COMMUNICATION - THE TRADE UNION FIGHT FOR THE RIGHT TO ADEQUATE COMPENSATION IN THE FACE OF UNFAIR DISMISSAL: ARE THE EUROPEAN SOCIAL CHARTER AND ITS BODY OF GUARANTEES THE LEVERS OF CHANGE THAT ARE NEEDED?

Fernando Luján de Frías – Vice Secretary-General for Trade Union Policy

1. The European Social Charter (hereinafter ESCS) officially constitutes the Social Constitution of Europe. This statement is not trivial, especially in a scenario in which, like that of the European Union, we have not yet managed to equip ourselves with a genuine EU Constitution. Its great relevance lies in the fact that, as such a normative Constitution, it contains, with a directly binding legal character, and therefore not mere programmatic proclamations and enforceable before national courts, with the ultimate control of conformity of a body of guarantees of its effective compliance such as the European Committee of Social Rights (ECSR, hereinafter), an extensive and modernised catalogue of **fundamental social human rights**, although not perfect, as it requires some updates and improvements. In the same way that the European Convention on Human Rights (ECHR, hereafter) is considered in all countries as the greatest exponent of the defence, reliable for its effectiveness, also of the European Court of Human Rights (ECtHR, hereafter), of civil and political human rights in the scope of the Council of Europe, where trade unions have a recognised right such as that of art. 11 (right of association in its dimension of trade union freedom) and art. 10 (freedom of expression as a powerful right of critical expression in the world of work), the ETUC should enjoy the same position and prestige (authority and power) for social, economic and cultural rights, definitively breaking with the artificial and anachronistic division between one and the other that has dominated the functioning of the States. However, as we will recall in this paper, the reality is much more disappointing for social rights, insofar as, partly corrected, no doubt, the ESC continues to be "the poor sister" of the ECHR, the "Cinderella of rights", as it is commonly known, and it is precisely this High Level Conference that should serve to mark the beginning of the end of this "inequality" in the treatment of some human rights with respect to others.

To say that the ESC **is a European Social Constitution of a normative nature** is much more than a nominal characterisation. It is a "legal weapon loaded with the future", if I may paraphrase the famous Spanish poet Gabriel García Celaya (he wrote that "poetry is a weapon loaded with the future"). Indeed, unlike other European social rights charters, such as that of 1989, or even the European Pillar of Social Rights (2017), of ambivalent scope for trade unionism, where solemn proclamation and symbolic value are more dominant, the SSC's legal regulations are full of legal-political and social commitments for the Member States and open up a suggestive range of possibilities for effective action for European trade unionism.

In fact, this direct regulation and immediate access to the ECHR, without having to exhaust the previous national channels, provides trade unionism with a European instrument in the event that the EU Member States and the Court of Justice of the European Union may slide down paths based, as in the recent past, more on promoting economic freedoms for a mercantilist economy and to the detriment of social rights, that is, of a social market economy, despite what the EU Treaties recognise. That is **why I see it as a powerful legal-union weapon, although more potential than effective**, as I will explain later.

Precisely, if in the field of the recognition of fundamental social and human rights, the ESC is a very advanced legal instrument and trade union action policy, it is in the field of guarantees of the effectiveness of its rights that it leaves something to be desired and requires new commitments and reforms aimed at reinforcing this level, in line with the reliability of the ECHR and its ECHR, as we have already mentioned. I will return later to this very important issue, which is central to the more general objectives of this High-Level Conference. A Conference that is undoubtedly coming at a very opportune moment, also because of its delicate nature, for the credibility of the European Social Charter system and its functionality for the real and effective correction of the persistent non-conformities of national social rights with regard to the high standards of protection of social and labour rights recognised and, hopefully, guaranteed by the ESC.

Those who are familiar with this subject know that the European Convention on Human Rights is a Human Rights Treaty and, therefore, its application and interpretation must take precedence over national laws, so that it is governed by the rules and principles inherent to the interpretation of Treaties and Conventions. It has binding effect and direct applicability, without prejudice to the fact that it has some more or less precise rules in its delimitation, which will require the corresponding interpretation by the Courts, in accordance with the reiterated doctrine of a quasi-judicial body of guarantees, the ECSR. It is, therefore, a *self-executing* rule, according to Art. A (Obligations) in relation to Part II (which includes, as we shall see, Art. 24 CSER -protection against unfair dismissal-).

