used to make tenured appointments pursuant to Article 399§1". Article 1§605 (c) of Law No. 296/2006 provided that "with effect from [1 January 2007], the permanent ranking lists (...) [referred to under Article 401§1 of Legislative Decree No. 297/1994] shall be transformed into ranking lists to be drawn upon until exhaustion [graduatorie ad esaurimento]" ("ERE lists").

Article 401§2 provides that permanent eligibility ranking lists should be regularly supplemented by the inclusion of teachers who have passed the tests set within the most recent regional competition based on qualifications and examinations for the same competition class and the same position, and of any teachers who have requested a transfer from the equivalent eligibility ranking of another province. At the time the new aspiring candidates are included, the positions in the eligibility ranking of those already included in the permanent eligibility ranking shall be updated.

32. Decree of the President of the Republic No. 323/1998 of 23 July 1998

Article 15§7 of Presidential Decree No. 323/1998 of 23 July 1998, provides that *"The certificates awarded in the state examination upon completion of courses at teacher-training institutes that began during or before school year 1997-1998 shall retain on a permanent basis the current legal status and shall continue to constitute accreditation for teaching in primary schools. They shall establish eligibility for participation in competitions based on qualifications and examinations for teaching positions in nursery schools and primary schools."*

33. Law No. 124/1999 (entry into force 25 May 1999) laying down urgent provisions for educational personnel - as amended

Article 2§1 of Law No. 124/1999 provides that in the first supplementation of the permanent eligibility ranking lists under Article 401 of Legislative Decree No. 297/1994, along with teachers who request a transfer from the corresponding ranking list of another province, eligibility for inclusion is to be recognized: a) in the first round/firstly, to teachers who meet the requirements of the previous rules for participation in the in the competitions for qualifications only; b) in the second round/secondly, to teachers who have passed the examinations in a previous competition based on qualifications and examinations or previous examinations even solely for the purpose of establishing accreditation in relation to the same competition class or the same position who, as at the date of entry into force of this Law, have been included on a ranking list for the hiring of non-tenured staff. The inclusion on a ranking list for the hiring of non-tenured staff is not required for staff who have passed the tests of the last competition based on qualifications and examinations published before the date of entry into force of this Law. Article 2§2 provides that the teachers referred to in paragraph 1 shall also include those who have passed the examinations of the reserved session referred to in paragraph 4.

Article 2§4 of Law No.124/1999 provides that at the same time as the first competition based on qualifications and examinations after the entry into force of the present law is announced, the Ministry of Education shall announce a reserved session of examinations for the award of the qualification or eligibility required to teach in nursery schools, in primary schools, and in institutes and schools providing secondary and art education, establishing entitlement to inclusion on the permanent ranking lists according to what is provided in paragraph 1. This session of examinations is reserved both for teachers without accreditation and nursery schoolteachers, technical-practical education teachers, applied art teachers and educational staff who do not have suitability to teach who, upon entry into force of the Law, had actually worked as teachers for at least 360 days during the period falling between school year 1989-1990 and the date of entry into force of the Law.

Fixed-term supply contracts of any school staff (teachers and non-teaching (ATA) staff) are governed by Article 4 of Law No. 124/1999, which reads as follows:

"Section 4 - Supply teaching (text in force as of 28 July 2016)

[1. *Annual supply teaching appointments may be made in order to cover teaching positions and posts that are effectively vacant and available before 31 December, and which are expected to remain so for the entire school year, where it is not possible to fill the vacancy using tenured teaching personnel employed within the same province or using supernumerary personnel, provided that no tenured personnel have already been allocated on any basis to such positions, pending the completion of competition procedures leading to the appointment of tenured teaching personnel.*] - The Constitutional Court, by its judgment No. 187/2016, ruled unconstitutional, in the manner and within the limits specified in the substantive part, Article 4§§1 and 11 of Law No. 124/1999 “*insofar as, given the absence of any effective limits on the maximum overall duration of successive fixed-term contracts of employment, it authorised the potentially open-ended renewal of fixed-term contracts of employment in order to cover vacant and available teaching and administrative, technical and auxiliary staff positions without reference to any objective justification*”.

2. *Temporary supply teaching appointments may be made until the completion of teaching activities to cover teaching positions and posts that are not vacant, but which become de facto available before 31 December and will remain so until the end of the school year. Similarly, temporary supply teaching appointments may be made until the completion of teaching activities to cover teaching hours that are not part of time-tabled posts or positions.*

3. *In situations other than those provided for under paragraphs 1 and 2 supply teachers shall be appointed.*

4. *Provincial staffing posts may not under any circumstances be filled by the hiring of non-tenured teaching personnel.*

5. *By decree (...) the Ministry for Public Education shall issue regulations on the awarding of annual and temporary supply teaching appointments in accordance with the criteria laid down in the following paragraphs.*

6. *Annual supply teaching appointments and temporary supply teaching appointments until the conclusion of teaching activities shall be made based on the permanent ranking lists [now, ERE lists] (...).*

7. *Supply teaching appointments falling under paragraph 3 shall be made based on the ranking lists of the district or school. (...)*

8. *Any individuals who have been included in the [ERE lists] (...), shall be entitled, in that order, to absolute preference in the awarding of temporary supply teaching appointments within the schools to which they have applied. (...).
(...)*

10. *The awarding of temporary supply teaching posts shall be authorised exclusively for the duration of the effective service requirements. Remuneration shall be due solely for the actual duration of the supply teaching appointments.
(...)*

14-bis. *Fixed-term contracts concluded in relation to the awarding of supply teaching appointments provided for under paragraphs 1, 2 and 3 that are necessary in order to guarantee the constant provision of schooling and education may be transformed into permanent employment contracts only in the event of the granting of tenure in accordance with the applicable legislation and on the basis of the ranking lists provided for under this Law and [the ERE lists]”.*

34. Law No. 53/2003 of 28 March 2003

Article 5§3 provided that: “*The degree examination taken upon conclusion of the courses in Science of Primary Education established pursuant to Article 3§2 of Law No. 341 of 19 November 1990, including the assessment of the trainee activity provided for under the relative course programme, shall have the status of a state examination and shall establish accreditation*

to teach, respectively, in nursery schools or in primary schools. It shall also establish entitlement to inclusion in the permanent ranking lists provided for under Article 401 of the Consolidated Act laid down by Legislative Decree No. 297 of 26 April 1994, as amended". Article 5§ 3 of Law No. 53 of 28 March 2003 was repealed by Law No. 244 of 24 December 2007 (Budget Law for 2008).

35. Decree-Law No. 97/2004 of 7 April 2004 (converted, with amendments, into Law No. 143/2004)

Article 2§1: "*Within the scope of their didactic structures, in the 2004-2005 academic year, and in any case no later than the date of entry into force of the legislative decree implementing Article 5 of Law No. 53, universities and institutions of high artistic and musical training (AFAM) will establish special courses lasting one year, reserved:*

...
c-bis) to teachers in possession of the final qualification of the degree course obtained in one of the years 1999, 2000, 2001 and 2002, who are without qualification or suitability and who have served for at least 360 days in the nursery school and in the elementary school from 1 September 1999 to the date of entry into force of this decree, subsequently and in accordance with the training methods defined in the transitional phase of implementation of the legislative decree to be issued pursuant to Article 5 of Law No. 53;
..."

