EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

24 September 2018

Case Document No. 1

Confédération générale du travail (CGT) c. France
Réclamation n° 171/2018

COMPLAINT

Registered at the Secretariat on 7 September 2018

Complaint by the Confédération Générale du Travail against France, with regard to Articles L. 1235-3 et seq. of the Labour Code, providing for compensation for dismissal without valid reason

I- General background to the complaint

A- Applicability of the revised European Social Charter and the Additional Protocol of 1995 in France, and entitlement of the Confédération générale du travail to submit collective complaints

On 18 October 1968 France signed the European Social Charter of 1961. It signed the Additional Protocol to the European Social Charter of 1995 on the day it was opened for signature, 9 November 1995. On 3 May 1996, it signed the revised European Social Charter, also opened for signature that day. On 7 May 1999, it ratified the Additional Protocol of 1995 and the revised Charter.

According to the declarations contained in the instrument of ratification of the revised European Social Charter of 1996, France considers itself bound by all the Articles in Part II of the revised European Social Charter, including Article 24.

Under Article 1c of the Additional Protocol to the Charter of 9 November 1995, the Confédération Générale du Travail (the "CGT"), a representative trade union, is entitled to lodge a collective complaint. In accordance with Article 38 of the CGT's statutes, the complaint is presented by its Secretary General (see CGT statutes, Appendix 1).

B- Relevant background and law

The provisions on dismissal without real or serious cause were established in French law by Law No. 73-680 of 13 July 1973 on the termination of employment contracts and were codified as follows up to 2017:

Labour Code:
"***Article L. 1235-2*** *If an employee is dismissed for a reason that is not real and serious, the court may propose that he or she be reinstated, with the retention of all of his/her accrued benefits.*

Article L. 1235-*3 If either of the parties objects, the court shall award the employee compensation. This compensation, payable by the employer, must be no less than the last six months' wages. It shall be due without prejudice to any compensation for dismissal provided for by Article L. 1234-9.*

Article L.1235-5 *Dismissal of employees who have been working for an undertaking for less than two years or dismissal in an undertaking which ordinarily employees fewer than eleven employees shall not be covered by the provisions relating to the following matters:*

1° Procedural irregularities, as described in Article L. 1235-2;

2° The lack of a real and serious reason, as provided for in Article L. 1235-3;

3° The reimbursement of unemployment benefit, as provided for by Article L. 1235-4.

In the event of unlawful dismissal, employees may claim compensation corresponding to the damage incurred.

However, in the event of a breach of the provisions of Articles L. 1232-4 and L. 1233-13 relating to assistance of employees by an adviser, the provisions on procedural irregularities set out in Article L. 1235-2 shall apply even to the dismissal of employees who have worked for an undertaking for less than two years and to dismissals by undertakings ordinarily employing fewer than eleven employees".

Accordingly, when they were faced with dismissals without valid reason, courts had to begin by proposing that the employee should be reinstated in the undertaking. If either of the parties objected, compensation for dismissal was awarded to the dismissed employee and charged to the employer. Employees who had worked for at least two years for an undertaking with 11 employees or more were entitled to compensation of no less than 6 months' gross salary, with no upper limit. For employees working for an undertaking for less than two years or for an undertaking employing fewer than 11 employees, compensation was to be calculated according to the damage incurred, with no lower or upper limit.

The courts had unfettered discretion to assess the facts in order to determine the amount of compensation required to offset the damage suffered by dismissed employees.

In 2015, the Minister of the Economy, Industry and Digital Affairs presented a bill on economic growth, activity and equal opportunities. Among the measures proposed was the establishment of a scale for compensation for dismissal without real or serious cause. However, the Constitutional Council ruled that this proposal was unconstitutional.[1] It considered that although this limitation of compensation was not unconstitutional in principle as it could serve a public interest goal, in the case in question it contravened the principle of equality as one of the two criteria taken into account was the size of the undertaking and this criterion had no connection with the damage incurred by the employee.

As a result, the Government established a compensation reference framework through a decree of 2016,[2] including a flat-rate scale depending on the employee's length of service, with the possibility of a one-month increase depending on his/her age and any particular problems he/she had in returning to work. This indicative scale could be taken into account by the courts, but was not binding on them (Articles L. 1235-1 and R. 1235-22, repealed, of the Labour Code – see Appendix 2).

