EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

26 March 2018

Case Document No. 1

***Confederation Generale du Travail - Force Ouvriere* (CGT-FO) v. France**
Complaint No.160/2018

COMPLAINT

Registered at the Secretariat on 12 March 2018

JCM/VLR/148-P

Paris, 7 March 2018

COMPLAINT

LODGED BY THE CONFEDERATION GENERALE DU TRAVAIL - FORCE OUVRIERE

AGAINST FRANCE

FOR THE INCORRECT APPLICATION OF ARTICLE 24 OF THE EUROPEAN SOCIAL CHARTER

The Confédération Générale du Travail - Force Ouvrière (CGT-FO) has the honour of presenting you with the following collective complaint, lodged on the ground that, in its view, French legislation fails to comply with the provisions of the European Social Charter.

The person responsible for this complaint in our union is its Secretary General, Mr Jean-Claude Mailly.

Article 24 of the Charter provides:

"With a view to ensuring the effective exercise of the right of workers to protection in cases of termination of employment, the Parties undertake to recognise:

a the right of all workers not to have their employment terminated without valid reasons for such termination connected with their capacity or conduct or based on the operational requirements of the undertaking, establishment or service;

b the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief.

To this end the Parties undertake to ensure that a worker who considers that his employment has

been terminated without a valid reason shall have the right to appeal to an impartial body."

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1. ADMISSIBILITY OF THE COMPLAINT

1.1 Applicability to France of the revised European Social Charter and of the 1995 Protocol to the European Social Charter providing for a system of collective complaints

France signed the European Social Charter of 1961 on 18 October 1968 and deposited its instruments of ratification on 9 March 1973. It signed the Additional Protocol of 1995 providing for a system of collective complaints on 9 November 1995 and ratified it on 7 May 1999. It signed the revised European Social Charter on 3 May 1996 and ratified it on 7 May 1999.

1.2 Applicability to France of Article 24 of the European Social Charter

According to the declarations contained in the instrument of ratification of the revised European Social Charter of 1996 deposited by France on 7 May 1999, France considers itself bound by all the Articles in Part II of the revised European Social Charter.

1.3 Compliance by the Confédération Générale du Travail – Force Ouvrière (CGT-FO) with Article 1 (c) of the Additional Protocol of 1995

The CGT-FO is a representative national trade union within the jurisdiction of France, satisfying the requirements of Article 1.c. of the Additional Protocol of 1995.

For the second time, as part of the reform of trade union representativeness deriving from the Law of 20 August 2008, the popularity of trade unions was measured at national, interoccupational and occupational sector level. On 31 March 2017 the Ministry of Labour presented the results obtained by the trade unions over the 2013-2016 cycle. The CGT-FO had gained 15.59% of the vote in workplace elections.

1.4 Compliance with Articles 23 and 25 of the Rules of the European Committee of Social Rights on the collective complaints procedure

In a decision of 19 February 2018, the trade union bureau, acting in accordance with Article 8 of the confederation's statutes, instructed its Secretary General, Jean-Claude Mailly, to lodge a complaint with the European Committee of Social Rights concerning the incorrect application by France of Article 24 of the European Social Charter.

2. SUBJECT OF THE COMPLAINT

The CGT-FO requests the European Committee of Social Rights to find that the scale placing an upper limit on compensation for damage incurred by employees dismissed for no good cause, as established by the recent French legislation deriving from Order No. 2017-1387 of 22 September 2017 on the predictability and increased security of employment relationships is in breach of Article 24 of the European Social Charter.
Compensation takes the form of a lump sum and precludes the possibility for courts to

review the situation and acknowledge that workers have suffered greater damage because of their dismissal.

3. THE RELEVANT LEGISLATION

3.1 Historical background

One of the features of French labour law until now has been the principle that employees will be fully compensated for any damage suffered because of the unjustified nature of their dismissal.

Since the adoption of Law No. 73-680 of 13 July 1973 on the law on dismissal, employers' entitlement to exercise the right to dismiss an employee has been subject to the existence of a "*real or serious cause*".
The courts therefore assess the lawfulness of the procedure followed and the real and serious nature of the grounds given. The goal of the 1973 legislation was to provide full relief for employees in the event of unjustified dismissal.

Before the reform of 2017, the Labour Code determined the amount of compensation on the basis of the undertaking's size and the employee's length of service.

Employees with at least two years' service **and** working in an undertaking with 11 employees or more were entitled, in the event of unjustified dismissal, to compensation of no less than their last six months' salary (former Article L 1235-3 of the Labour Code). This was a guaranteed lower limit, but no upper limit was established.
Reinstatement could only occur if agreed upon by the two parties so it was optional.

Employees of companies with fewer than 11 employees **or** less than two years' service could claim compensation calculated on the basis of the damage incurred in the event of unjustified dismissal (former Article L 1235-5 of the Labour Code).
The Labour Code did not therefore apply any lower or upper limit in such cases.

The dismissal of protected workers (trade union and staff representatives) and dismissals based on violations of fundamental freedoms (discrimination, harassment, etc.) were declared invalid so it was possible for the employee to demand his/her reinstatement.

Courts therefore had a large margin of discretion where it came to relief.

Whereas the aim of the severance pay awarded on termination of a contract – whether dismissal was justified or unjustified – was simply to compensate for the damage arising from loss of employment, the compensation granted to employees for dismissal without real or serious cause was intended both to offset all the damage incurred by the employee and serve as punishment.

In this connection, the lower limit of six months' salary laid down in Article L 1235-5 of the Labour Code in the version prior to the entry into force of the order was often regarded by

legal doctrine as punitive damages. The punitive role of this compensation was all the more clear where the minimum compensation amounted to twelve months' salary in certain cases of invalid dismissal (former Articles L 1235-11 and L 1226-15).