Article 2§3 provides that: "*3. The courses referred to in paragraphs 1 and 2 are established for the achievement of the qualification or suitability to teach, following a final exam that has the value of a State exam and for the consequent inclusion in the permanent rankings referred to in article 1§1, on the basis of modalities defined by decree of the Minister of Education, University and Research, which also provides for the adhesion of a minimum number of students, in each university, for the activation of the respective course, namely the temporal modulation of the courses themselves in relation to the number of students.*"

36. Law No. 296/2006 of 27 December 2006

Article 1§605 of Law No. 296 of 27 December 2006 (Budget Law for 2007) provided for a three-year plan for the granting of tenured status to teaching and non-teaching (ATA) staff in schools administered by the state and the transformation of permanent ranking lists pursuant to Article 401 of Legislative Decree No. 297/1994 into ERE.

37. Ministerial Decree of 16 March 2007

By the Decree of 16 March 2007, the MEUR stipulated that the degree in Science of Primary Education constituted the sole qualification based on which an application could be filed for inclusion on the ERE lists.

38. Decree-Law No. 137/2008 of 1 September 2008, converted with amendments into Law No. 139/2008, of 30 October 2008

Article 5 bis of Decree-Law No. 137/2008 established rules regarding the inclusion in the eligibility ranking lists to be drawn upon until exhaustion of certain categories of holders of teaching certificates. Among these rules the holders of primary school teaching certificates by 2001-2002 were not included.

At the same time, Article 6 of Decree-Law No. 137/2008 recognised the degree in Science of Primary Education as establishing accreditation to teach in primary and nursery schools: "*1. The degree examination taken upon conclusion of the courses in Science of Primary Education established pursuant to Article 3§2 of Law No. 341 of 19 November 1990, as amended, including the assessment of the trainee activity provided for under the associated course programme, shall have the status of a state examination and shall establish accreditation to teach in primary*

schools or in nursery schools, depending upon the specialisation chosen. 2. The provisions of paragraph 1 shall also apply to those who took the final degree examination in courses in Science of Primary Education during the period falling between the entry into force of Law No. 244 of 24 December 2007 and the date of entry into force of this Decree."

39. Decree of the President of the Republic of 25 March 2014, enacted by Ministerial Decree No. 353/2014 of 22 May 2014

Until the adoption of Presidential Decree of 25 March 2014, teachers with primary school teaching certificates received up to the 2001-2002 academic year were able to teach in primary schools administered by the state only through supply appointments made based on the band III institute ranking lists, as well as in accredited independent schools, under either permanent or fixed-term contracts. Presidential Decree of 25 March 2014 accepted opinion No. 3813/2013 of the Council of State and acknowledged the right of holders of primary school teaching certificates to inclusion in the band II institute ranking lists of accredited teachers.

By Ministerial Decree No. 353 of 22 May 2014, which made provision to update the institute or district ranking lists for the 2014-2015, 2015-2016 and 2016-2017 three-year period, the MEUR implemented the Decree of the President of the Republic of 25 March 2014 and enabled for the first time the inclusion of the holders of pre-2002-2003 primary school teaching certificates in band II institute ranking lists.

40. Ministerial Decree No. 235/2014, of 1 April 2014, and Ministerial Decree No. 325/2015, of 3 June 2015

Ministerial Decree No. 235/2014, of 1 April 2014 made provision to update the ERE for the 2014-2017 period. Judgment No. 1973 of 16 April 2015, of the 6th Division of the Council of State, annulled it insofar as it did not authorise teachers holding primary school teaching certificates establishing accreditation that had been received during or before the 2001-2002 academic year to be included in addition in band III of the ERE.

By Ministerial Decree No. 325/2015, the MEUR recognized the holders of primary school teaching certificates received during or before the 2001-2002 the right to access to the second band of the school and district rankings, which may only grant the assignment of short-term employment. However, as it revived in Article 5 the criteria for updating the ranking lists resulting from the provisions contained in Ministerial Decree No. 235/2014, it resulted in a new exclusion from the ERE of all teachers holding a primary school teaching certificate, even if received during or before the 2001-2002 academic year.

41. Law No. 107/2015 (entry into force 16 July 2015) - Reform of the national education and training system and delegation of authority to reorganise applicable legislative provisions - as amended

Article 1§95 provided for "*an extraordinary plan for the recruitment of permanent teaching staff (...)*" which, under Article 1§109, would be done partly based on national public competitions at regional level based on qualifications and examinations and partly based on the ERE lists until they would be depleted in full.

Article 1§114: "*The Ministry of Education, Universities and Research, without prejudice to the authorisation procedure, shall announce, by 1 December 2015, a competition based on qualifications and examinations for the recruitment of permanent teaching staff for State schools and educational institutions pursuant to Article 400 of the Consolidated Text referred to in Legislative Decree No. 297 of 16 April 1994, as amended by paragraph 113 of this Article, to fill, within the limits of the financial resources available, all vacant and available posts on the "organico dell'autonomia", as well as posts that become vacant during the three-year period. Regarding the aforementioned call for applications only, the following are among the qualifications eligible for a higher score:*

a) the teaching qualification obtained following both the access to the qualification paths through public selective procedures for qualifications and exams, and the achievement of a specific master's degree or single cycle degree;

b) fixed-term service, for a continuous period of not less than 180 days, in schools and educational institutions of all types and degrees.”

Article 1§131 provided that “With effect from 1 September 2016, fixed-term employment contracts concluded with teaching, educational, administrative, technical and auxiliary staff at school and educational institutions administered by the state in order to cover vacant and available positions may not have an overall duration in excess of thirty-six months, even if not continuous”. Article 1§131 was repealed by Decree-Law No. 87/2018, converted with amendments by Law No. 96/2018 of 9 August 2018

Article 1§132: “The budget for the Ministry for Education, Universities and Research shall establish a fund for payments required under the terms of court orders awarding compensation for the harm caused by the conclusion of successive fixed-term contracts for a total period in excess of thirty-six months, whether consecutive or non-consecutive, to vacant and available positions, at a level of 10 million euros each for the years 2015 and 2016, without prejudice to the provisions of Article 14 of Decree-Law No. 669 of 31 December 1996, converted with amendments into Law No. 30/1997 of 28 February 1997, as amended.”

42. Decree-Law No. 87/2018 (entry into force 14 July 2018) - Urgent provisions on the dignity of workers and undertakings - converted with amendments by Law No. 96/2018 (entry into in force on 12 August 2018)

Decree-Law No. 87/2018 of 12 July 2018 made provision for specific measures with the aim of resolving the issue affecting teachers holding vocational school-leaving qualifications that had arisen following Judgment No. 11/2017 of the Council of State in Plenary Session.

At the time the complaint was lodged, Article 4§1 provided that “In order to ensure an orderly start to school year 2018/2019 and to safeguard continuity of teaching in the interest of pupils, any court orders that have the effect of annulling fixed-term or permanent contracts concluded between schools administered by the state and teachers holding a vocational school-leaving qualification obtained during or before school year 2001-2002 shall be... implemented within 120 days of the date on which notice of the court order was given to the Ministry of Education, Universities and Research.” Article 4§1-bis provided that “In order to safeguard continuity of teaching in the interest of pupils throughout school year 2018/2019, the Ministry of Education, Universities and Research shall, subject to the limit of vacant and available positions, implement the court orders falling under paragraph 7:

a) by transforming the permanent contracts of employment concluded with teachers falling under paragraph 1 into fixed-term contracts of employment expiring on 30 June 2019;

b) by concluding with the teachers falling under paragraph 1 a fixed-term contract expiring no later than 30 June 2019, instead of the annual supply appointment previously made.”