Subsequently, Law No. 2017-1340 of 15 September 2017 entitled the Government, on the basis of Article 38 of the Constitution, to issue orders for measures falling within the sphere of this law to "enhance the predictability and hence the security of employment relationships or the effects of their termination on employees and their employees …". Order No. 2017-1387 of 22 September 2017 on the predictability and increased security of employment relationships amended the provisions on financial compensation for dismissal without valid reason, by incorporating binding compensation bands depending on length of service and the size of the undertaking into Article L. 1235-3 of the Labour Code, which now provides as follows:

"*If an employee is dismissed for a reason that is not real and serious, the court may propose that he or she be reinstated, with the retention of all of his/her accrued benefits.*

If either of the parties objects to such reinstatement, the court shall award the employee compensation, to be covered by the employer, and whose amounts shall lie between the lower and upper limits set in the table below.

[1] Constitutional Council, 5 August 2015, No. 2015-715 DC

[2] Article 1 of Decree No. 2016-1581 of 23 November 2016

Length of service of the employee with the undertaking (in full years)	Minimum compensation (in months of gross salary)	Maximum compensation (in months of gross salary)
0	Not applicable	1
1	1	2
2	3	3.5
3	3	4
4	3	5
5	3	6
6	3	7
7	3	8
8	3	8
9	3	9
10	3	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 and over	3	20

In the event of a dismissal from an undertaking ordinarily employing fewer than eleven employees, the minimum amounts below shall be applicable, by derogation from those set above:

Length of service of the employee with the undertaking (in full years)	**Minimum compensation (in months of gross salary)**
0	Not applicable
1	0.5
2	0.5
3	1
4	1
5	1.5
6	1.5
7	2
8	2
9	2.5
10	2.5

When determining the amount of compensation, the court may take account of any compensation for dismissal awarded other than that referred to in Article L. 1234-9.

This compensation shall be combined, where they apply, with the amounts provided for in Articles L. 1235-12, L. 1235-13 and L. 1235-15, within the limits of the maximum amounts provided for in this article".

Provision was also made in the order for exceptions to these compensation bands:

Article L. 1235-3-1 of the Labour Code:

"Article L. 1235-3 shall not be applicable where the courts find that a dismissal is rendered null and void for one of the grounds set out in the second paragraph of this article. In such cases, where employees do not ask for their employment contract to continue or their reinstatement is impossible, the courts shall grant them compensation, payable by the employer, which must be no less than the last six months' wages.

The grounds referred to in the first paragraph above are as follows:

1° the breach of a fundamental freedom;
2° psychological or sexual harassment in the circumstances described in Articles L. 1152-3 and L. 1153-4;
3° discriminatory dismissal of the type described in Articles L. 1132-4 and L. 1134-4;
4° dismissal following the initiation of legal proceedings in relation to gender equality at work in the circumstances described in Article L. 1144-3, or following the denunciation of crimes or offences;
5° dismissal of a protected employee, as described in Articles L. 2411-1 and L. 2412-1, as a result of the exercise of his or her office;
6° dismissal of an employee in breach of the protections referred to in Articles L. 1225-71 and L. 1226-13.

Compensation shall be payable without prejudice to the payment of the salary which would have been received during the period of invalidity, where it is owed pursuant to the provisions of Article L. 1225-71 and to the protected status granted to certain employees pursuant to Chapter I of Part I of Book IV of the second part of the Labour Code, and without prejudice to any severance pay provided for by statute, collective agreement or contract".

These provisions are a clear breach of Article 24 of the European Social Charter in that they deny employees who are dismissed without valid reason the right to adequate or appropriate relief as they fail to guarantee a right to an effective remedy against the unlawful dismissal.

I) Summary of the complaint.

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."

Yet, the new French legislation, particularly Article L. 1235-3 of the Labour Code, does not make it possible to guarantee adequate compensation or other appropriate relief for workers who have been dismissed for no valid reason (A). Nor do they enable them to enjoy the right to an effective remedy against the dismissal (B).