Henceforth, with the new scale introduced by Order No. 2017-1387 of 22 September 2017, the punitive role of compensation is destined to decline. What is more, its compensatory function has also been curtailed.

3.2 Order No. 2017-1387 of 22 September 2017

The establishment of "scales" is a current legal trend, and social law could not be immune to this.
Since 2013, various attempts had been made to introduce an upper limit on compensation for unjustified dismissal.

3.2.1 Warning signs: Attempts to set up scales

Initially, two indicative scales were introduced recently into the Labour Code.

- The first indicative scale was supposed to be used by judges in the conciliation and advice office (BCO) of the industrial relations tribunal (*conseil de prud'hommes*).

It was introduced by Law No. 2013-504 on the protection of employment of 14 June 2013 and implemented by Decree No. 2013-721 of 2 August 2013 (as amended by Decree No. 2016-1582 of 23 November 2016). This was the former Article D 1235-21 of the Labour Code.

- The second indicative scale could be used in the trial office of the industrial relations tribunal. It stemmed from the so-called Macron Law (No. 2015-990 of 6 August 2015) (formerly Articles L 1235-1 and R 1235-22 of the Labour Code).

As their name indicates, these were indicative reference frameworks, meaning that they were just tools at the disposal of judges to determine the compensation owed to employees for dismissal without real or serious cause.

In principle therefore judges were under no obligation to apply them (unless both parties so desired).

In practice, these scales were not applied and were scrapped by the Order of 22 September 2017.
The introduction of a mandatory scale which is binding on courts made this optional scale obsolete.

Before the "successful" introduction of a mandatory scale through the Order of 22 September 2017 an unsuccessful attempt at introducing a mandatory scale was made in 2015.

In Decision No. 2015-715-DC of 5 August 2015, the Constitutional Council censured this scale, finding it to be unconstitutional with regard to the principle of equality.

In the Council's view it was not acceptable to limit compensation for dismissal without real or serious cause on the basis of the number of staff employed by the undertaking as this was unconnected with the damage incurred by the employee.

However, the Council did approve of the actual principle of an upper limit, considering that such a reform pursued "*general interest aims*" by ensuring greater legal certainty and promoting employment through the removal of barriers to hiring.

After this failure, a new attempt to apply a scale to damages arose during preparation of the law on labour, modernisation of social dialogue and safeguarding of career paths (Law No. 2016-1088 of 8 August 2016 – the so-called El Khomri Law).

The draft law proposed a scale which referred solely to the employee's length of service.
No lower limit was set; only upper limits were established.
This provision was withdrawn under pressure from the trade unions.

The desire to impose a scale emerged again in 2017 and was satisfied this time with the publication of Order No. 2017-1387 of 22 September 2017 on the predictability and increased security of employment relationships. The reform places an upper limit on compensation for dismissal without real or serious cause, which varies according to the employee's length of service.

3.2.2 Purpose and justification of the reform of 2017

Many purposes and functions were ascribed to the new system. Initially, the introduction of a scale was presented as a tool to aid judicial decision making.

In helping courts to harmonise their practices where it comes to assessing damage, the introduction of a scale is presented as a transparent instrument designed to counter the lack of clarity of the criteria used when evaluating losses.

The Ministry of Labour insisted on the goal of ensuring fair treatment of employees.
Lastly, the system is supposed to make the termination of employment contracts more secure for employers by dispelling the uncertainty as to the amounts of compensation they may be required to pay.

According to the report by A. Milon submitted on behalf of the French parliament's Social Affairs Committee on 19 July 2017, the lower limit on the compensation for unjustified dismissal within the meaning of Article L 1235-3 of the Labour Code seemed "*to many employers to discourage them from hiring because of its high amount, the uncertainty of its level .. and the highly differing practices of different courts".*

In Decision No. 2017-751 DC of 7 September 2017, the Constitutional Council found as follows: "*by authorising the government to set a mandatory reference framework for*

damages awarded by the courts in the event of dismissal without real or serious cause save where such dismissals were vitiated by exceptionally serious misconduct by the employer[1], the aim of the legislation was to increase the predictability of the consequences of the termination of employment contracts. It therefore pursued a public interest goal. It follows from this that the authorisation does not by itself disproportionately infringe the rights of victims of wrongful acts. The complaint of a failure to observe the principle of responsibility must therefore be dismissed" (paragraph 33).

The French Minister of Labour, Ms Muriel Pénicaud, drew a parallel between the system and those already set up in other EU member states to justify the reform.

It is true that other European countries such as Italy and Finland have already introduced an upper limit on the compensation payable in cases of unjustified dismissal.

However, it was precisely because of the measure placing an upper limit on compensation for unjustified dismissal that the relevant Finnish legislation was recently found to be in breach of the Charter by the European Committee of Social Rights.

3.2.3 The scale introduced by the French legislation of 2017

It was therefore Order No. 2017-1387 of 22 September 2017, issued pursuant to Article 3 of the enabling law authorising the government to introduce any measure required "to increase foreseeability and hence to make the employment relationship or the effects of a termination on the employer and the employee more certain"[2], which now established a mandatory scale of compensation payments to be granted by the industrial relations tribunal.

Under Article L 1235-3 of the Labour Code, in the event of an unjustified dismissal, the court is required to award the employee concerned a compensation payment, whose amount should lie between the minimum and maximum sums set according to the employee's length of service and the size of the undertaking, neither of which have anything to do with the damage which this payment is, however, designed to offset.

Thus, under this new legislation on compensation for dismissal without real or serious cause or unlawful dismissal, reinstatement is still optional and when one or other of the parties does not agree to reinstatement, the compensation paid to the employee is calculated as follows:

[1] Namely violations of fundamental freedoms connected with discriminatory dismissals or failure to comply with the special protection measures linked to pregnancy, maternity, employment injuries and occupational diseases.