As of 26 May 2021, Article 4§1 provides that in order to reconcile the protection of teachers' rights fully included in the competition rankings, subject to exhaustion or institute, and to safeguard continuity of teaching, any civil or administrative courts orders on the inclusion in the aforementioned rankings -ERE lists-, which entail the forfeiture of fixed-term teaching contracts or indeterminate stipulated at state educational institutions shall be implemented within fifteen days from the date of notification of the court order to the Ministry of Education, of the university and research, pursuant to paragraph 1-bis-.

As of 26 May 2021, Article 4§1-bis provides that in order to safeguard teaching continuity in the interest of pupils, the Ministry of Education, of the university and research provides, within the scope and within the limits of vacant and available posts, to implement jurisdictional decisions referred to in paragraph 1, when subsequently notified on the twentieth day from the beginning of classes in the region of reference, transforming permanent employment contracts stipulated with the teachers referred to in paragraph 1 in fixed-term employment contracts with a final deadline of 30 June of each school year, as well as by modifying fixed-term contracts stipulated with the teachers referred to in paragraph 1, so that the its deadline is not later than 30 June of each year scholastic.

Article 4§1-ter provides that the teaching posts which are available and vacant in preschool and primary school are to be filled at 50% by drawing from the ERE lists, while the remaining 50% would be filled by drawing from the ranking lists resulting from competitions held in 2016 (under Article 1§114 of Law No. 107/2015) and, on second instance, from other ranking lists provided under different provisions.

Article 4§1-quater provides that *“the remaining 50 percent of vacant and available teaching positions, whether ordinary positions, including enhancement roles, or support positions, whose inclusion in a competition has been authorised under Article 39§3-bis of Law No. 449 of 27 December 1997, in nursery and primary schools shall be filled each year by drawing on the merit-based ranking lists for the following competition procedures, with priority being given to those falling under letter a):*

a) competitions announced in 2016 pursuant to Article 1§114 of Law No. 107 of 13 July 2015, with regard solely to those who have achieved the minimum score stipulated in the competition notice prior to expiry of the ranking lists, without prejudice to the right to tenured status for the successful candidates in the competition;

b) the extraordinary competition announced in each region, to which 50 percent of the positions falling under this paragraph until each regional merits-based ranking list has been entirely depleted shall be allocated, after the positions used for the procedure falling under letter a); each regional ranking list shall be abolished once it has been depleted;

c) ordinary competitions based on qualifications and examinations announced at biennial intervals pursuant to Article 400 of the Consolidated Act laid down by Legislative Decree No. 297 of 16 April 1994 and to Articles 1§109(b) and §110 of Law No. 107 of 13 July 2015 to which 50 percent of vacant and available positions falling under this paragraph shall be allocated, and in any case any positions remaining vacant and available following the completion of the procedures provided for under letters (a) and (b);”

Article 4§1-quinquies provides for further exceptional competitions which would be reserved to teachers (including those who, instead of a university degree, hold a *“diploma magistrale”*, i.e., a secondary school teacher-training qualification) with at least 2 years teaching experience during the last 8 years. It stipulates that *“The Ministry of Education, Universities and Research is authorised to announce the extraordinary competition provided for under paragraph 1-quater (b), notwithstanding the ordinary authorisation procedures, which shall continue to apply for the subsequent grant of tenured status, within each region and separately for nursery and primary schools, to fill ordinary positions, including enhancement roles, and support positions. The competition shall be reserved for teachers who, as at the date stipulated in the competition notice as the deadline for submitting the application, hold one of the following qualifications:*

a) a qualification establishing entitlement to teach awarded upon completion of an undergraduate degree course in Science of Primary Education or an equivalent qualification obtained abroad that is recognised in Italy under applicable legislation, provided that the teachers holding the above-mentioned qualifications have performed at least two years of specific service within the last eight school years, which need not be consecutive, in an ordinary or support position at a school administered by the state, which is eligible for consideration as such pursuant to Article 11§14 of Law No. 124 of 3 May 1999;

b) a vocational school-leaving qualification establishing eligibility or an equivalent qualification obtained abroad that is recognised in Italy under applicable legislation, obtained in any case during or before school year 2001-2002, provided that the teachers holding the above-mentioned qualifications have performed at least two years of specific service within the last eight school years, which need not be consecutive, in an ordinary or support position at a school administered by the state, which is eligible for consideration as such pursuant to Article 11§14 of Law No. 124 of 3 May 1999”.

D – Domestic case-law

43. 6th Division of the Council of State, Judgment No. 1973/2015 of 16 April 2015

In Judgment No. 1973/2015 of 16 April 2015, the 6th Division of the Council of State stated that according to Presidential Decree of 25 March 2014, there seemed to be no doubt that teachers holding a primary school teaching certificate received during or before the 2001-2002 academic year already held a qualification establishing accreditation at the time the ranking lists were transformed from permanent ranking lists into ERE. Therefore, the 6th Division of the Council of State considered unlawful the criteria laid out by Ministerial Decree No. 235/2014 and annulled it insofar as it did not authorize the appellants -some teachers holding primary school teaching certificates received during or before the 2001-2002 academic year- to be included in addition on the ERE.

Following Judgment No. 1973/2015, the 6th Division of the Council of State issued six judgments (Nos. 3628/2015, 3673/2015, 3675/2015, 3788/2015, 4232/2015 and 5439/2015) and several interim and administrative orders with identical content recognising the right of holders of primary school teaching certificates awarded under the old system constituting qualifications establishing accreditation during or before the 2001-2002 academic year to inclusion in band III of the ERE.

Following Judgment No. 11/2017 of 20 December 2017 of the Council of State in Plenary Session, the 6th Division of the Council of State, in its Judgment No. 217/2018 of 16 January 2018, still recognised the right of holders of primary school teaching certificates awarded under the old system constituting qualifications establishing accreditation during or before the 2001-2002 academic year to inclusion in band III of the ERE.

44. 6th Division of the Council of State, Judgment-Order No. 364/2016, of 29 January 2016

By Judgment-Order No. 364/2016 of 29 January 2016, the 6th Division of the Council of State remitted to a plenary hearing the question concerning the inclusion of the holders of primary school teaching certificates received during or before the 2001-2002 academic year on the ERE lists. The 6th Division of the Council of State considered that the question of the reopening of the exhaustive lists to include the holders of primary school teaching certificates received during or before the 2001-2002 academic year does not appear to have any legal basis, notwithstanding the reasons of fairness and equal treatment laid out in Presidential Decree of 25 March 2014 and Ministerial Decree No. 353/2014, which according to Judgment-Order No. 364/2016 could, in theory, justify a new intervention by the legislator, but not the extension of the exceptions, which are provided for by way of exception and strict interpretation. The 6th Division of the Council of State also held that the inclusion of the holders of primary school teaching certificates received during or before the 2001-2002 academic year in the ERE lists should not be automatic and should also consider their previous teaching experience.

Due to the referral of the case to the Plenary of the Council of State, the question of the inclusion on the ERE lists of the holders of primary school teaching certificates received during or before the 2001-2002 academic year was finally dealt under Judgment 11/2017.