2. So much for what ought to be, but what is to be is something else, not only in Spain. In spite of this undeniable relevance of the SSC in terms of the fundamental social and human rights of the Council of Europe, the fact is that, until very recently, the SSC in Spain (as occurs in these countries, such as France, as will be said later) has not been consistent with this relevance, so that its attention has been much less than the application by national jurisdictions of the ECHR and the doctrine of the ECtHR, which enjoy a great deal of judicial and legal prestige. Here we find **a deep institutional gap or fracture** between some rights and others, so that **despite being indivisible**, according to the United Nations General Assembly in its Resolution 32/13 of 1977, their guarantees of application, within the Council of Europe, diverge notably.

A gap which, incidentally, can also be found within the EU. This is evidenced by the fact that the CJEU is more inclined towards economic freedoms than towards social rights, as the European Economic and Social Committee (EESC) recently pointed out, precisely in relation to the Spanish Presidency of the EU in the last six months[1] . Thus, as illustrated by some famous cases (e.g. the

[1] Opinion of the European Economic and Social Committee. A protocol on social progress (exploratory opinion requested by the Spanish Presidency) **(OJEU C 293/09 18.8.2023)**

Laval case), this confrontation between the social and the economic in the "two" institutional Europes leads to major conflicts of validity (EU law or Council of Europe law), which would be resolved if the EU were to ratify the ESC, not just the ECHR. A conflict between the European or non-European ties of the states, which may arise again, by the way, with the transposition of Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union. This is undoubtedly **a serious problem that has been going on for years and which, I understand, should be resolved sooner rather than later, which I hope will help**,

In this scenario of contradiction between the relevance of the European Social Charter and the more limited practical application, it is important to point out that Spain **has not ratified the** Revised European Social Charter of 1996 (hereinafter CSER), although we had ratified that of 1961 (a long time ago, although its validity was scarce, disappointing to say the least) **until June 2021**, as well as the **Additional Protocol to the European Social Charter** establishing a system of collective complaints (Strasbourg, 9 November 1995). Despite intense trade union demand, especially spurred on by the UGT, which I represent, for these legal milestones to have taken place much earlier, it was not possible to achieve them until the aforementioned date. Since then it has been in force in Spain (the Instrument of Ratification of the Additional Protocol to the ETUC was published in the Official State Gazette of 2 November 2022). It has taken a long time, but it is here.

And the UGT **was the first Spanish trade union to be aware** of the historic moment it offered for a path of trade union action on a more solid legal-social basis, given that it meant, at least potentially, it is insisted, having two more ways of actively defending social rights against laws that would laminate or curtail them:

1) **before national courts,** because of their primacy over national laws (technically known as the conventionality trial - before applying a national law, it must be verified that it does not violate an international law, in this case the CSE, and if it is found to violate it, the national law must be set aside in order to apply the international law, in this case the CSE).
2) **before a real European instance of legal guarantees for** the enforcement by states and companies of such rights, on the same level as civil and political rights, in case they are not respected, even if they are not correctly applied by national courts.

Fully convinced of its usefulness (which practice has taught us should be protected against its weaknesses and dark spots, which it also has, and should be corrected, along the lines proposed by several objectives assumed by this High Level Conference), the UGT, as the most representative class union in Spain, which gives us a position of great relevance, but also responsibility, in the defence of the rights of workers and citizens in general, decided to take **the first step and presented the first collective complaint to the ECSRC in Spain.** Months later, other state and regional trade unions in my country followed in its footsteps. What issue did my union choose to take this historic step - or at least that is what we believed at the time, and, in part, we still believe -?

3. Did you choose it at random, you ask? We did not choose it at random. **The UGT put a lot of present and future trade union strategy there**, and as far as I will try to explain to you, in a reasonable amount of time and with the meridian clarity I would like, it has a lot to do with several of the objectives that bring us to this High Level Conference.

Certainly, we were, and we are, very aware that there were at that time (and there are today), many important issues that, as we have been exposing through the allegations that UGT made in the system of Reports, the other technique -more weakened, in our opinion, as experience has shown us- of control of compliance with the CSE, could have encouraged that pioneering experience. Let us think of questions of great interest and significance for the working class, such as the Minimum Interprofessional Wage, which has existed in my country for a long time, but which had had very low figures until the last few years. Or even on issues relating to working time, in particular overtime, which in my country is too much, with the high cost in terms of employment that it entails and, moreover, without a good number of them being paid, which encourages them to be carried out outside the law, which is in direct contradiction with the provisions of article 4 in relation to article 2 of the CSE.