[2] This Order is subject to ratification, which gives legislative force to the provisions (law to be published soon).

Length of service in the undertaking (full years)	Minimum compensation (in months of gross salary)		Maximum compensation (in months of gross salary)
	Undertakings with 11 employees or more	Undertakings with fewer than 11 employees	
0	Not applicable	Not applicable	1
1	1	0.5	2
2	3	0.5	3.5
3	3	1	4
4	3	1	5
5	3	1.5	6
6	3	1.5	7
7	3	2	8
8	3	2	8
9	3	2.5	9
10	3	2.5	10
11	3		10.5
12	3		11
13	3		11.5
14	3		12
15	3		13
16	3		13.5
17	3		14
18	3		14.5
19	3		15
20	3		15.5
21	3		16
22	3		16.5
23	3		17
24	3		17.5
25	3		18
26	3		18.5
27	3		19
28	3		19.5
29	3		20
30 or more	3		20

- **The scope of the scale**

The scale applies to dismissals proper, whether on economic or personal grounds. However, the legislation also intended to give the scale a general scope, covering terminations of employment which are not dismissals in the legal sense of the term but have the effect thereof. As a result Article L 1235-3-2 applies the scale to justified notifications of termination and judicial terminations delivered on grounds of the employer's fault.

- **The lower limits**

The order sets different lower limits for small companies with fewer than 11 employees,

reflecting its authors' desire to take account of the relative vulnerability of these companies and not penalise them financially.

This permanent desire to meet the expectations of MSMEs was moreover a guideline featuring in all of the orders of 2017 implementing labour law reform.

This specific lower limit, which is lower than for larger undertakings, applies only to employees with fewer than 11 years' service.

For employers with 11 years' service or more, the lower limits on compensation in small undertakings are aligned with those for larger ones (at 3 months).

Compared with the previous situation, the standard lower limit applying to employees with fewer than 2 years' service working for undertakings with more than 10 employees has been reduced by half, from 6 months to 3.

As to employees of small undertakings, there was no lower limit before the reform, but court practice was generally to grant at least three months.
However, the lower limits for such employees in the new legislation are ridiculously low (half a month's or one month's salary depending on length of service!).

It should also be pointed out that it was not by chance that the lower limit on compensation was set at six months' salary in the legislation of 1973.

According to studies by DARES published in May 2015, the six-month lower limit matched the average length of unemployment at the time, which has increased considerably since. This limit should now be set at 9 months.[3]

- **Upper limits**

This is the main innovation in the system for the compensation of dismissal without real or serious cause.

No distinction is made according to the size of undertakings, in accordance with the requirements of the Constitutional Council;[4] upper limits vary only according to the employee's length of service.

It is worth noting immediately that only the criterion of length of service is taken into account when making good the damage suffered by employees, whereas their age, health, family burdens, etc., are totally overlooked.

As to the lump sum provided for by the scale, it is a **maximum of 20 months' salary** after 29 years of service and can no longer increase afterwards, this being the absolute limit.

[3] J. Mouly, "Les indemnisations en matière de licenciement", *Droit social*, Dossier: La réforme du droit du travail (RDT), 2018, 13.

[4] See above, pp. 5 and 6.

In some cases, the lower and upper limit are almost identical (e.g. for an employee with two months' service in an undertaking with 11 employees or more, the lower limit is 3 months and the upper 3.5), and this limits the court's discretion accordingly.

3.2.4 The rare exceptions to the scale

There is an exception to the mandatory nature of the scale where a court finds that the dismissal is null and void on one of the grounds given in paragraph 2 of Article L 1235-3-1 of the Labour Code.

In such cases, reinstatement will be permitted. However, where employees do not ask for their employment contract to continue or their reinstatement is impossible, the court will award compensation, payable by the employer, which must be equal to at least the last six months' wages.

The grounds concerned are as follows:

- breach of a fundamental freedom;
- psychological or sexual harassment;
- discriminatory dismissal or dismissal following the initiation of legal proceedings;
- gender equality infringements;
- denunciation of crimes or offences;
- dismissal linked to the exercise of an elected office by a protected employee;
- failure to observe the protection enjoyed by certain employees[5] (maternity, employment injury and occupational disease).

The new wording of Article L 1235-3-1 deriving from the Order of 22 September 2018 favoured the approach of giving a list of exceptions and highlighted the government's desire to limit exceptions to the scale strictly.

In such cases, there is no upper limit on compensation; as some authors put it, "nullity invalidates the scale because fundamental breaches cannot be quantified". [6]

3.2.5 Lumping together of payments enabling the reduction of compensation paid

In all cases where the scale is applied and therefore an upper limit is placed on compensation, the Order of 22 September provides for all relevant payments to be lumped together, resulting in a reduction in the compensation paid.

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[5] Relevant circumstances are as follows:

- pregnancy, maternity, paternity leave, new parents' leave, adoption leave, child-care leave, going part time, sick child leave, resignation to bring up a child (Article L 1225-71).

- employment injury and occupational disease (Article L 1226-13)

[6] P. Adam, "Libertés fondamentales et barémisation : la grande évasion", *RDT*, 2017, 643 – C.Percher "Le plafonnement des indemnités de licenciement injustifié à l'aune de l'article 24 de la Charte sociale européenne révisée", *RDT*, 2017, 726.

The new Article L 1235-3, paragraph 4, of the Labour Code provides that when determining the amount of compensation for dismissal without real or serious cause, "*courts may take account of the severance payments awarded on termination of the contract*".

This means that, although courts may not go below the lower limit of the scale, they may adjust the damages awarded for the lack of real or serious cause depending on the other payments awarded on dismissal.