45. Judgment No. 11/2017 of 20 December 2017 of the Council of State in plenary session

Judgment No. 11/2017 established the following legal principles:

1. It must be ruled out, except in the case of multiple acts with inseparable effects, that the judicial annulment of an administrative act may benefit the interested parties who did not lodge the action within the deadline and for whom, therefore, a situation of non-appeal has already occurred, with the consequent exhaustion of the relevant legal relationship.
2. The mere possession of primary school teaching certificates, even if obtained before the academic year 2001-2002, does not constitute sufficient qualification to be included in the ERE lists established by Article 1§605 (c) of Law No. 296/2006.

Regarding the question concerning the efficacy *erga omnes* of Ministerial Decree No. 235/2014, and of the annulment of Judgment No. 1973/2015 of the 6th Division of the Council of State, Judgment No. 11/2017 of the Council of State in plenary session considers that the judicial annulment of an administrative act cannot benefit interested parties who have not filed an appeal in time except in the case of multiple acts of inseparable effects, which is not the case of holders of primary school teacher certificates received during or before the 2001-2002 academic year. In the same line, Judgment No. 11/2017 recalls that according to Italian law the permanence of teachers on the ERE lists requires an application from the interested party that shall be submitted within the period established by the MEUR for the updating of the ranking lists. It further recalls that Italian law sets out a difference between any interested teacher in being included in the ERE, who cannot remedy the absence of application for inclusion in time, and teachers that have already been included in the ERE but did not apply for confirmation at the time of its update, who may lodge an appeal after being excluded from the ERE. For this reason, Judgment No. 11/2017 of the Council of State considers that Judgment No. 1973/2015 of the Council of State cannot have *erga omnes* effect. In addition, Judgment No. 11/2017 insists that Ministerial Decree No. 235/2014 refers to the update of the position of those who were already included in the ERE lists and does not deal with the position of those who seek inclusion in the ERE. Judgment No. 11/2017 notes that according to Article 1§605 of Law 296/2006, the first updating of the permanent ranking lists was ordered in Ministerial Decree of 16 March 2007, so the violation of the rights of the appellants would have hypothetically occurred at the date of publication of Ministerial Decree of 16 March 2007. Judgment No. 11/2017 considers that the applicants had therefore forfeited any rights regarding the challenge of Ministerial Decree of 16 March 2007. Furthermore, Judgment No. 11/2017 notes that Judgment No. 1973/2015 expressly limits in its operative part the effect of the annulment of Ministerial Decree No. 235/2014 to those who had filed the appeal.

Regarding the scope and effects of the qualifying value attributed to the teaching qualification obtained before the 2001-2002 academic year, Judgment No. 11/2017 considers that the Decree of the President of the Republic of 25 March 2014 -which incorporated the opinion of the Council of State No. 3818/2013- cannot be invoked for that purpose, since it only acknowledges the right of holders of primary school teaching certificates to inclusion in the band II institute ranking lists of accredited teachers and not in the ERE lists. In addition, it considers that Article 15§7 of Decree of the President of the Republic No. 323/1998 is to be interpreted in the sense that primary school teaching certificates obtained up to the 2001-2002 school year retain their legal value as a qualification and allow their holders (without the need to obtain a diploma) to participate in the selection procedures reserved for obtaining an appropriate qualification for inclusion on the ERE lists.

Judgment No. 11/2017 remarks that the qualification to teach in nursery and primary schools according to Articles 194 and 197 of Legislative Decree No. 297/1994, and Presidential Decree No. 323/1998, has never constituted sufficient qualification for inclusion in the permanent lists established by Article 401 of Legislative Decree No. 297/1994 and the ERE lists. To be included in such lists it was required to pass competitive procedures (regional competitions for degrees and exams) for which the teacher diploma was a requirement of participation according to Article 402 of Legislative Decree No. 297/1994, Article 2§4 of Law No. 124/1999, and Article 2§1 (c-bis) of Decree-Law No. 97/2004. Judgment No. 11/2017 recalls that Article 2§1 (c-bis) of

Decree-Law No. 97/2004 provided for the establishment of one-year university courses reserved for teachers in possession of the final qualification of the degree course obtained in one of the years 1999, 2000, 2001 and 2002, who do not have qualification and who have served for at least 360 days in the nursery school and in the elementary school from 1 September 1999 to the date of its entry into force. Passing these courses constituted a qualification for access to the ranking lists.

Judgment No. 11/2017 further insists that since primary school teaching certificates obtained up to the 2001-2002 school year have never constituted a sufficient qualification for inclusion in the permanent or ERE lists, the applicants should not benefit from Ministerial Decree of 16 March 2007 and therefore should not be allowed to be included in the ERE lists, in particular bearing in mind that Article 1§605 of Law No. 296/2006 ordered the closure of the ERE lists.

An appeal was lodged against Judgment No. 11/2017. It was declared inadmissible by Order No. 19679/2019 issued by the Joint Divisions of the Court of Cassation.

By Judgment No. 5/2019 of 27 February 2019, the Council of State in plenary session upheld judgment No. 11/2017 and reiterated the principle that the mere possession of primary school teaching certificates, even if obtained before the academic year 2001-2002, does not constitute a sufficient qualification to be included in the ERE lists established by Article 1§605 (c) of Law No. 296/2006.

E – Practice concerning the recruitment of public education staff

46. Access to indefinite duration (tenured) teaching posts in public education (nursery, primary and secondary schools)

Such access is provided through a “double channel mechanism”, i.e., the available teaching positions are filled out:

- By 50% on the basis of Recruitment competitions ranking lists (*Graduatorie di merito*), i.e., ranking lists resulting from competitions based on qualifications and examinations (Article 399§1 and 400 of Legislative Decree No. 297/1994), to be held on a regional basis every 3 years (if vacant and available posts are available);
- By 50% by drawing candidates from the ERE lists (*Graduatorie ad esaurimento*), in their order of ranking (Article 399§1 of Legislative Decree No. 297/1994). ERE Lists were formerly known as “Permanent ranking Lists” and include:
 - candidates who had been included only on the basis of their qualifications when the lists were drawn up (Category I – *Prima fascia*);
 - teachers who had a teaching qualification and working experience of 360 days when the lists were drawn up (Category II – *Seconda fascia*), and
 - teachers who were registered after the initial lists had been drawn up (Category III – *Terza fascia*).

In 2007, the “Permanent ranking lists” were closed to new entries and were henceforth called “Eligibility ranking lists to be drawn upon until exhaustion” (ERE lists), meaning that the candidates registered at the time of the closure of the lists would remain eligible to recruitment until the lists would be depleted (when all candidates would be struck from the lists, whether because he/she had been recruited or for other reasons). As a result, since 2007, only candidates already registered on the ERE lists before 2007 can be appointed to indefinite duration posts, in addition to those who succeed new recruitment competitions based on qualifications and examinations.

47. Access to teaching qualification

The requirements for eligibility to take part in a competition for the appointment of teachers (eligibility for competition – *idoneità*) and those for obtaining a teaching qualification (*abilitazione*) have often changed in the course of time. As a result, supply teachers recruited under fixed-term contracts are not equally qualified both in terms of educational background and in terms of in-service teaching experience. Depending on the rules applicable at the time of their appointment, some of them have been required to undergo specific trainings to obtain a teaching qualification.