Without underestimating its great importance, in any way, the UGT considered that such an institutionally important moment, also at the trade union level, should have as its objective that absolutely essential guarantee for the dignity of the worker, not only for his or her stability or job security: **adequate protection against unfair dismissals**, that is, against dismissals without cause, where the company acts only as in the past, without justified cause, in an arbitrary manner.

If dismissal is the most delicate moment, or one of the most delicate moments, in the entire employment relationship, because it is where the difference in power between company and worker is most markedly reflected, allowing dismissal without just cause, that is, to put it plainly, arbitrary dismissal, dismissal just because, by purely arbitrary decision, (I am not talking about those with economic, productive or disciplinary causes, of course), emphasises the vulnerability of the person and affects their own human dignity, as I said, not only, of course, their chances of keeping a job, or finding another one, in order to provide for their dignified existence, and often that of their family as well.

It is no coincidence that even the ECtHR has had the opportunity to address the protection of the right to work against dismissal without cause, in order to guarantee a fair trial (Art. 6.1 ECHR), which in many States was not guaranteed, requiring special guarantees, also in terms of the adequacy and speed of responses (ECHR 10 July 2012, case K.M.C. v. Hungary). Ultimately, this protection, albeit tangential, shows how important adequate protection against dismissal without just cause is for a civilised social state governed by the rule of law. It should be remembered, as does the ECtHR, and also the ECHR, that guarantees of rights must be designed in such a way that they do not merely guarantee theoretical or illusory rights, but real and effective rights, without, says the ECtHR, the fact that a claim can be brought under domestic law against dismissal without cause guaranteeing the effectiveness of the right.

But although all this is also very important, in Spain the problem was and is greater, because, despite the right to work and the protection against dismissal without cause being recognised, even in the constitution, my country breaks record after record, unfortunately (these are not to be presumed, rather the opposite) Spain has broken the record for dismissals, approaching a **whopping half a million**, 40 per cent more than last year. Of these, more than 300,000 are disciplinary, **most of them recognised by the company, agreed in a judicial conciliation or declared in a judgement as unfair**.

In Spanish law, the term "inappropriateness" is a euphemism to which we have become too accustomed and, in reality, means dismissal without just cause. Why is this so? In the UGT, through the exhaustive analysis that we have made[2] , with the collaboration of several of the Spanish public universities that have been most known for studying this issue, we are convinced (and convinced) that it is because of the very low cost in Spain of dismissal without cause. If, for individual disciplinary dismissals the average compensation is around 9,512€, reducing to 9,310€ for objective dismissals for cause (year 2021, last statistical information), according to the statistics of the CGPJ, for that same year (2021), it was just over 10,500€, barely 10% more (representing just the average salary of 4 months). Although these amounts are already very low, it is also important to avoid the "statistical trap", insofar as it is an average amount, and there is a large statistical deviation, because there are sectors with few dismissals and high severance payments, and sectors with many dismissals, low salaries, low seniority, which means that the most common, the most frequent severance payment is significantly lower. Moreover, this lack of protection is also age and gender-specific, because it is detrimental to types of contracts in which women are more prevalent. For this reason, the compensation of people with temporary and/or part-time contracts is less than 4,000 Euros.

As I will try to explain immediately, briefly, this worrying and degrading situation of the quality of employment protection in Spain (Spain is the EU country that has most reduced its index of individual protection against dismissal, according to the OECD indicator) is not a coincidence, it is not a fatalism that Spain is experiencing, It has legal explanations (due to a programme of downward reforms of protection against dismissal since 1984, which act with automatisms and legal predeterminations of compensation, without being able to include or introduce criteria that address the real damage resulting from dismissal without cause) and also of a socio-economic nature (high temporality, low wages, high gender gaps, also the precariousness of youth work, etc.).). But you may wonder what the trade unions are doing to put a stop to such a worrying situation. Are they doing nothing, are they impassive in the face of such a serious deterioration of one of the essential guarantees of labour law in all civilised states, certainly the most referential European states in social, economic, cultural terms, etc.?