As one author points out,[7] "*what is called into question here is the separate nature of severance pay – which does not serve the same purpose as the damages described in Article L 1235-3 … At all events, courts are authorised to take account of payments intended to offset other damage in order to reduce compensation for employees dismissed without legitimate grounds, and this is not good policy".*

Bearing in mind these difficulties, the ratifying law excluded statutory severance pay from this grouping, meaning, however, that the possibility of taking account of payments provided for by collective agreements was confirmed!

At the same time, the legislation – while appearing to allow them to be awarded concurrently – lumps together the payments designed to compensate for failure to abide by certain rules connected with redundancies and infringement of re-recruitment priority.

The upper limit consequently applies to all of these payments taken together (Article L 1235-3, last paragraph).

Lastly, the legislation brought an end to the so-called contaminating-ground case-law[8] in which, where there were several unlawful grounds but one infringed a fundamental right, all other grounds would be neutralised and the dismissal would be automatically rendered invalid.

Courts are no longer excused from examining other grounds "to take account thereof where appropriate when calculating the payment to be awarded to the employee" (Article L 1235-3-1).
Courts are therefore clearly invited to "adjust" the compensation to be awarded for invalid dismissals where other unlawful grounds have been identified.

In this way, even dismissals which are not subject to the scale are affected by these rules on the reduction of compensation payments.

3.2.6 No alternative legal remedies

Apart from the rare exceptions (see section 3.2.4 above) linked to discriminatory dismissal or

[7] J. Mouly, "Les indemnisations en matière de licenciement", *RDT,* 2018, 12.

[8] Court of Cassation, Social Affairs Division (Cass. soc.), 3 February 2016, No. 14-18600.

dismissal carried out in breach of fundamental freedoms, the upper limit on compensation payments is intended to apply to all unjustified dismissal.

It should be noted that French law does not include any alternative legal remedies making it possible to circumvent the upper limit on compensation such as to "*permit full compensation for the damage suffered by the employee*".

Since the adoption of the Law of 13 July 1973 on dismissal, the legal proceedings enabling employees to obtain "compensation for dismissal without real or serious cause" are special proceedings which rule out the application of ordinary civil liability law.

The special law derogates from the general law and relief for the damage incurred by the employee is only provided by the special law.

Ordinary civil liability law applies only when the dismissal was decided on in vexatious circumstances,[9] but then the compensation awarded relates to a specific loss.

Such action is not a general alternative legal remedy and applies only in particular situations.

In the same way, where it has been possible in a very particular situation to invoke the tortious liability of a parent company which has contributed to the closure of a branch through its misconduct or culpably thoughtless behaviour, this tortious liability claim will not necessarily mean that the employees will receive additional compensation.[10]

The implementation of civil liability law is only possible in unusual, peripheral circumstances and does not therefore constitute an alternative legal remedy making it possible to compensate entirely for unjustified dismissal.

4. THE MERITS OF THE COMPLAINT

The relevant supra-national texts, particularly the revised European Social Charter, must be examined so as to compare the provisions of the French legislation with the requirements of the Charter.

4.1 ILO Convention 158

The relevant provision is that of Article 10 of Convention 158, under which "*if [the courts] are not empowered or do not find it practicable, in accordance with national law and practice, to declare the termination invalid and/or order or propose reinstatement of the worker, they shall be empowered to order payment of adequate compensation or such other*

[9] Cass. soc., 12 March 1987, No. 84-41002, Civil case reports (Bull civ.) V, No. 147.

[10] Cass. soc., 8 July 2014, No. 13-15573 – D 2014-1552 – RDT 2014, 672, study by A. Fabre.

relief as may be deemed appropriate".

It is worth noting that, according to this article, payment of compensation is purely a subsidiary measure, as it is considered preferable to declare the termination invalid and reinstate the employee.

The compensation awarded must be "adequate" and "appropriate".

4.2 Article 24 of the revised European Social Charter

The right to protection in cases of termination of employment
With a view to ensuring the effective exercise of the right of workers to **protection in cases of termination of employment**, the Parties undertake to recognise:

a. the right of all workers not to have their **employment terminated without valid reasons** for such termination connected with their capacity or conduct or based on the operational requirements of the undertaking, establishment or service;
b. the right of workers whose employment is terminated **without a valid reason** to **adequate compensation** or **other appropriate relief**.

To this end the Parties undertake to ensure that a worker who considers that his employment has been terminated without a valid reason shall have the **right to appeal** to an **impartial body**.

4.3 Relevant ECSR case-law

To supervise the implementation of the Charter alongside the reporting system, the Additional Protocol of 9 November 1995 set up a new collective complaints system[11] also run by the ECSR, through which it was able to adopt a number of important decisions[12]. Accordingly, in its work of supervising national legislation, particularly in its decisions adopted with regard to Article 24 of the Charter, the ECSR has specified that all protection arrangements based on compensation for unfair dismissal, although left to the sole discretion of the member states, must satisfy the following criteria:

- be appropriate and adequate ;
- be effective and fit for purpose;
- act as a deterrent for employers.

The ECSR put these criteria into practice in a recent decision concerning Finland.

In this case, in which an association for the protection of social rights, the Finnish Society of Social Rights, opposed the Finnish state, the ECSR found that the cap on the compensation

[11] J.F. Akandji-Kombé, "L'application de la Charte sociale européenne. La mise en œuvre du mécanisme des réclamations collectives", *Dr. Soc.* 2000-888.

[12] J.P. Marguénaud and J. Mouly, "Le Comité européen des Droits Sociaux. Un laboratoire d'idées sociales méconnu", *Revue du droit public*, 2011.685.

that could be awarded by the relevant Finnish courts was incompatible with Article 24 of the revised European Social Charter.