48. Recruitment competitions

The latest recruitment competitions in the public education sector (teaching staff) based on qualifications and examinations have been organised respectively in:

- February 2016 (in accordance with Law No.107/2015), concerning 63,712 teaching posts, including support teachers, in preschool, primary schools and secondary schools of first and second level in 2016-2018;
- February 2018 (in accordance with Legislative Decree No. 59/2017) concerning teachers and support teachers in secondary schools of first and second level;
- November 2018 (in accordance with Ministerial Decree 17/10/2018, implementing Article 4§1-quater b of Decree-Law No. 87/2018 converted with amendments by Law No. 96/2018) concerning teachers and support teachers in preschool and primary schools (extraordinary competition, open to those with a primary school teaching qualification);
- April 2020 (in accordance with Law No. 159/2019 and Decree-Law No. 34/2020), concerning 24,000 + 8,000 teaching posts, including support teachers, in secondary schools (extraordinary competition, addressing teachers with three years of service); 25,000 + 8,000 teaching posts in secondary school (ordinary competition, open to candidates with teaching qualification or specific academic background); 12,863 teaching posts in preschool and primary school (ordinary competition, open to those with a teaching qualification or those holding a “diploma magistrale” obtained before 2001-2002); a competition procedure giving extraordinary access to teaching qualification valid for secondary schools to teachers with three years of service.

49. Access to fixed-term contracts – general rules

Fixed-term contracts to supply teachers are granted to cover temporarily vacant posts under different circumstances:

- a) *Annual supply teaching appointments* (from 1st September to 31st August) for teaching posts which are effectively vacant and available (“*de jure vacancies*”, where there is no tenured post-holder, for example after a definitive transferral) before 31 December and are expected to remain so for the entire school year (Article 4§1 and 4§6 of Law No. 124/1999);
- b) *Temporary supply teaching appointments* (from 1st September to 30th June) for teaching posts which are not vacant but are *de facto* available (“*de facto vacancies*”, where there is a tenured post-holder, but (s)he is temporarily posted elsewhere) before 31 December and will remain so for the entire school year or for covering spare teaching hours that are not part of time-tabled posts (Article 4§2 and 4§6 of Law No. 124/1999);
- c) *Other situations* (shorter contracts) (Article 4§3 of Law No. 124/1999).

50. **Access to fixed-term contracts – annual and long-term appointments**

Annual supply teaching appointments (from 1 September to 31 August – see “a” above) and Long-term supply teaching appointments until the conclusion of teaching activities (from 1 September to 30 June – see “b” above) are made based on the ERE lists. In case there is no candidate in the ERE lists, provisions adopted in 2000 and 2019 allow the appointment of candidates from the District or Institute ranking lists or based on new specific provincial ranking lists set up to this effect.

51. **Access to fixed-term contracts – short-term appointments**

Short-term supply teaching appointments (see “c” above) are made (pursuant to Article 5 of the Decree of the Ministry for Public Education No. 201/2000), based on District or Institute ranking lists (*Graduatorie d’Istituto*) which include:

- teachers registered in any Category of the ERE lists (*Category I*);
- teachers who have a teaching qualification but are not registered in the ERE lists (*Category II*);
- teachers who are not registered in the ERE lists and do not hold a teaching qualification but have the academic qualification required to teach (*Category III*).

RELEVANT INTERNATIONAL MATERIAL

A – International Labour Organisation (ILO)

52. Convention (No. 158) concerning Termination of Employment at the Initiative of the Employer (adopted on 22 June 1982, entry into force: 23 November 1985)

Article 2§3

3. Adequate safeguards shall be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from this Convention.

53. Recommendation (No. 166) concerning Termination of Employment at the Initiative of the Employer (adopted on 22 June 1982)

Article 3

(1) Adequate safeguards should be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from the Termination of Employment Convention, 1982, and this Recommendation.

(2) To this end, for example, provision may be made for one or more of the following:

(a) limiting recourse to contracts for a specified period to cases in which, owing either to the nature of the work to be effected or to the circumstances under which it is to be effected or to the interests of the worker, the employment relationship cannot be of indeterminate duration;

(b) deeming contracts for a specified period of time, other than in the cases referred to in clause (a) of this subparagraph, to be contracts of employment of indeterminate duration;

(c) deeming contracts for a specified period of time, when renewed on one or more occasions, other than in the cases mentioned in clause (a) of this subparagraph, to be contracts of employment of indeterminate duration.

B – The European Union.

54. EU Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP

ANNEX: ETUC-UNICE-CEEP framework agreement on fixed-term work

“(…)

Purpose (clause 1)

The purpose of this framework agreement is to:

- (a) improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination;
- (b) establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships.

Scope (clause 2)

1. This agreement applies to fixed-term workers who have an employment contract or employment relationship as defined in law, collective agreements or practice in each Member State.
2. Member States after consultation with the social partners and/or the social partners may provide that this agreement does not apply to:
 - (a) initial vocational training relationships and apprenticeship schemes;
 - (b) employment contracts and relationships which have been concluded within the framework of a specific public or publicly-supported training, integration and vocational retraining programme.

Definitions (clause 3)

1. For the purpose of this agreement the term "fixed-term worker" means a person having an employment contract or relationship entered into directly between an employer and a worker where the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event.
2. For the purpose of this agreement, the term "comparable permanent worker" means a worker with an employment contract or relationship of indefinite duration, in the same establishment, engaged in the same or similar work/occupation, due regard being given to qualifications/skills. Where there is no comparable permanent worker in the same establishment, the comparison shall be made by reference to the applicable collective agreement, or where there is no applicable collective agreement, in accordance with national law, collective agreements or practice.

Principle of non-discrimination (clause 4)

1. In respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds.
2. Where appropriate, the principle of pro rata temporis shall apply.
3. The arrangements for the application of this clause shall be defined by the Member States after consultation with the social partners and/or the social partners, having regard to Community law and national law, collective agreements and practice.
4. Period-of service qualifications relating to particular conditions of employment shall be the same for fixed-term workers as for permanent workers except where different length-of service qualifications are justified on objective grounds.

Measures to prevent abuse (clause 5)

1. To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States, after consultation with social partners in accordance with national

law, collective agreements or practice, and/or the social partners, shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures:

- (a) objective reasons justifying the renewal of such contracts or relationships;
- (b) the maximum total duration of successive fixed-term employment contracts or relationships;
- (c) the number of renewals of such contracts or relationships.

2. Member States after consultation with the social partners and/or the social partners shall, where appropriate, determine under what conditions fixed-term employment contracts or relationships:

- (a) shall be regarded as "successive"
 - (b) shall be deemed to be contracts or relationships of indefinite duration.
- (...)"

55. Court of Justice of the European Union (CJEU)

Several cases have been brought before the CJEU concerning the interpretation of the framework agreement on fixed-term work concluded on 18 March 1999 in relation to the provisions applicable under Italian law in case of abuses arising from successive fixed-term employment contracts by a public sector employer. The CJEU notably held that "*the Framework Agreement must be interpreted as meaning that, where the domestic law of the Member State concerned includes, in the sector under consideration, other effective measures to prevent and, where relevant, punish the abuse of successive fixed-term employment contracts within the meaning of clause 5§ 1 of that agreement, it does not preclude the application of a rule of national law which prohibits absolutely, in the public sector only, the conversion into a contract of indefinite duration of a succession of fixed-term employment contracts which, having been intended to cover fixed and permanent needs of the employer, must be regarded as constituting an abuse*". (Case C-378/07, Angelidaki and others, CJEU Judgment of 23 April 2009, §189).