Some of you are probably aware that a labour reform has recently been carried out in Spain, in 2021, which has had very positive results in terms of job quality culture, reducing by less than half the high rates of temporary employment and its progressive increase in stability. An agreed reform that has sought to recover the rights and balances lost in the labour market and in labour relations due to reforms inspired by neoliberalism and austerity policies, imposed on debtor states such as Spain after the great crisis of 2008-2009. Partly as a result of the unilateral decisions of a government that neither agreed nor listened in the Social Dialogue, but only imposed reforms to devalue protection, especially the cost of dismissal, the cost of arbitrary dismissal, and partly as a reflection of the policies of this Europe of the Markets, which is therefore opposed to, or at least different from, the Social Europe of the Council of Europe and its ESC. The Greek colleagues, partly also the Portuguese, know what I am talking about, because they suffered especially from this

[2] UGT (2023). El coste del despido individual sin causa justificada en España Balance de situación y propuesta de reforma para su adecuación a la carta social europea revisada. Available online.

tension between the two sides of Europe, the EU's mercantile side, the powerful, social side of the Council, the side that is trying to submit to the market**.**

4. No, unfortunately, although it may surprise you. Of course, it was not because UGT did not insist on it. For my union, this issue was, and is, crucial for healthy, mature, quality labour relations, for social reasons of dignified protection against the arbitrariness of companies - which are not isolated cases, according to the data I have given you. But, as you are well aware, an agreed reform has many advantages and also, it is undeniable, disadvantages. One of them was that the issue of dismissal was taboo for Spanish employers and, consequently, it was placed as a red line for the reform. Dismissals are not to be touched", we were told, otherwise there would be no agreement. The union, out of responsibility, accepted the achievement of other advantages, which we did not want to put at risk.

Of course, as they say in legal proceedings, we "reserve civil action" on the subject (here the claim to the CEDS will emerge), because the UGT was not prepared to give up this crucial issue for a rational model of labour regulation, driven by the search for competitiveness, yes, but not at the cost of leaving the fate of the job to the arbitrary decision of an employer. Knowing how little it costs, the employer does not even care to recognise at the moment of dismissal that it is unfair, pays the little it costs and continues with his or her company, and the worker has to face a search for difficult outplacement opportunities in Spain (we are also the EU country with the lowest outplacement rate in the EU) with a small amount of money.

Don't you have a progressive government, because the government didn't go where the unions couldn't because of the employers' refusal, you may ask, perhaps? Yes, the government may be progressive, but on the one hand, it also wanted an agreed reform. Secondly, this reform with a pact was a condition imposed by the European Commission for the distribution of *Next Generation* funds. Therefore, the employers' decision to leave dismissal out of the reform could not be compromised. Once again, the imperatives of the "Europe of the markets (and/or of the merchants)", albeit now with a slightly more solidarity-based face (through the distribution of funds for the financing of development policies), were imposed on the social Europe of the Council.

And why tell us all this, you may ask, and what relevance does it have for the scope of a collective complaint to the ECSRC, one of so many that have been lodged over the years, but which was the first time it had been made by a Spanish trade union? In my opinion, this background is essential to understand (1) **not only the legal and economic value of this collective complaint in Spain**, but also (2) to **be able to understand the new field of strategic trade union action that is opening up with this new (quasi-) judicial remedy**, and to show the (3) **transcendence that** this complaint may have **throughout Europe, including in countries such as Italy or France**, or in the ***Nordic countries*** (always reluctant to grant more social reforms within the framework of the EU). An approach that is directly related to the objectives of this Conference:

(i) assess "the current social rights challenges and the required responses from a Charter perspective, taking into account the human rights architecture of the Council of Europe", as well as

(ii) encourage "the ratification of the European Social Charter by the EU" (it is only committed to the ECHR, but has not yet done so because of resistance from the CJEU) and, above all, to encourage "the ratification of the European Social Charter by

the EU" (it is only committed to the ECHR, but has not yet done so because of resistance from the CJEU) and, above all,

(iii) to establish what kind of relations will be established "between the organs of the Charter, the States" and - I added - those who use it most as petitioners, the trade unions, to contribute to the "improvement of the effective application of the Charter in the light of the texts adopted as part of the reform".

A relationship which, I would add, is not always as transparent as it should be, nor in all cases is it always helpful, but rather detrimental, to the effective and reliable implementation of its instruments.

5. Let's take it one step at a time, as the old man used to say. The Revised European Social Charter (CSER) has an article, Article 24, which recognises it as a fundamental human social right, which the ratifying states must guarantee effectively, without half-measures or constant devaluations:

a) "the right of all workers not to be dismissed without valid reasons relating to their qualifications or conduct, or based on the operational requirements of the undertaking, establishment or service".

b) *"the right of workers dismissed without valid reason* ***to adequate compensation*** *or* ***other appropriate relief***".