This decision, given on 8 September 2016,[13] has the merit – and this is a crucial point where it comes to establishing principles – of giving a definition of the expression "appropriate compensation systems" used in Article 24 of the Charter.

In paragraph 45 of its decision the ECSR states that "compensation systems are considered appropriate, if they include for the following:

1. reimbursement of financial losses incurred between the date of dismissal and the decision of the appeal body;
2. possibility of reinstatement;
3. compensation at a level high enough to dissuade the employer and make good the damage suffered by the employee".

This definition highlights the two purposes of compensation which should not be undermined by the introduction of an upper limit, namely reimbursing the losses incurred by employees and acting as a deterrent for employers (4.3.1). However, the ECSR does agree, where an upper limit has been established, to take account of alternative legal remedies provided that they enable additional compensation for the damage incurred by the employee (4.3.2).

4.3.1 The compensatory and dissuasive roles of the sums awarded to employees who have been unfairly dismissed

Article 2 of Finland's Law No. 398/2013, on which the proceedings focussed, delimits compensation for unjustified dismissal by setting a lower limit of three months' salary and **an upper limit of 24 months'**.
Where the person who has been dismissed is an elected trade union delegate or staff representative, the upper limit on compensation is 30 months' salary.

In the case in question, the Finnish Society of Social Rights lodged a complaint on 29 April 2014 in which it alleged a violation by Finland of Article 24 of the revised European Social Charter on the ground, in particular, of the establishment of an upper limit of 24 months' salary on the amount of compensation awarded for unjustified dismissal.

In its decision, the ECSR states that "any upper limit on compensation that may preclude damages from being commensurate with the loss suffered and sufficiently dissuasive is in principle, contrary to the Charter".[14]

This means that the upper limit must not rob the compensation of its dual role as reparation and deterrent.

[13] ECSR, 8 September 2016, No. 106/2014, Finnish Society of Social Rights v. Finland.

[14] Decision by the ECSR, 8 September 2016, §46.

Relief must therefore both take into account any loss incurred by employees between their dismissal and the decision to award them compensation and be of a sufficient amount to make good the damage after the loss of their job; the aim therefore is to provide full compensation.[15] Compensation awards must also act as a deterrent for employers.

Awards therefore may, if necessary, exceed the damage actually suffered by the employee so that they can have a dissuasive effect.

In this case, the ECSR, holds that "in some cases of unfair dismissal an award of compensation of 24 months as provided for under the Employment Contracts Act may not be sufficient to make good the loss and damage suffered".[16]

In exceptional cases, the Committee acknowledges that even where the upper limit does not allow for full reparation, this will not be considered to be in breach of Article 24 if employees can obtain additional compensation through alternative legal remedies.

4.3.2 The existence of "alternative legal remedies" allowing for additional compensation

Reiterating the arguments already outlined in its conclusions,[17] the Committee considers that, if there is such a ceiling on compensation for pecuniary damage, the victim must be able to seek compensation for non-pecuniary damage through other legal avenues.[18]

In this case the Government referred to Law No. 412/1974 on tort liability (which applies where employees have suffered personal bodily or non-pecuniary damage or damage has been caused to property) to argue that additional compensation was available through ordinary tort liability law.

However, the ECSR dismissed the Finnish Government's argument because it looked further than the abstract content of the Finnish legislation and checked how it was actually applied by the courts.

In its very first decision on the merits of a complaint, adopted on 9 September 1999 in the case of International Commission of Jurists v. Portugal and concerning child labour,[19] the Committee had clearly stated, as the European Court of Human Rights had already done with regard to the civil and political rights enshrined in the Convention, that the goal of the Charter was "to protect rights not merely theoretically, but also in fact".[20]

[15] J. Mouly, "Le plafonnement des indemnités de licenciement injustifié devant le comité européen des droits sociaux. Une condamnation de mauvaise augure pour la 'réforme Macron'?", *Dr. Soc.* 2017, 745.

[16] §49 of the Finnish decision.

[17] ECSR Conclusions on Finland of 7 December 2012 and 12 December 2016.

[18] ECSR Decision, 8 September 2016, §46.

[19] *RTD civ.* 2000. 937, note J.P. Marguénaud.

[20] ECHR, 9 October 1979, No. 62899/73, Airey v. Ireland.

It was therefore when it focused on the actual situation of the employees in the Finnish case that the Committee saw that these alternative legal remedies were not really effective in the light of the aim pursued.

In its conclusions in 2008 adopted as part of its reporting procedure, the ECSR had already noted that Finland's legislation was not in conformity with Article 24, on the ground, in particular, that an upper limit was applied to the compensation awarded by its industrial relations tribunals; however, in 2012, it had adjusted its position, noting that employees who had been unfairly dismissed could also rely on the Tort Liability Act.[21]

This was why the Finnish Society of Social Rights showed that, in reality, this law had never been applied by the courts. The Committee noted that the Government had not provided any examples of cases in which compensation had been awarded for unfair dismissal, the only judgment proposed being one of discriminatory dismissal.
The Committee inferred from this that "the Tort Liability Act does not apply in all situations of unlawful dismissal" (§51).

It concluded that the Tort Liability Act, which is a general law, is not an appropriate alternative to the reparation of the damage incurred by an employee who has been dismissed (§ 52).

It came to the same conclusion with regard to Finland's Employment Contracts Act, as only dismissal on discriminatory grounds is not subject to the statutory upper limit (§ 48).