It should also be mentioned that in its decision of 9 September 1999 on Complaint No. 1/1998, International Commission of Jurists (CIJ) v. Portugal, the European Committee of Social Rights pointed out that the aim of the European Social Charter was to protect rights not merely theoretically, but also in fact. In this connection, the Committee undertakes to ascertain that the Charter is applied properly in France not only in law but also in practice.

A- The lack of adequate compensation or other appropriate relief in French law.

In its decision of 8 September 2016 in Finnish Society of Social Rights v. Finland (Complaint No. 106/2014), the European Committee of Social Rights clarified the situation with regard to Article 24 §1 b) of the European Social Charter. It is specified in paragraph 45 of the decision that compensation for dismissal without valid reason is considered appropriate where compensation systems include the following provisions:

" *- reimbursement of financial losses incurred between the date of dismissal and the decision of the appeal body;*

- possibility of reinstatement and/or

- compensation at a level high enough to dissuade the employer and make good the damage suffered by the employee."

Yet, French law does not provide for the reimbursement of financial losses incurred between the date of dismissal and the decision of the appeal body (1) or for compensation of a sufficient amount to offset the damage suffered by the victim (2) or to deter the employer (3). Nor is there any alternative legal remedy providing for additional compensation (4).

1) No reimbursement of financial losses incurred between the date of dismissal and the decision of the appeal body

French labour law makes no provision for reimbursement of financial losses stemming from dismissals between the date of dismissal and the court decision.

Reimbursement is paid only in certain cases, listed in Article L. 1235-3-1 of the Labour Code, which provides as follows:

"Article L. 1235-3 shall not be applicable where the courts find that a dismissal is rendered null and void for one of the grounds set out in the second paragraph of this article. In such cases, where employees do not ask for their employment contract to continue or their reinstatement is impossible, the courts shall grant them compensation, payable by the employer, which must be no less than the last six months' wages.

The grounds referred to in the first paragraph above are as follows:

1° the breach of a fundamental freedom;
2° psychological or sexual harassment in the circumstances described in Articles L. 1152-3 and L. 1153-4;
3° discriminatory dismissal of the type described in Articles L. 1132-4 and L. 1134-4;
4° dismissal following the initiation of legal proceedings in relation to gender equality at work in the circumstances described in Article L. 1144-3, or following the denunciation of crimes or offences;

5° dismissal of a protected employee, as described in Articles L. 2411-1 and L. 2412-1, as a result of the exercise of his or her office;
6° dismissal of an employee in breach of the protections referred to in Articles L. 1225-71 and L. 1226-13.

Compensation shall be payable without prejudice to the payment of the salary which would have been received during the period of invalidity, where it is owed pursuant to the provisions of Article L. 1225-71 and to the protected status granted to certain employees pursuant to Chapter I of Part I of Book IV of the second part of the Labour Code, and without prejudice to any severance pay provided for by statute, collective agreement or contract".

This makes it clear that compensation is paid only in cases involving offences such as the breach of a fundamental freedom, harassment or discrimination.

Any compensation awarded by French courts therefore lumps together loss of wages between the dismissal date and the court decision, financial losses after the court decision if the employee has not yet found work again, the loss of other earnings that he or she could have anticipated if kept on in the undertaking,[3] exclusion from employment preservation measures,[4] etc., all of which are subject to the upper limits provided for in Article L. 1235-3 of the Labour Code.

It is quite clear that none of this comes near to affording the adequate relief required by Article 24 of the Charter.

2) The lack of compensation of a sufficiently high level to compensate for the damage suffered by the victim

The Committee will note that the compensation paid for dismissal for no valid reason is inadequate because it lies within very narrow compensation bands (a). In addition the courts are authorised to include sums owed for other forms of damage in the amount of this compensation, thus reducing it still further (b). Lastly, compensation is calculated on the sole basis of length of service, thus precluding any personal, individual assessment of the damage suffered by employees (c).

a) <u>Lower and upper limits on compensation incapable of guaranteeing appropriate relief for the damage suffered as a result of dismissal for no valid reason</u>

In its decision of 8 September 2016 concerning Finland, the Committee found that the upper limit on compensation for unfair dismissal could allow situations to persist in which the compensation awarded failed to make good the loss sustained by the employee concerned.[5] This upper limit therefore was incompatible with Article 24 of the Charter.