Although the right recognised in letter a) allows a very relevant analysis of the causes of dismissal and the existence of a general prohibition of dismissal without just cause (therefore, not only as a system of protection ex post, after dismissal, but also ex ante, before dismissal), I would like to focus on letter b) the "**Right to appropriate redress**" as an **essential content of the European human right to protection** against dismissal, among whose main guarantees is, in turn, "**the right to adequate compensation**".

Of course, you may miss an express mention of the right to reinstatement of the worker when there is no just cause, especially if we compare this article with its original source, ILO Convention 158 on termination of employment, which does expressly recognise it, even as a general rule[3] . Despite its importance, we do not want to go into this issue now, which is very relevant for the "trade union fight for a just right" (as the illustrious German jurist IHERING used to say) for effective protection against arbitrary dismissal or dismissal without just cause. We will only recall that the ECSR has already established a solid doctrine, according to which the right to compulsory

[3] Art. 10 of ILO Convention 158 states: "If the bodies referred to in Article 8 of this Convention conclude that the termination of employment is unjustified and if under national law and practice they are not empowered or do not consider it possible in the circumstances to annul the termination and possibly order or propose the reinstatement of the worker, they shall have the power to order the payment of adequate compensation or such other relief as may be deemed appropriate.

reinstatement is also part of the essential content of Art. 24 CSER, because it has a place as a concrete guarantee of the "right to an appropriate remedy".

But in this paper I want to focus on what is meant by the "**right to adequate compensation**". Undoubtedly, this debate is going through much of Europe (not as a "ghost", but as a genuinely European "first order debate" of social policy and human rights, urged by trade unions all over Europe - as in Spain, pioneered by UGT), in different phases. It did so in the previous decade (2012-2019), in Central and Northern European countries, and in the South[4] .

And it is doing so in this decade as well (2021-2024), with even greater intensity, in countries such as France (with a double conviction[5]) and, of course, Spain (which is awaiting a decision on the Fund, having already completed the previous - tormented - procedure). We are therefore **facing a major European problem (challenge), neither of** Spain alone nor of Southern or Northern Europe, but of the whole of Europe[6] , and therefore of the Council of Europe (it should also be of the EU, although the EU does not, as is well known, have competence in this area, except with regard to collective redundancies and the consultation procedure - Directive 59/98/EC). So, with the debate thus posed, the immediate question, which we will answer just as quickly, is what has the ECSR said on the matter, and has it reached the same basic decision, i.e. case law, in all cases?

I will not keep you on tenterhooks like the old - and good - thrillers, leaving the answer until the end. Fortunately, **the ECSR has so far - and let us hope so** (despite some siren calls in some quarters) - **given the same answer,** creating a solid body of jurisprudence: **everyone had legislation that did not comply with art. 24 CSER and had to reform it.**

6. And why were they non-conformist? Because **in all cases (**in several of them, devaluing their previous legislation, which had been more protective, at the mercy of the neoliberal winds that are also blowing through Europe and the austerity policies of 2012-2015, as in the case of Italy and France**) the compensation is not adequate, as it is automatic, priced by law (downwards)** and without the possibility of taking into account either the real damages derived from the dismissal or the due deterrent effect, so that companies do not feel encouraged to incur in arbitrariness, because it is cheap**.**

Let us explain it in more detail, always in accordance with the strict doctrine of the ECSR, which we understand will be applied to the Spanish case, which maintains a situation analogous to

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[4] EX. Conclusions 2012, Slovenia (this experience is interesting, because almost a decade later, and although the ECSR asked for more information, in the 2020 Conclusions it appreciates that the reforms carried out in that time lead to declare, at least provisionally, conformity with Art. 24 CSER); Background Decision Finnish Society for Social Rights v. Finland, complaint n. 106/2014, delivered on 8 September 2016; Conclusions 2016, Bulgaria; Background Decision Confederazione Generale Italiana del Lavoro (CGIL) v. Italy, complaint n. 158/2017, delivered on 11 September 2019.