The Committee's decision may therefore be summed up as follows. The "adequate compensation" referred to in Article 24 of the Charter must be understood to mean the full reparation of the damage suffered by the employee as a result of his/her dismissal.
Placing an upper limit of 24 months' salary on this compensation may mean that it is insufficient to attain this objective because in some cases, the damage suffered by the employee may be higher. Yet, the alternative legal remedies available to employees referred to by the Government are not sufficient as they do not enable employees to obtain the necessary additional compensation in all cases. The Committee concludes from this that by establishing an upper limit on compensation for unjustified dismissal of 24 months' salary, Finnish legislation is in breach of Article 24 of the Charter.

This conclusion appears to be such that it must also apply to French legislation given that the

[21] It should also be noted that in accordance with these principles, in its conclusions of 2016 on Italy, the ECSR asked the Italian Government for clarification concerning the regulations on dismissal provided for in Article 18 of Law No. 300/1970 as amended by Law No. 92/2012 – and pointed out that "**any ceiling in compensation that may preclude damages from being commensurate with the loss suffered and sufficiently dissuasive are proscribed.** If there is such a ceiling on compensation for pecuniary damage, the victim must be able to seek compensation for non-pecuniary damage through other legal avenues (e.g. anti-discrimination legislation) and the courts competent for awarding compensation for pecuniary and non-pecuniary damage must decide within a reasonable time (Conclusions 2012, Slovenia and Finland). The Committee asks whether in case there is a ceiling, **it is possible to seek compensation through other legal avenues. In the meantime the Committee reserves its position**". Following these conclusions, the CGIL lodged a complaint against Italy (No. 158/2017) on 16 October 2017 requesting that the ECSR find Italian legislation incompatible with Article 24 of the Charter (complaint being examined).

upper limit on compensation awards for unjustified dismissal established by Order No. 2017.1387 of 22 September 2017 can be criticised in exactly the same ways as the relevant Finnish legislation.[22]

4.4 A review of the French legislation in the light of the requirements of Article 24 of the revised European Social Charter

4.4.1 Insufficient compensation in relation to the damage suffered by the employee between the date of dismissal and the decision of the appeal body

The French system of compensation for unjustified dismissal does not properly ensure reimbursement of financial losses between the date of dismissal and the decision of the appeal body, as required by the Charter.

The system of penalties described provides workers with an imbalanced protection for the period preceding the judicial recognition of the unfair nature of the dismissal because it places the burden of the length of the proceedings and the time span between the pronouncement of the dismissal and the finding against the employer on the financially weakest party, and to the advantage of the employer, who suffers no consequence as a result of his/her dilatory procedural practices.

The unfairly dismissed employee is the person with whom the obligation lies to bring proceedings and who suffers from the drawbacks of their length and their uncertainties.

The average length of a trial before an industrial relations tribunal is 15 to 17 months (not including any subsequent appeal and cassation proceedings).

Proceedings may last up to 30 months in the event of a split decision[23].
There have moreover been repeated findings against France for these excessive delays,[24] based on Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which states that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal".

In view of the length of these proceedings, the establishment of a scale with very low lower limits and clearly insufficient upper limits will prompt unfairly dismissed workers to decide against going to court.[25]

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[22] See J. Mouly, "Le plafonnement des indemnités de licenciement injustifié devant le Comité européen des droits sociaux. Une condamnation de mauvaise augure pour la 'réforme Macron'"? *Dr. Soc.* 2017, 745, and C. Percher, "Le plafonnement des indemnités de licenciement injustifié à l'aune de l'article 24 de la Charte sociale européenne révisée", *RDT* 2017, 726.

[23] See the official statistics of the Ministry of Justice – 2016.

[24] In 2012 and in 2016; see the article by Mediapart of 23 November 2012, "Délais raisonnables de la procédure prud'homale : l'Etat condamné"; see also the article in the newspaper Le Monde of 7 April 2016 , "L'Etat à nouveau inquiété pour des délais excessifs aux Prud'hommes".

[25] The weekly financial newspaper *La Tribune* of 1 September 2017, "Les indemnités prud'homales vont singulièrement diminuer".

This is moreover what can already be seen in the figures for cases brought.
As some newspapers have remarked, "even before the upper limit was placed on compensation, as the executive wished, industrial relations tribunals were reporting that 'everything was designed to discourage employees'.[26]
For example there was a decrease in the number of cases brought in the first quarter of 2017 of between 40 and 50% in Roubaix and 41% in Paris.

The increase in the complexity of proceedings brought about by the Macron Law of 6 August 2015 forces employees who wish to take their employers before the industrial relations tribunal for unjustified dismissal to fill in a form which is now six pages long compared to only one before.[27]

Tribunal proceedings themselves have become singularly complex and appeals have become written procedures in which employees can no longer represent themselves.

Added to this is the sharp rise in breaches of contract. According to the statistics office, DARES, they rose by 5.5% over the year from May 2016 to May 2017.

Admittedly, we do not yet have the Ministry of Justice statistics for 2018 as they have only been prepared up to 2016,[28] but the trends being reported by industrial relations tribunals all over France show that this decrease in proceedings which had already begun before the 2017 reform is continuing inexorably in 2018.

At national level therefore we seem to be heading towards a total collapse in the number of cases brought, which would seem, according to the honorary senior member of the Social Affairs Division, of the Court of Cassation, Pierre Bailly, to amount to somewhere between a quarter and a third fewer cases:

"It could be that, in future, this decline in the number of cases will continue or even accelerate as the upper limit on compensation provided for in the orders of September 2017 amending the Labour Code may deter employees with low lengths of service from contesting decisions in the industrial relations tribunals".[29]

Unfortunately, Mr Bailly's fear seems well founded.

For example, Order 2017-1387 of 22 September 2017 now allows employers to terminate employment relationships at their own discretion and without valid grounds, on the basis of

[26] *Le Monde* of 12 September 2017.

[27] *Le Parisien* of 3 July 2017, "Prud'hommes : le nombre d'affaires nouvelles en chute libre".