The provisions of Articles L. 1235-3 et seq. of the French Labour Code are similar to the Finnish law on the subject. Under Finnish law, there is an upper limit of 24 months' gross salary on the compensation

[3] Court of Cassation, Social Affairs Division (Cass. Soc.), 16 January 2008, no. 06-40543, on compensation for loss of opportunity to optimise the capital invested in a provision for participation in surpluses; Cass. Soc. 30 March 2011, no. 09-69515: loss of opportunity to take advantage of a low borrowing rate granted to all employees of a bank. In Cyril Wolmark, "The regulations on compensation for unfair dismissal", *Le Droit ouvrier* legal review, December 2017, no. 833, p.738
[4] Cass. Soc. 14 September 2017, no. 16-11563
[5] Complaint No. 106/2014, para. 49, ECSR, 8 September 2016, Finnish Society of Social Rights v. Finland (no. 106/2014)

that may be awarded for dismissal without valid reason. The upper limit set by French law since 2017 is lower than that provided for in Finland, as it stands at **a maximum of 20 months' gross salary provided that the employee has worked for at least 29 years in an undertaking ordinarily employing 11 persons or more. Moreover, the lowest possible payment is merely 1 month's salary!** This makes it quite clear that the upper limit in France cannot be compatible with the provisions of the Charter either.

The compensation is not just inadequate; it is completely derisory for employees with short lengths of service. This is especially the case in undertakings with fewer than 11 employees, where the derisory upper limit is coupled with a derisory lower limit.

It is made even more laughable by the fact that in French law, it is not possible to combine compensation for dismissal without real and serious cause with compensation for procedural irregularities, as the latter has been subsumed into the former.[6]

A study on compensation in the courts for dismissal without real and serious cause was conducted by the Ministry of Justice in May 2015. It is based on 401 judgments given by appeal courts in October 2014. Of these, 284 related to employees with at least 2 years' service working for an undertaking with 11 employees or more.[7]

Table 7: Compensation awards in terms of months of salary granted according to length of service and circumstances, with due regard for the lower limit of six months' salary
(284 judgments awarding compensation under L. 1235-3)

Length of service	Total	6 months' salary		6 months to 1 year		1 year to 18 months		18 months to 2 years		2 years or more	
		Number	%	Number	%	Number	%	Number	%	Number	%
2 to 5 years	109	17	15.6	53	48.6	26	23.9	7	6.4	6	5.5
5 to 10 years	84	6	7.1	36	42.9	23	27.4	14	16.7	5	6
10 to 15 years	37	0	0	4	10.8	21	56.8	4	10.8	8	21.6
15 to 20 years	24	0	0	5	20.8	10	41.7	3	12.5	6	25
20 years or more	30	1	3.3	0	0	8	26.7	6	20	15	50
Total L.1235-3 judgments	**284**	**24**	**8.5**	**98**	**34.5**	**88**	**31**	**34**	**12**	**40**	**14.1**

When compared with the compensation bands adopted in Article L. 1235-3 of the Labour Code, the results of this study show that the new scales are less advantageous for dismissed employees and do not therefore cover all of the damage suffered:

[6] Cass. Soc., 25 May 1976, no.75-40337

[7] Study by the Ministry of Justice published in May 2015, commissioned by the Ministry of Labour as part of an appraisal on the establishment of a scale for compensation in the labour courts.

- For employees with 5 to 9 years' service, 50% of the decisions assessed gave rise to the payment of compensation higher than the upper limit set by the new scale (six to nine months' salary); specifically, 27.4% were awarded between 12 and 18 months' salary, 16.7% between 18 and 23 months' and 6% 24 months' or more.

- For employees with 10 to 14 years' service, 90% of the decisions assessed gave rise to the payment of compensation higher than the upper limit set by the new scale (10 to 12 months' salary); specifically, 56.8% were awarded between 12 and 18 months' salary, 10.8% between 18 and 23 months' and 21% 24 months' or more.