[5] Decision on the merits of 23 March 2022, Conféderation Générale de Travail Force Ouvrier (CGT-FO) v. France, n. 160/2018 and Confédération générale du travail v. France, complaint 171/2018. https://hudoc.esc.coe.int/fre/#{%22sort%22:[%22escpublicationdate%20descending%22],%22escdcidentifier%22:[%22cc-160-2018-dmerits-en%22]}. As well as the decision on the merits of 5 July 2022 Syndicat CFDT de la métallurgie de la Meuse v. France, complaint n. 175/219, https://www.coe.int/en/web/european-social-charter/processed-complaints/-/asset_publisher/5GEFkJmH2bYG/content/no-175-2019-syndicat-cfdt-de-la-metallurgie-de-la-meuse-v-france

[6] In relation to CYPRUS, for example, the 2020 Conclusions (non-conformity)

those condemned in Slovenia, Finland, Italy and France. In fact, **legal reasoning 83 of the Basic Decision of 5 July 2022** (the last one issued, for the moment, on this matter) states:

"83. Compensation schemes are deemed to comply with the SSC when they fulfil the following conditions:

a. *Provide for the reimbursement of financial losses incurred between the date of dismissal and the decision of the appeal body*[7]
b. Provide for the possibility of reinstatement of the worker; ***AND/OR***
c. *Provide for compensation of a sufficiently high level to deter the employer and redress the harm suffered by the victim*. Compensation for unfair dismissal should be proportionate to the loss suffered by the victim and sufficiently dissuasive to employers. Any compensation ceilings that may prevent the damages from being proportionate to the loss suffered and sufficiently dissuasive are, in principle, contrary to Article 24 CSE (Finnish Society of Social Rights v. Finland) (...)".

In this way, we can see how the ECSRC considers a system of compensation for unfair dismissal that is taxed and predetermined by law, based both on the use of automatic criteria (seniority and salary) and on the setting of maximum ceilings, to be contrary to the CSER. Predetermination, taxation and ceilings were found in all these legislations and, therefore, motivated the condemnation by the ECSRC. A similar situation in the Spanish case, which also does not provide for a minimum compensation, unlike what happened in its historical-social legislation, so that here we know of a progressive devaluation of protection, which the very significant improvements in collective rights cannot compensate for, insofar as it is not at all easy for collective agreements to provide for improvements in these compensations (they do exist in collective dismissals finalised with an agreement, but that is another matter, insofar as there is cause). [8]

True, the ECSL specifies or specifies that there are ceilings (which was the case in all cases, also in Spain).

"The victim [the worker] ***should be able to claim*** compensation for material damage through other legal channels and the courts competent to award compensation for material and non-material damage should decide within a reasonable time (Conclusions 2012, Slovenia; Conclusions 2012, Finland)".

However, it is also important to bear in mind that, according to the case law of the ECHR, this possibility should not be merely theoretical or symbolic, but effective (the general doctrine of the

[7] Annotation for the Spanish case: In Spain they are called "salarios de tramitación". These wages are available, in their payment, to companies, because if they decide not to reinstate the unfairly dismissed worker, they save the payment of this compensation. This was confirmed in the 2012 reform and could not be changed until now, generating enormous legal uncertainty and a notable weakness in the protection of workers.

[8] Incidentally, it is precisely in this area that there is scope for establishing differentiated compensation based on different personal criteria, such as age, employment opportunities, difficulties of return, etc. Its validity has been established in the Supreme Court's STS Sentence of 24 January 2023. However, this has nothing to do with individual dismissals without cause, where this option does not effectively exist.

ECHR and the ECtHR on the effective recognition of rights that are not purely theoretical, as they become illusory, should be recalled):

1) The courts must have a wide margin to decide in each case all the circumstances of the dismissed worker, so that all the damages that may have been caused are taken into account.

On this reasoning, French law was declared contrary to Art. 24 CSER:

"Moreover, courts have a narrow margin of manoeuvre to decide the case on its merits when considering individuals" (reasoning 89, in fine).[9]

2) This possibility of resorting to alternatives to fixed compensation must be generalised, and can in no way be exceptional or marginal, as was the case in France (and even more marginal in Italy).