[28] In 2016, which is the last year in which data are available for the entire country, a little less than 150 000 employees brought proceedings against their employers before this joint body, which comprises both employers' and employees' representatives. According to the Ministry of Justice's figures this meant this amounted to a decrease of 18.7% in one year (http://www.justice.gouv.fr/art_pix/Stat_Annuaire_ministere-justice_2016_chapitre4.pdf).

[29] Le Monde of 30 January 2018.

a simple cost-benefit analysis taking account of the compensation award for the employee provided for by the legislation. This approach is clearly incompatible with Article 24 of the revised Charter because it totally undermines the principle that dismissal without justification must be regarded as an "unfair" act.

And it is evident that the French system does not guarantee that employees will receive appropriate relief matching the damage incurred.

4.4.2 Insufficient compensation in view of the aims of fully making good the damage incurred by the employee and deterring employers

The imposition of an "upper limit" or a "mandatory scale" on compensation awards for dismissal without real or serious cause by Order No. 2017-1387 of 22 September 2017 satisfies the wishes of the employers' association, the MEDEF (see point 3.2.2 above) and reflects a desire to make French labour law a little more flexible still than before.

As was explained in sections 3.2.3 and 3.2.4 above, Order 2017-1387 of 22 September provides for two types of compensation, namely compensation with an upper limit in most cases and, in rare exceptional circumstances (where a fundamental freedom has been infringed, e.g. discrimination), unlimited compensation.

Reinstatement is optional, save for rare exceptions (invalid dismissal).
On a theoretical level, except in cases of invalidity, this reform casts doubt on the principle of full reparation of the damage suffered by the employee because of the unjustified nature of the dismissal and, by correlation, significantly reduces the power of the courts.

Article L 1235-3 of the Labour Code provides for an upper limit of between 1 month's gross salary for employees with less than 1 year's service and 20 months' gross salary for 29 years of service or more.

Already, there is a possible violation of Article 24 of the Charter by France because the upper limit set by the order is still lower than the 24 months of gross salary which was deemed insufficient to afford appropriate reparation by the Committee in the Finnish case.

Furthermore, the mechanism whereby different forms of compensation are lumped together (see section 3.2.5 above) means that payments awarded for another purpose are taken into account.

The inadequacy of the relief derives not only from its objectively low level but also from the fact that it is fixed in advance by the law and cannot by definition be proportionate or dissuasive.

As some authors have quite rightly pointed out,[30] adopting a scale makes it possible to

[30] A. Lyon-Caen, "La complexité du barème"*, RDT*, 2016.65 - G.Bargain and T. Sachs, "La tentation du barème"*, RDT* 2016.251.

calculate what an illegal act will cost and therefore encourages persons to commit this act if, according to common thinking, this cost is not as great as the inconvenience caused by complying with the law.

Ultimately, the scale authorises "efficient law-breaking".[31]

This kind of approach is not acceptable in labour law.[32]
The punitive role of reparation is gradually being eroded.

Furthermore, with regard to the deterrent nature of the compensation, doubts may be raised about the compatibility of French law with Article 24 of the Charter. On this point, one author[33] has highlighted the provisions of Article L 1235-4 of the Labour Code, which makes it possible to order offending employers to reimburse the employment office (Pôle emploi) for all or part of the unemployment benefit paid to dismissed employees, from the date of their dismissal up to the date of the verdict.

However, this compensation cannot in any way meet the deterrent requirement set by the ECSR in its decision of 8 September 2016.

This compensation is designed to offset the loss incurred by Pôle emploi, not the employee.

In addition, in November 2017, the French Government set up a simulator to calculate compensation payments in the event of unjustified dismissal enabling employers to calculate very precisely the "risk" that they ran in unlawfully dismissing an employee.[34]

This possibility for employers hardly seems compatible with the dissuasive role that compensation is supposed to fulfil with regard to unjustified dismissal of employees.

The prior quantification of the cost of unfair dismissal, quite apart from being shocking, is undoubtedly in breach of Article 24 of the Charter.

The inadequacy of the penalty is all the clearer if it is considered that when compensation is calculated, no attention is paid to the workers' age or the fact that some are in more socially vulnerable situations than others.

Nor does the mechanism take any account of the difficulty of finding a new job when the unemployment rate is so high in France and differs from one employment catchment area to another (meaning that some regions suffer from even higher unemployment than others) and according to the type of work and qualifications sought.

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[31] P. Lokiec, "Déréguler le travail ne fera pas baisser le chômage", LPA 2016 n°61, p 4.

[32] Jean Mouly emphasises that major groups which are relocating a company already set aside the amounts that they may have to pay in compensation for dismissal. This scale will inevitably increase and extend such practices. RDT 2017, 746.

[33] J. Mouly - article cited above.

[34] https : www.service.public.fr/simulateur/calcul/bareme-indemnites-prudhomales.

Employees' individual circumstances are not taken into account when calculating damage.

Length of service alone cannot serve to calculate the entire damage. Clearly therefore the compensation provided for in the French system does not meet the conditions of "appropriate relief".

4.4.3 No alternative legal remedies providing for additional compensation

Where there is an upper limit, the ECSR will take into account the existence of alternative legal remedies provided that these enable additional compensation for the damage incurred by the employee.

It was pointed out in section 3.2.6 above that French law makes no provision, save in exceptional circumstances, to obtain additional compensation.

As in the case of Finland, in which the Committee held that *"*in some cases of unfair dismissal an award of compensation of 24 months as provided for under the Employment Contracts Act may not be sufficient to make good the loss and damage suffered",[35] the Committee should find in the case of France that the award of compensation of a (maximum) amount of 20 months' salary provided for by the new Article L 1235-3 of the Labour Code, added by Order No. 2017-1387 of 22 September 2017, cannot be sufficient to compensate for the losses and damage suffered by employees in some cases of unfair dismissal.