THE LAW

PRELIMINARY CONSIDERATIONS

As to the relevant domestic legislation and practice

56. The Committee takes note of some relevant developments in the domestic legal order, which occurred after the date of lodging of the complaint and are reflected above, in the section on "Relevant domestic and international law".

57. It notes in particular that:

- a. Article 1§131 of Law 107/2015, which set a maximum overall duration of 36 months for fixed-term contracts was repealed (by Decree-Law No. 87/2018, see above).
- b. A new National Collective Labour Agreement (NCLA) for the Education and Research Branch was signed on 19 April 2018, which provides that fixed-term contracts in the Schools Branch for teaching and non-teaching (ATA) staff shall indicate a term (Article 41) but does not include specific restrictions to the use of fixed-term contracts in schools (except as regards the University Branch).

- c. Recruitment plans have been adopted in the public sector and the public education sector, which aim inter alia at including the holders of primary school teaching certificates awarded under the old system before the end of the 2001-2002 academic year in the ERE lists
- i. The special one-year courses established by Article 2§1 (c-bis) of Decree-Law No. 97/2004 for granting accreditation of suitability to teach pursuant to Article 5 of Law No. 53/2003, and therefore accreditation to participate in the competitions to be included in the ERE lists. These courses were reserved for teachers holding primary school teaching certificates awarded in 1999, 2000, 2001 or 2002 who lack accreditation or suitability to teach and who have worked for at least 360 days in a nursery school or in a primary school between 1 September 1999 and the date of entry into force of Decree-Law No. 97/2004;
 - ii. The extraordinary competition held in November 2018 pursuant to Ministerial Decree 17/10/2018 implementing Article 4§1-quater (b) of Decree-Law No. 87/2018, open for teachers in preschool and primary schools that hold primary school teaching certificates received during or before the 2001-2002 academic year excluded from the ERE lists;
 - iii. The ordinary competition held in April 2020 pursuant to Decree of the Director General No. 510/2020, for the allocation of 12,863 teaching posts in preschool and primary school, open to holders of primary school teaching certificates obtained before 2001-2002.

58. The Committee recalls that in its practice in the framework of the collective complaints procedure, it rules on the legal situation prevailing at the time of its decision on the merits (European Council of Police Trade Unions (CESP) v. France, Complaint No. 57/2009, decision on the merits of 1 December 2010, §52). It accordingly takes note of the abovementioned developments and of their implications for the complaint at hand.

As to the provisions of the Charter at stake

59. ANIEF alleges that through a series of legislative changes and decisions of the Council of State, Court of Cassation, Supreme Court, and judgments of the merit courts at first and second instance that preclude recognition of the right to employment stability to the holders of primary school teaching certificates, Italy has violated the following provisions of the Charter:

- a. Article 1§§1 and 2, as the precarious employment situation of teachers holding primary school teaching certificates awarded under the old system before the end of the 2001-2002 academic year does not correspond to the engagement of achieving and maintaining a level of employment as high and stable as possible, and infringes upon the right of the aforementioned teachers to earn their living in an occupation freely entered upon;

- b. Article 4§§1 and 4, as the lack of recognition of the right to employment stability to the holders of primary school teaching certificates awarded under the old system before the end of the 2001-2002 academic year does not ensure them a fair and decent remuneration and infringes upon the right of public education staff to a reasonable period of notice for termination of employment;
- c. Article 5, as national legislation has undermined the freedom of workers in schools to form national trade union organisations such as the ANIEF for the protection of their economic and social interests, and to join those organisations;
- d. Article 6§4, as the legislation and the judiciary, undermine the right of the holders of primary school teaching certificates to collective action through ANIEF, by depriving of effect the cases brought by ANIEF before the CJEU and the Italian Constitutional Court;
- e. Article 24, as Italy has not recognised for tens of thousands of holders of primary school teaching certificates who were hired as workforce under permanent or fixed-term contracts : (i) the right of all workers to not to have their employment terminated for reasons not connected with their capacity or conduct or based on the operational requirements of the public offices or service, and; (ii) their right to get in such cases an adequate compensation or other appropriate relief by appeal to an impartial body;
- f. Article E taken together with each of the aforementioned provisions, on account of discrimination of holders of primary school teaching certificates awarded under the old system before the end of the 2001-2002 academic year that have not been included in the ERE lists because of Judgment No. 11/2017 of the Council of State, in comparison to those who have been included in the ERE lists because of Judgment No. 1973/2015 of the Council of State.

60. The Committee notes that the submissions in this complaint focus on the legal situation of the holders of primary school teaching certificates awarded under the old system before the end of the 2001-2002 academic year.

61. ANIEF argues that the precarious employment situation of the holders of primary school teaching certificates awarded under the old system before the end of the 2001-2002 academic year implies, as noted above, the violation of Articles 1§1, 1§2, 4§1, 4§4, 5, 6§4, 24 and E in conjunction with each of the provisions concerned of the Charter. However, the Committee notes that the grievances expressed by ANIEF in respect of most of the provisions of the Charter invoked are not sufficiently substantiated to allow a distinct assessment under these provisions.

62. Considering the overall information available, the Committee decides to assess this complaint solely under Article 1§2 of the Charter and rejects the allegations made under the other provisions as unsubstantiated, for the complaint relates in substance

to the enjoyment without discrimination of the right of the holders of primary school teaching certificates awarded before the end of the 2001-2002 academic year to be recruited on indefinite duration contracts and, therefore, to earn their living in an occupation freely entered upon.

63. In the same vein, considering that Article 1§131 of Law No. 107/2015 was repealed by Decree-Law No. 87/2018, the Committee rejects the allegation concerning the prohibition of the appointment, as of 1 September 2016, of holders of primary school teaching certificates awarded before the end of the 2001-2002 academic year in schools administered by the State upon completion of 36 months' service as unsubstantiated.

I. ALLEGED VIOLATION OF ARTICLE 1§2 OF THE CHARTER

64. Article 1§2 of the Charter reads:

Article 1 – The right to work

Part I: "Everyone shall have the opportunity to earn his living in an occupation freely entered upon."

Part II: "With a view to ensuring the effective exercise of the right to work, the Contracting Parties undertake:

(...)

2. to protect effectively the right of the worker to earn his living in an occupation freely entered upon;
(...)"

A – ARGUMENTS OF THE PARTIES

1. The complainant organisation

65. ANIEF alleges that by not granting holders of primary school teaching certificates received during or before the 2001-2002 academic year any opportunity under Law No. 107/2015 to achieve stable tenured status, Italy has violated Article 1§2 of the Charter, for it has not protected the right of these workers to earn their living in an occupation freely entered upon.

66. ANIEF complains that the extraordinary plan for the recruitment of permanent teaching staff provided for under Article 1§95 of Law No. 107/2015 excluded all holders of primary school teaching certificates with a qualification establishing accreditation obtained up to 2001-2002 if they had not been included in the provincial ERE lists.

67. In addition, ANIEF states that the reserved competitions provided for in Decree-Law No. 87/2018 link the inclusion in the ERE lists of the holders of primary school teaching certificates received during or before the 2001-2002 academic year to success in a competition procedure controlled by the MEUR that excludes all teachers who do not fulfill the prerequisites of two years' service and all teachers who have

worked for accredited independent schools and municipal schools. ANIEF accordingly states that these competitions do not remedy the alleged violation of the Charter.