On this reasoning, it will dismantle or discredit the French government's argumentation that it had provided a number of examples where workers could obtain additional compensation, citing several Court of Cassation (Supreme Court) decisions in its support. However, for the Committee:

"According to the law and practice of national courts, including the Court of Cassation, other legal avenues are possible in certain limited cases, but do **not apply in all cases of unjustified dismissal**" (Legal reasoning 167 of the Basic Decision of 23 March 2022, Confédération Générale de travail Force Ouvrier (CGT-FO) v France n. 160/2018 and Confédération générale du travail v France, complaint 171/2018).[10]

What about Spain? We have seen that the doctrine of the ECSR is uniform, reiterated and crystalline like the waters of a coral sea. It has maintained it for almost a decade and a half without altering a letter, a dot or a comma, repeating its reasoning in almost the same words. The **national laws being challenged changed, but the ECSR dictated the same words of reproach, after thorough reasoning**. One after the other.

What awaits the UGT in this jurisprudential scenario? Logically, that the ECSR maintains its doctrine unchallenged, in which case there would be no argument for the Basic Decision not to be condemnatory against Spain. The Spanish situation is not only analogous to that of Finland, Italy and France, but also has even greater shortcomings, insofar as it:

A) does not only grant the option for reinstatement or compensation to the violator (the company)
B) but leaves it up to you to decide whether or not to pay the processing wages (consequential loss due to the immediate loss of employment),
C) and lacks legal minimums, so that compensation payments of less than €1,000, i.e. not even one month's minimum wage, are frequent.

[9] https://hudoc.esc.coe.int/eng#{%22sort%22:[%22escpublicationdate%20descending%22],%22escdcidentifier%22:[%22cc-175-2019-dmerits-en%22]}
[10] https://hudoc.esc.coe.int/fre/#{%22sort%22:[%22escpublicationdate%20descending%22],%22escdcidentifier%22:[%22cc-160-2018-dmerits-en%22]}

D) The compensation was reduced from 45 days of salary per year of service and 42 monthly payments to only 33 days of salary per year of service and a limit of 24 monthly payments (art. 56 ET and art. 110 LRJS).

E) Since this system was established in 1980, no additional compensation has ever been granted, and of the hundreds of thousands of judgements of unfair dismissal that have been handed down in the last three years, only twice has additional compensation been granted, and it is considered to be EXCEPTIONAL. This has never been recognised by the SC, not even once.

Consequently, when the legislative situation in Spain is assessed in general terms and analysed point by point, it does not meet a single one of the requirements of the ECHR. But is a guilty verdict a foregone conclusion? Apart from the fact that "one should never sell the bear's skin before it is hunted" (with all due respect for all bears and always within the framework of the greatest respect for nature and the environment), we can see some shadows, or rather ghosts, which reflect a dangerous dynamic of the ECHS after the latest reforms and which are worth commenting on, even briefly, as they are very timely in the context of this High Level Conference and have a dimension that goes far beyond the specific issue of the collective complaint presented by the UGT and even the very regulation of fair dismissal without just cause throughout Europe, in accordance with the demanding and ambitious requirements of Art. 24 CSER, which are not very well reflected in the EU. 24 CSER, which are not reflected in most of the European national legislations.

8. In fact, we have seen in this overview of the jurisprudential doctrine of the ECSRC the formidable ally that the ETUC system can be, through the committed interpretations of guarantee of its highest enforcement body, the ECSRC, for **the effective improvement of trade union action in the** face of all legislation, sometimes driven by EU commitments, which are seduced by the current neoliberal dreams and the cutting of social and labour rights. These policies have had an impact on the (de)regulation of dismissal without cause, facilitating its implementation due to the absence of serious obligations of justification of the cause and the very low cost it has (the financial price of arbitrariness is prioritised, raising the social costs of dismissal - borne by workers, especially in the case of women, very young, or very old - with fewer employment opportunities).

However, these virtues or virtues cannot make us lose sight of the fact that there are significant risks, and even some threats, to the consolidation of this legal tool in defence of human social rights in general, and of the right to appropriate redress in the face of unfair dismissal in particular. The first comes from the weakness of the guarantees of compliance with the ECHR doctrine, which is taken less seriously than the judgments of the ECtHR. To cite one example, the French Court of Cassation's judgment of 11 May 2022, which, in rejecting the plaintiff employee's claim concerning the ceilings set by the Labour Code, found that the ECHR is based on a "programmatic logic" and that its Article 24 has no direct effect in French law. Furthermore, it disallows the decisions of the ECSRC, as they are not of a judicial nature and therefore, it says, are not binding on the States parties. Consequently, it understands that art. 24 CSER, despite being ratified by France, cannot be invoked by workers in disputes between private individuals and, therefore, nor by trade unions in their legal defence of their members and the working class in general.