- For employees with 15 to 19 years' service, 37.5% of the decisions assessed gave rise to the payment of compensation higher than the upper limit set by the new scale (13 to 15 months' salary); specifically, 12.5% were awarded over 18 months' salary and 25% 24 months' or more.

- For employees with more than 20 years' service, at least 50% of the compensation awards were higher than the upper limit set by the new scale (15.5 to 20 months' salary), as 50% thereof ordered employers to pay at least 24 months' salary.

The upper limits set by the new scale are clearly much lower than the maximum amounts awarded by labour courts in 2015, and this is so despite the fact that even these amounts could not be considered high enough to make good all the damage suffered by employees.

It is also worth noting that the new compensation bands are highly variable and unequal. For example, when an employee has 29 years' service in an undertaking with 11 employees or more, compensation may range from 3 to 20 months' gross salary; however, sometimes the band is very narrow, as for employees with 2 years' service, whose compensation payment has to be between 3 and 3.5 months' salary. Furthermore, as one author notes, "the maximum compensation that can be paid to an employee with 40 years' service is the same is that paid to an employee with 29 years' service",[8] whereas the eldest employees are those most likely to experience long-term unemployment.

b) <u>Limitation of the amount of compensation for dismissal without valid reason through the inclusion of separate types of damage</u>

The compensation scale raises a second problem, namely that of the "lumping together" of the various types of damage connected with dismissal. Paragraph 4 of Article L. 1235-3 provides that "when determining the amount of compensation, the court may take account of any compensation for dismissal awarded other than that referred to in Article L. 1234-9". Article L. 1234-9 refers to severance pay, which is owed for any form of dismissal, whether fair or not, save in the event of serious or gross misconduct by the employee.

This means that the calculation of compensation for dismissal without real or serious cause is distorted by the inclusion of other types of compensation for dismissal paid on termination of the employment relationship, particularly contractual or compromise payments, compensation in lieu of notice, compensation for outstanding paid leave, non-competition payments, or extra-legal payments paid under an employment preservation programme (in the event of dismissal for economic reasons). The aim therefore is no longer just to make good the damage caused by dismissal for no valid reason but to group together a series of other unspecified forms of damage connected with dismissal as they occur "at the point of termination". The aim of this grouping process is to set an "overall" amount of compensation and has the effect of reducing the relief awarded for unlawful loss of employment.

[8] J. Mouly, "Compensation for unfair dismissal under pressure from supra-legal standards", *Le Droit ouvrier*, July 2018, No. 840, p. 439.

Once the courts reach the upper limit applying to compensation for dismissal without valid reason, none of the other forms of damage are made good as the awards are not permitted, when taken together, to exceed the statutory limit. As one author notes, "***this means that is not just the principle of full redress that is undermined, but the principle of redress per se***".[9]

In this way French law restricts compensation for dismissal without valid reason just that little bit more, infringing the principle of appropriate relief enshrined in Article 24 of the Charter. It is true that Article L. 1234-9 of the Labour Code does not force courts to include other forms of damage when determining compensation amounts but the mere fact that they may do so is enough to undermine the principle of full compensation.

c) <u>Setting the lower and upper limit on compensation for the damage incurred on the sole basis of the employee's length of service with the undertaking</u>

Article L. 1235-3 also restricts the assessment of the damage suffered by the victim of a dismissal without real or serious cause by applying only one criterion to determine the compensation band to be applied, namely length of service.[10]

By definition, the damage suffered depends on each person's individual and personal circumstances. Assessments should be made on a case-by-case basis so as to ensure that full compensation is guaranteed. However, the sole criterion of length of service is not enough to be able to appraise the employee's personal circumstances. In some situations it is not even linked to the damage suffered. If the intention is for this to be an objective criterion, its actual effect is to prevent a true personal and individual assessment of the damage as it is difficult to imagine how there can be any adequate compensation without taking the employee's situation into proper account, based on other criteria such as age, family circumstances, training and qualifications, job prospects, disability, reintegration, etc. The length of the employment relationship is only one of the criteria taken into account by courts when assessing the damage incurred by employees. After a number of years, employees do have a right to expect a degree of "stability" in their work, but this criterion is far from sufficient.
Only an individual and personal assessment of the situation is capable of guaranteeing dismissed workers adequate compensation for the damage they have suffered, as provided for by Article 24 of the European Social Charter.