68. ANIEF further complains that Judgment No. 11/2017 of the Council of State in Plenary Session departed from the established case law of the 6th Division of the Council of State in Judgment No. 1973/2015 (and some other judgments and interim administrative orders of similar content) concerning the suitability of a primary school teaching certificate awarded up to the 2001-2002 school year in establishing eligibility for inclusion in the provincial ERE lists.

69. ANIEF claims that holders of primary school teaching certificates received during or before the 2001-2002 academic year should have had recognised the right to be included in the ERE lists according to Article 2 of Inter-Ministerial Decree of 10 March 1997 and Article 15§7 of Decree of the President of the Republic No. 323/1998. ANIEF further claims that despite this, Ministerial Decree No. 235/2014 and Ministerial Decree No. 325/2015 prevented holders of primary school teaching certificates received during or before the 2001-2002 academic year from being included in the ERE lists when they made provision to update those lists.

70. ANIEF bases its claim on Judgment No. 1973/2015 (and some other judgments and interim administrative orders of similar content) of the 6th Division of the Council of State. These decisions considered the criteria laid out by Ministerial Decree No. 235/2014 to be unlawful and annulled it insofar as it did not authorize the appellants - some holders of primary school teaching certificates received during or before the 2001-2002 academic year - to be included in the ERE lists.

71. According to ANIEF, Judgment No. 1973/2015 has *erga omnes* effect, and therefore Ministerial Decree No. 235/2014 should be considered annulled not only for the original complainants in the procedure, but also for all the holders of primary school teaching certificates obtained before or during academic year 2001-2002.

72. In view of the foregoing, ANIEF also complains that this change in the case law amounted to discrimination against 50,203 holders of primary school teaching certificates who were dismissed by the MEUR from their permanent (6,669 teachers) or fixed-term (43,534 teachers) employment because of Judgment No. 11/2017. According to ANIEF, discrimination arises insofar as some other 2,600 holders of primary school teaching certificates have been granted the right to inclusion in the ERE lists because of Judgment No. 1973/2015.

2. The respondent Government

73. The Government points out in the first place that according to Inter-Ministerial Decree of 10 March 1997 and Article 15§7 of Decree of the President of the Republic No. 323/1998, primary school teaching certificates obtained before or during academic year 2001-2002 allow their holders to participate in the selection procedures reserved for obtaining an appropriate qualification for inclusion in the ERE lists without the need to obtain a diploma. Therefore, the Government claims that holders of primary school teaching certificates obtained before or during academic year 2001-2002 are not entitled to be included in the ERE lists without succeeding in the competitions held for that purpose.

74. The Government states that the legal provision that does not allow the holders of primary school teaching certificates with a qualification establishing accreditation obtained up to 2001-2002 to be included in the ERE is Article 1§605 (c) of Law No. 296/2006, which transformed the permanent ranking lists into ERE lists and closed the rankings, except for the allowed inclusion of new teachers after the specific competitions held to that extent. In the same line, the Government adds that Ministerial Decree No. 235/2014 and Ministerial Decree No. 325/2015 provide for updates in the position of those who were already included in the ERE lists, but do not deal with the situation of those who seek inclusion in the ERE lists.

75. As regards the allegation that the extraordinary plan for the recruitment of permanent teaching staff provided for under Article 1§95 of Law No. 107/2015 excluded all holders of primary school teaching certificates with a qualification establishing accreditation obtained up to 2001-2002 if they had not been included in the provincial ERE, the Government insists that Article 4§1 (quater) of Decree-Law No. 87/2018 provides for an extraordinary competition at the regional level for the allocation of teaching positions in nursery and primary schools that is reserved for teachers who, among other qualifications, hold a primary school teaching certificate obtained during or before school year 2001-2002.

76. Regarding the competitions held throughout the years and the inclusion of the holders of primary school teaching certificates obtained up to 2001-2002 academic year, the Government adds that during the 1999-2000 two-year period almost 200,000 teachers gained entitlement to inclusion in permanent ranking lists thanks to: (i) the eligibility obtained in the competition based on qualifications and examinations announced in 1999, and (ii) the parallel reserved competition procedure launched pursuant to Article 2§4 of Law No. 124/1999 and intended for holders of a primary school teaching certificate obtained during or before school year 2001-2002 who had completed at least 360 days of service.

77. The Government insists that Article 2§1(c-bis) of Decree-Law No. 97/2004 established special one-year courses reserved for teachers holding primary school teaching certificates awarded in 1999, 2000, 2001 or 2002 who lack accreditation or suitability to teach and who have worked for at least 360 days in a nursery school or in a primary school between 1 September 1999 and the date of entry into force of Decree-Law No. 97/2004. The Government further insists that pursuant to Article 5 of Law No. 53/2003, these courses would grant accreditation of suitability to teach, and therefore accreditation to participate in the competitions that would allow those who passed them to be included in the ERE lists.

78. As regards the complaint that the change in the relevant domestic case law amounted to discrimination against holders of primary school teaching certificates who have not been included in the ERE lists compared to those who have, the Government insists that Article 1§605 (c) of Law No. 296/2006 is the legal provision that transformed

the permanent ranking lists into ERE lists. The Government further insists that Article 1§605 (c) of Law No. 296/2006 closed the rankings for the holders of primary school teaching certificates obtained up to 2001-2002 academic year.

79. In insisting on the fact that Ministerial Decree No. 235/2014 and Ministerial Decree No. 325/2015 do not deal with the situation of those who seek inclusion in the ERE lists, the Government argues that Judgment No. 1973/2015 does not have *erga omnes* effect, for Ministerial Decree No. 235/2014 is exclusively addressed to those who are already included in the ERE lists (*i.e.*, specific subjects or, in any case, easily determinable), so it lacks an essential aspect of the normative act such as the indeterminacy of the addressees. In line with Judgment No. 11/2017, the Government further remarks that the operative part of Judgment No. 1973/2015 limits its effects to those who brought the action upheld by that judgment.

B – Assessment of the Committee

80. The Committee notes that the complaint relates in substance to the employment situation of some 50,000 holders of a primary school teaching certificate received during or before the 2001-2002 academic year, who have been regularly working as supply teachers in public preschool and primary school under fixed-term contracts. Due to the change in teaching qualification requirements brought about by the law and the domestic case law, these teachers are not entitled to be registered on the ERE lists from which teachers may be recruited on indefinite duration contracts. This is because their qualification is not recognised as sufficient.

81. As explained in the preliminary considerations, the Committee considers that this situation falls within the scope of Article 1§2 of the Charter. In this regard, the Committee recalls that Article 1§2 of the Charter requires States Parties to effectively protect the right of workers to earn their living in an occupation freely entered upon. This obligation implies, *inter alia*, the elimination of all forms of discrimination in employment regardless of the legal nature of the professional relationship (*Syndicat national des Professions du Tourisme v. France*, Complaint No. 6/1999, decision on the merits of 10 October 2000, §24; *Quaker Council for European Affairs (QCEA) v. Greece*, Complaint No. 8/2000, decision on the merits of 25 April 2001, §20; *Fellesforbundet for Sjøfolk (FFFS) v. Norway*, Complaint No. 74/2011, decision on the merits of 2 July 2013, §104; *Confederazione Generale Italiana del Lavoro (CGIL) v. Italy*, Complaint No. 91/2013, decision on admissibility and the merits of 12 October 2015, §235).