Of course, this position is a crass error and flatly contradicts the very letter of the CSER, which does establish its binding nature (Article A with respect to Part II, where Art. 24 CSER is), subjecting

the States Parties to the control of the ECSR (Article C). Of course, the ECSR reproved this position of the French SC, reminding it that the CESCR does create binding obligations and that the guarantee to verify compliance or non-compliance lies with the ECSR, not with the national courts. In particular, the ECSR recalls that:

"The Committee considers that it is for the national courts to rule on the question at issue (in casu, adequate compensation) in accordance with the principles it has established in this regard or, as the case may be, it is for the French legislator to provide national courts with the means to apply the appropriate consequences as to the conformity with the Charter of the domestic provisions in question (see, mutais mutandis, Confederation of Swedish Enterprises v. Sweden, complaint n. 12/2002, decision on the merits of 22 May 2003, para. 43).

Although legally the situation is very clear, at the institutional level and in terms of legal policy, including trade union policy, the result is worrying and should lead the Council of Europe to reflect deeply on the matter. First, because this situation creates an unequal understanding of the same issue in the different European countries, so that while the French SC rebels against the doctrine of the ECHR (this is nothing new in this area of international courts, because the German Constitutional Court, for example, has also rebelled more than once against the doctrine of the ECHR), the Italian Constitutional Court and the Italian Court of Cassation do accept the interpretative value of the doctrine of the ECHR as an interpretative criterion. Secondly, to the extent that, instead of the states feeling concerned by this indication of the ECtHR to strengthen the instruments of compliance with the CSER, a tendency is identified, they seek to control the functioning of the ECtHR in a more incisive manner.

Consequently, this High Level Conference is a good place to take note of these dysfunctions and weaknesses in the system of guarantees of effectiveness of the EESRC, in relation to the crucial issue of protection against dismissal without cause, yes, but also in general, with regard to the other issues already presented and those to be presented in the future (UGT - convinced of the need and desirability of strengthening a body of guarantees such as the EESRC - has already presented another collective complaint - on overtime). Although these debates are by no means new, we believe that the time has come to address them with the seriousness and coherence required. In this sense, and only by way of a basic proposal, my organisation believes that it is important, if not strictly necessary, in order to advance the principle of social progress enshrined in the ETUC and its ECHS:

1) Ratification by the EU of the SES, which would avoid the conflicts that sometimes arise between the different mandates of one law (more market-based) and another (more solidarity-based). This was recently proposed by the EESC, and the UGT believes that it is a good way forward and also a way of gaining legal certainty. In this sense, the CJEU could adopt decisions taking into account these fundamental human social rights, reinforcing the provisions of the Community Charter of Fundamental Rights.

2) States should provide the ECSRC with more resources so that it can carry out its important work swiftly and impartially. In the first area, agility, there has been a notable deterioration in the average time taken to resolve collective complaints. Whereas a few years ago the average was 18 months, it now stands at 48 months. Secondly, we are aware that the latest reforms are leading to greater State control of the dynamics of the functioning of the ECSRC,

raising doubts about this impartiality, which would jeopardise the reliability of the ECSRC and the prestige it enjoys today,

3) It is clear that, despite the progressive doctrine of the ECHR and its subjection to the rules and principles of a fair trial ex art. 6 ECHR, there are some obsolete dynamics of action, and a lack of transparency of the ECHR, which should be corrected, by virtue of the requirement of the principle of equality of procedural arms. The current position of state control is not the best response to the reliability or trust that the ECHR deserves in order to be able to continue fulfilling its lofty mission and to continue to enjoy the aforementioned jurisprudential authority.

4) Generally speaking, national courts tend to open a gulf between their consideration of the CESCR and the ECHR and that of the ECHR and the ECtHR, to the clear detriment of the former. Although, as we have seen, the situation is uneven in the different countries and national jurisdictions, a certain disbelief in the binding value of the SSC's mandates and the jurisprudential authority of the doctrine of the ECHR dominates.

Consequently, progress must be made towards greater equality in the consideration due to both branches of human, civil and social rights. This is undoubtedly the conviction cherished and defended by the UGT and the ETUC, and we hope that this High Level Conference will mark a turning point in this direction. We all have a lot at stake in this endeavour, which certainly deserves the joint efforts of the whole of Europe (States, trade unions, employers and citizens). That is our conviction, that is our commitment. Let us trust in the reciprocity of the institutions in these efforts and horizons of social justice.

Madrid march 14th, 2024