It should be noted that the reference framework set up by a Decree of 23 November 2016 and repealed by the Order of 22 September 2017, codified in Article R. 1325-22, provided for an increase in compensation for employees over 50 years of age and "in cases of particular problems for applicants in finding new employment, linked with their personal circumstances and their level of qualifications in view of the situation of the labour market at local level or in the sector of activity concerned".[11] This highlights the many other criteria on which assessments of the damage suffered can be based such as age, personal circumstances, qualifications and the labour market.

Lastly, it is a known fact that the damage suffered by employees when they lose their job is highly dependent on their ability to find a new job – a problem which is compounded if they are dismissed unlawfully. Yet, it is clear that the length-of-service criterion has no direct link with the difficulty of finding another job. Although the average length of a period of unemployment is now 418 days,[12] this length varies greatly according to the age and sex of the person concerned, which are much more relevant criteria where it comes to assessing damage. For instance, average unemployment periods for women are 446 days, compared to 386 days for men, in other words two months more. Likewise, unemployment periods for employees over the age of 50 average 683 days, compared to 229 days for those under 25.

[9] Ibid., p. 440.
[10] Article L. 1235-3 of the Labour Code
[11] Article R. 1325-22 of the Labour Code, repealed.
[12] In the third quarter of 2017, source French employment office (*Pôle emploi*), Statistics, studies and assessments, November 2017, no. 17.050

As to women over 50, on average they remain unemployed for 721 days. Geographical factors also play a major role: in the Ile-de-France region, people are unemployed on average for 386 days, whereas in Hauts-de-France the average figure is 463 days, in other words two and a half months more.[13]

Of course, it could be argued that these criteria may be taken into account by the courts within the framework set for them. However, this argument is invalidated by three considerations:

- firstly, the upper limits are sometimes so low that it is impossible to take account of criteria other than length of service;
- secondly, even the higher upper limits are not enough to enable every criterion to be taken into account;
- lastly, the bands applied are often very narrow (for example, for employees with 5 years' service or more, for whom the band ranges from three months to three and a half months, and for all employees in companies with fewer than 11 employees).

The compensation provided for by the law does not therefore make it possible to compensate dismissed employees properly. Nor does compensation for the damage suffered fulfil its role as a deterrent to employers.

3) The lack of compensation of a sufficiently high level to deter employers

In paragraph 46 of its decision of 2016 concerning Finland, the European Committee of Social Rights stated 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". Yet, the new French legislation seems to provide little deterrent for employers.

Compensation for dismissal is calculated on the basis of two criteria, length of service (for upper and lower limits) and company size (for lower limits). This restriction to two criteria has the effect that the cost of dismissal is highly predictable. Offences by employers now have a cost which they can easily anticipate. The French authorities even provide a "simulator of compensation in the event of unlawful dismissal" on their official website.[14] **This predictability automatically strips compensation of any dissuasive effect** and constitutes a breach of Article 24 of the Charter.

The result of this combination of an upper limit on compensation and the predictability of the cost of dismissal is that workers are afforded little protection from dismissal without real or serious cause.

It could be argued that the upper limits provided for by the law are sufficient to act as a deterrent. However, these limits are extremely low and, as one author notes, they are actually quite close to the amounts "corresponding to statutory compensation for lawful dismissal (which courts can moreover take into account in their decisions), which has never been presented as a deterrent".[15] For instance, the upper limit ranges from 15 days' to one months' salary for companies with fewer than 11 employees and employees with less than five years' service, and is only two months' salary for employees with two years' service in companies with 11 employees or more.

The damage suffered by employees also depends on the seriousness of the offence committed by the employer.

The lower limit of 6 months' salary previously provided for in French law ensured that this "punitive

[13] Source *Pôle emploi*, Statistics, studies and assessments, November 2017, no. 17.050 (Appendix 3)
[14] https://www.service-public.fr/simulateur/calcul/bareme-indemnites-prudhomales
[15] Cyril Wolmark, ibid., p.741

function" was fulfilled. This is the principle of civil liability: anyone guilty of wrongdoing must make good the damage caused by their actions. There is quite clearly a link between misconduct and damage.