The amount of 20 months' salary is clearly not high enough for the unfairly dismissed employee to obtain full relief in all cases.

There is also a concern that the maximum amount will not actually be awarded because courts have clearly been invited to reduce awards and lump compensation together.
In practice, the amount of relief will always be pulled down.

Still more, if employees do not have the necessary length of service to claim 20 months' salary but have incurred very large damage in reality, they will never obtain reparation in keeping with their actual loss.

The French legal system does not make it possible to make use of alternative legal remedies that would enable employees to obtain additional unlimited compensation.

In section 3.2.6 above it is shown that only the Labour Code is supposed to apply to compensate for unjustified dismissal and that this rules out the application of the Civil Code.

It is only in very peripheral cases that ordinary civil liability law is applied and decisions establishing case-law in this field are very rare.

It is clear that the limited compensation system is supposed to apply to the vast majority of cases of unjustified dismissal.

[35] §49 of the Finnish Society of Social Rights v. Finland decision.

Ordinary civil liability law is therefore not a general alternative legal remedy enabling reparation of the damage incurred by an employee dismissed without good cause.

5. CONCLUSIONS

It has been demonstrated that the scale which places an upper limit on compensation for damage incurred by unfairly dismissed employees, incorporated into French legislation by Order No. 2017-1387 of 22 September 2017 and based solely on length of service, does not make it possible to ensure that in all cases, full relief of the damage actually suffered by the employee is achieved and does not make it generally and sufficiently possible to make use of alternative legal remedies.

For these reasons the CGT-FO requests the European Committee of Social Rights:

- to declare the complaint it has lodged admissible;

- to hold that the French legislation on compensation for damage incurred by workers dismissed without good cause is **in breach of Article 24 of the revised European Social Charter** because it establishes an upper limit of 20 months' salary and it does not meet the criteria for **appropriate relief,** namely adequacy, effectiveness and acting as a deterrent to employers;

- to urge France to amend its legislation to comply with the European Social Charter.

Jean-Claude MAILLY
Secretary General of the Confédération Générale du Travail - Force Ouvrière

DOCUMENTS IN SUPPORT OF CGT-FO'S CLAIMS

1. Statutes of the Confédération générale du travail – Force ouvrière.

2. Decision of 18 February 2018 by the CGT-FO bureau to assign authority on this matter to its Secretary General, Mr Jean-Claude Mailly.

3. Order No. 2017-1387 of 22 September 2017 on the predictability and increased security of employment relationships, amending Articles L 1235-3 et seq. of the Labour Code.

4. Decision of the Constitutional Council of 5 August 2015 (No. 2015-715 DC).

5. Decision of the Constitutional Council of 7 September 2017 (No. 2017-751 DC).

6. J. Mouly, "Les indemnisations en matière de licenciement" ("*Compensation for dismissal*"), *Droit social*, *Dossier: La réforme du droit du travail (RDT)*, 2018, 10.

7. P. Adam, "Libertés fondamentales et barémisation: la grande évasion" ("*Fundamental freedoms and scales – the great escape*"), *RDT*, 2017, 643.

8. C. Percher, "Le plafonnement des indemnités de licenciement injustifié à l'aune de l'article 24 de la Charte sociale européenne révisée" ("*Upper limits on compensation for dismissal incompatible with Article 24 of the revised European Social Charter*"), *RDT*, 2017, 726.

9. Court of Cassation, Social Affairs Division (Cass. soc.), 3 February 2016, No. 14-18600.

10. Cass. soc., 12 March 1987, No. 84-41002, Official Gazette for Civil Cases (Bull civ.) V, No. 147.

11. Cass. soc., 8 July 2014, No. 13-15573, RDT, 2014, 672 study by A. Fabre.

12. ECSR, 8 September 2016, No. 106/2014, Finnish Society of Social Rights v. Finland.

13. J. Mouly, "Le plafonnement des indemnités de licenciement injustifié devant le Comité Européen des droits sociaux. Une condamnation de mauvaise augure pour la 'réforme Macron ?'" ("*Upper limits on compensation for dismissal found to be unjustified by the European Committee of Social Rights. A bad sign for the 'Macron reform?'*") *, Dr Soc. 2017,* 745.

14. Labour disputes. Ministry of Justice Statistics - 2016.

15. “Délais déraisonnables de la procédure prud’homale : l’Etat condamné” (“*Unreasonable delays in industrial relations tribunal proceedings – French state denounced*”) – *Mediapart*, 23 November 2012.

16. Le Monde of 7 April 2016, “L’Etat à nouveau inquiété pour des délais excessifs aux Prud’hommes” (“*French state berated again for excessive delays before industrial relations tribunals*”).

17. La Tribune of 1 September 2017, “Les indemnités prud’homales vont singulièrement diminuer” (“*Sharp drop in compensation payments in industrial disputes on horizon*”).

18. Le Parisien of 3 July 2017, “Prud’hommes : le nombre d’affaires nouvelles en chute libre” (“*Industrial relations tribunals – number of cases plummeting*”).

19. Le Monde of 12 September 2017, “Prud’hommes : depuis la Loi Macron de 2015, le nombre de saisines est en chute” (“*Industrial relations tribunals – number of cases declining since the 2015 Macron Law*”).

20. Le Monde of 30 January 2018, “Les recours aux prud’hommes en chute libre depuis 2009” (“*Industrial relations cases plummeting since 2009*”).

21. A. Lyon-Caen, “La complexité du barème” (“*The complexity of the scale*”), *RDT*, 2016, 65.

22. G. Bargain and T. Sachs, “La tentation du barème” (“*The lure of the scale*”), *RDT*, 2016, 251.