82. The Committee points out that Article 1§2 of the Charter further requires the prohibition of any other practice that might interfere with workers' right to earn their living in an occupation freely entered upon. The Committee recalls that this right does not imply however that the worker's occupation, freely entered upon, shall be preserved in all circumstances from any changes, including those resulting from a reorganization of activities in the public sector (*Unione Generale Lavoratori - Federazione Nazionale Corpo forestale dello Stato (UGL-CFS) and Sindacato autonomo polizia ambientale forestale (SAPAF) v. Italy*, Complaint No. 143/2017, decision on the merits of 3 July 2019, §77).

83. As regards the alleged discrimination resulting from the change in the domestic case law, the Committee recalls that discrimination is defined as a difference in treatment between persons in comparable situations, where the treatment does not pursue a legitimate aim, is not based on objective and reasonable grounds or is not proportionate to the aim pursued (*Syndicat national des Professions du Tourisme v. France*, op. cit., §§24-25).

84. Discriminatory acts prohibited by Article 1§2 are those that may occur in connection with employment conditions in general, in particular with regard to remuneration, training, promotion, transfer and dismissal or other detrimental action (Conclusions XVI-1 (2002) Austria).

85. In the instant case, the Committee notes firstly that because of the change in the case law of the Council of State, while holders of primary school teaching certificates received during or before the 2001-2002 academic year concerned by Judgment No. 1973/2015 have been granted access to the ERE lists, holders of primary school teaching certificates received during or before the 2001-2002 academic year concerned by Judgment No.11/2017 have been excluded from access to such lists. The Committee notes that this constitutes a difference in treatment.

86. The Committee further notes that all the abovementioned holders of primary school teaching certificates are in comparable situations, as they hold the same teaching qualification, namely primary school teaching certificates received before or during academic year 2001-2002.

87. As to whether the difference in treatment pursues a legitimate aim and is based on objective and reasonable grounds, the Committee has previously considered that the establishment of transparent and objective selection procedures to enable access to indefinite duration employment in the public sector is based on objective and reasonable grounds, and corresponds to the legitimate aim of securing the principle of impartiality and the proper conduct of public administration (*Associazione Professionale e Sindacale (ANIEF) v. Italy*, Complaint No. 146/2017, decision on the merits of 7 July 2020, §82).

88. The Committee notes that the parties disagree as to the legal value of primary school teaching certificates received during or before the 2001-2002 academic year. ANIEF claims that these teaching certificates grant their holders the immediate right to automatic inclusion in the ERE lists. By contrast, the Government states that these teaching certificates are to be considered as sufficient qualification only for the purpose of participation in the selection procedures that grant an appropriate qualification for inclusion in the ERE lists.

89. The Committee points out that until the enactment of Law No. 341/1990, primary school teaching certificates established entitlement: (i) to participate in the sessions for the granting of accreditation to teach in nursery schools, as provided for under Article 9§2 of Law No. 444/1968, and (ii) to participate in ordinary competitions based on qualifications and examinations for teaching positions in nursery schools and primary schools. The Committee observes that Article 3§2 of Law No. 341/1990, on the reform of university teaching regulations, provided for the establishment of a new degree

course (Science of Primary Education) offering a specialisation for primary school as the qualification establishing eligibility for participation in competitions for teaching posts.

90. The Committee further points out that after the enactment of Law No. 341/1990, completed by Inter-ministerial Decree of 10 March 1997, the legal status of primary school teaching certificates was maintained by Article 15§7 of Decree of the President of the Republic No. 323/1998. Article 15§7 of this Decree thus allowed holders of primary school teaching certificates received during or before the 2001-2002 academic year to participate in competitions based on qualifications and examinations for teaching positions in nursery schools and primary schools. Success in these competitions would lead to inclusion in the ranking lists (future ERE lists).

91. In view of these elements, the Committee considers that the changes in the teaching qualification requirements are objective and reasonable and pursue the legitimate aim of the proper functioning of the public school system and the proper conduct and impartiality of the public administration.

92. In any event, the Committee considers that the States Parties to the Charter enjoy a margin of discretion as to the establishment of the conditions required to access to state employment. In this regard, the Committee notes that Article 97§4 of the Italian Constitution lays down the general principle that employment in the public administration is accessed through competitive examinations, except in the cases established by law.

93. As to whether the difference in treatment is proportionate to the aim pursued, the Committee considers that the fact that some holders of primary school teaching certificates received during or before the 2001-2002 academic year have been excluded from the ERE lists while others have been included cannot be *per se* regarded as contrary to the Charter, provided that effective measures exist to allow those who have been excluded from the ERE lists without proper justification to have effective remedies against this decision.

94. In this respect, the Committee notes that Italy has enacted specific legislation to provide redress to holders of primary school teaching certificates received during or before the 2001-2002 academic year that have been excluded from the ERE lists. The Committee also notes that Italy has established alternative pathways to ordinary recruitment competitions for granting access to tenured positions, namely:

- The special one-year courses established by Article 2§1 (c-bis) of Decree-Law No. 97/2004 for granting accreditation of suitability to teach pursuant to Article 5 of Law No. 53/2003, and therefore accreditation to participate in the competitions to be included in the ERE lists. These courses were reserved for teachers holding primary school teaching certificates awarded in 1999, 2000, 2001 or 2002 who lack accreditation or suitability to teach and who have worked for at least 360 days in a nursery school or in a primary school between 1 September 1999 and the date of entry into force of Decree-Law No. 97/2004;

- The extraordinary competition held in November 2018 pursuant to Ministerial Decree 17/10/2018 implementing Article 4§1-quater (b) of Decree-Law No. 87/2018, open for teachers in preschool and primary schools that hold primary school teaching certificates received during or before the 2001-2002 academic year excluded from the ERE lists;
- The ordinary competition held in April 2020 pursuant to Decree of the Director General No. 510/2020, for the allocation of 12,863 teaching posts in preschool and primary school, open to holders of primary school teaching certificates obtained before 2001-2002.

95. Moreover, the Committee considers that the specific legislation referred to in the previous paragraph indicates that the allegations made by ANIEF regarding the lack of inclusion of the concerned teachers in the extraordinary recruitment plans launched by the Italian MEUR cannot be sustained.

96. In view of the above, the Committee considers that the situation of the holders of primary school teaching certificates received during or before the 2001-2002 academic year who are not entitled to be automatically included in the ERE lists following Judgment No. 11/2017 does not amount to a discriminatory treatment, compared to that of holders of primary school teaching certificates received during or before the 2001-2002 academic year who have been included in the ERE because of Judgment No. 1973/2015.

97. The Committee accordingly holds that there is no violation of Article 1§2 of the Charter as regards the situation of holders of primary school teaching certificates received during or before the 2001-2002 academic year who are not entitled to be automatically included in the ERE lists following Judgment No. 11/2017.

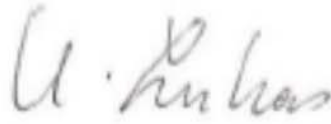
CONCLUSION

For these reasons, the Committee concludes:

- unanimously that there is no violation of Article 1§2 of the Charter.



Kristine DUPATE
Rapporteur



Karin LUKAS
President



Henrik KRISTENSEN
Deputy Executive Secretary