Furthermore, although the French Constitutional Council considered it unjustified to place an upper limit on compensation for dismissal on the basis of a criterion linked to the undertaking's size,[16] it did find it possible to place a lower limit on compensation based on this criterion.[17] As one author notes, the constitutional judges held that compensation was also a sanction "because of its pecuniary nature" and that it could "vary according to the financial strength of the beneficiary".[18] Compensation therefore has a punitive function linked to the seriousness of the offence.

The dissuasive effect of compensation is also necessarily linked to the scale of the offence: employers should not be encouraged to commit serious offences because they will have exactly the same consequences as a less serious offence.

Yet, **the drastic lowering of the 6-month threshold and the establishment of extremely low upper limits do not enable the seriousness of the employer's offence to be taken into account.** Furthermore, the courts' room for manoeuvre is too restricted and the compensation bands are too narrow for this aspect to be considered. The result of this will be that an employer dismissing an employee who has refused to agree to a significant increase in his or her working hours, a wage reduction or a transfer to another country without a mobility clause will be punished in the same way as an employer dismissing an employee on too imprecise a ground. And not only will he or she be punished in the same way but, once again, it is possible that he or she will be ordered to pay only a derisory sum if the employee has not been in service for long.

4) The lack of any alternative means of compensation

In paragraph 46 of its decision on Finnish Society of Social Rights v. Finland, the Committee stated that an upper limit on the compensation at issue could be compatible with the Charter if other legal avenues permitted adequate compensation of the damage incurred by complementing the upper limit. The Committee must ascertain therefore whether any alternative means of compensation is available to victims of dismissal without valid reason.

In the case of Finland, the Committee held in paragraph 52 of its decision that national civil liability legislation did not constitute an alternative legal avenue for all victims of dismissal without valid reason because it was only available to victims of discrimination. This legal remedy did not therefore make it possible for all victims of dismissal without valid reason to be compensated (para. 53).

Again, as in Finland, French labour law is incompatible with Article 24 of the Charter as it makes no provision for any alternative legal avenue to provide full compensation for all damage incurred. Article L. 1235-3-1 of the Labour Code simply lists a number of exceptions to the standard compensation bands. They relate to breaches of fundamental freedoms, cases of harassment or discrimination, or dismissal of an employee in an elected or trade union office or with special maternity-related protection or in the event of an employment injury or occupational disease. As in the Finnish case, such scenarios are peripheral, relate only to the most serious cases of unlawful dismissal and do not provide all employees with access to adequate compensation for the damage they have suffered.

[16] Constitutional Council, 5 August 2015, no. 2015-715 DC

[17] Constitutional Council, 13 October 2016, no. 2016-582 QPC: "The intention of the legislation, in providing that the minimum amount of compensation awarded by the courts in the event of a dismissal without real or serious cause is applicable only in companies with eleven employees or more, was to avoid placing too high a burden on companies which it considered economically more vulnerable by adjusting the conditions in which the employer's liability could be incurred. In this way, it was pursuing a general interest goal."

[18] J. Mouly, ibid., p. 436.

As one author notes, other than the aforementioned exceptions, "only damage which is entirely distinct from that deriving from the termination of employment is not covered by the upper limit".[19]

No example of any cases can be supplied to support the argument that alternative legal avenues are available to compensate for damage arising from loss of employment. The correct approach here is to look in concrete terms at the decisions of the French Court of Cassation, not to reason in abstract terms about what the law might allow if the courts decided to alter their case-law, which is still a highly hypothetical circumstance.

The only means of obtaining damages on the basis of the Civil Code lies in the extremely limited application of Article 1231-1 of the Civil Code (formerly Article 1147).[20] This article establishes the general principle of liability but is only used residually in dismissal law, to order employers to pay damages when the dismissal was made in **abusive or vexatious circumstances**. In no respect does the article allow the employee to be compensated on the basis of whether the dismissal was founded or unfounded, which is a matter already addressed by Article L. 1235-3, a special law derogating from the general law enshrined in Article 1231-1. A dismissal may have a valid reason yet be made in abusive or vexatious circumstances,[21] just as it may be ill-founded yet be made in non-vexatious circumstances. Compensation for each of these offences may also be cumulative.

For example, the Court of Cassation decided in one case that a court of appeal, on finding that "the circumstances of the termination concerned had been vexatious **because of the brutality of the dismissal and the animosity** of the new management team towards the employee; and qualifying the employer's misconduct as such, bringing it to the conclusion that this conduct **had caused the employee separate damage from that resulting from the dismissal**, had been right to infer that the employee could claim damages **in addition to compensation for dismissal without real or serious cause**".[22]

This rule is not therefore in any respect an alternative legal avenue making it possible to complement compensation for dismissal without valid reason. It is a means of making good another type of damage.

B) Infringement of the right to an effective remedy before a court

Article L. 1235-3 of the Labour Code also breaches paragraph 2 of Article 24 of the Charter, which provides that "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".

The impugned provisions are in breach of this second paragraph because they do not make it possible to guarantee that victims of dismissal without real or serious cause have an effective remedy against the measure. By restricting the power of courts to exercise unfettered discretion when assessing the damage suffered by a dismissed employee, the Order of 22 September 2017 directly infringes the right of appeal of parties who have been dismissed without valid reason.

In principle the courts must have full discretion to assess the damage stemming from the termination of the employment relationship. They determine the scale thereof with due regard for the principle of adequate compensation for the damage incurred. This discretion is seriously undermined by the establishment of compensation bands. The courts must abide by a predetermined reference

[19] Cyril Wolmark, as cited above.
[20] Article 1231-1 of the Civil Code: "Debtors shall be ordered, where appropriate, to pay damages, either because the obligation has not been fulfilled or because it has been fulfilled belatedly, if they cannot prove that they were prevented from doing so by *force majeure."*
[21] Example: Cass. Soc., 22 June 2016, no. 14-15171: "the validity of a claim for damages for the termination of an employment contract under vexatious conditions is unconnected with the validity of the termination".
[22] Cass. Soc., 12 March 1987, no. 84-41002

framework based on a single criterion, namely the employee's length of service with the undertaking. The courts' discretion to assess damage in an "unfettered" manner is highly restricted.

In practice, these compensation scales result in a standardisation of judicial decisions, which inevitably has an impact on employees' right of appeal. Victims of dismissal without real or serious cause simply abandon the idea of going to court. Everything has been done to discourage employees from exercising their right to appeal and following the various legislative amendments (concerning the contractual termination of employment contracts or procedural rules), there was a drastic decline in the number of appeals, including a 40 to 50% decrease in the first quarter of 2017 in Roubaix and a 41% decrease in Paris. There was also a 66% decline in Créteil between the first quarter of 2016 and the first quarter of 2017 according to Jamila Mansour, the Vice-President of the Bobigny Labour Court.[23]

Since compensation payments are kept relatively low but the costs of legal proceedings (hiring a lawyer, court application fees, etc.) remain the same, this dissuades victims of unfair dismissal from bringing cases before the labour courts. As a result it is the right to appeal *per se* which has been undermined by the reform.

More broadly speaking, labour law as a whole and its respect by employers has been called into question by these rules. As one author puts it, "on a more fundamental level, it is even the basic rules of labour law that are wavering, because it is on the desirability of disputing dismissals that the assertion of many rights by employees depends".[24]

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The new provisions of the French Labour Code on dismissal without real or serious cause have the effect of discouraging employees from exercising their right to appeal. The courts, which formerly had unfettered discretion to assess the damage incurred, now have very little room to manoeuvre. Full compensation of the damage resulting from dismissal without valid reason has been rendered impossible. The European Committee of Social Rights can only find and decide that the impugned provisions fail to comply with Article 24 of the European Social Charter.

[23] http://www.lemonde.fr/politique/article/2017/09/12/prud-hommes-depuis-la-loi-macron-de-2015-le- nombre-des-saisines-est-en-chute_5184387_823448.html#4wFs2cIWP6Cgs1p4.99 http://www.leparisien.fr/economie/prud-hommes-le-nombre-d-affaires-nouvelles-en-chute-libre-03-07-2017- 7105698.php

[24] Cyril Wolmark, op. cit., p. 744