EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

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Case Document No. 2

Unión General de Trabajadores (UGT) v. Spain
Complaint No. 207/2022

OBSERVATIONS BY THE INTERNATIONAL ORGANISATION OF EMPLOYERS (IOE)

Registered at the Secretariat on 1 December 2022

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Geneva, 30 November 2022

COMMENTS BY THE INTERNATIONAL ORGANIZATION OF EMPLOYERS (IOE) ON THE COLLECTIVE COMPLAINT

Unión General de Trabajadores (UGT) v. Spain
Complaint No. 207/2022

1. The secretariat of the European Committee of Social Rights (ECSR) registered on 24 March 2022 the complaint lodged by Unión General de Trabajadores (UGT) against Spain under number 207/2022.

2. By decision of 14 September 2022, the ECSR declared the said complaint admissible and invited, inter alia, the international employers' organisations to submit observations before 30 November 2022.

3. Pursuant to Article 7§2 of the 1995 Additional Protocol to the European Social Charter, the International Organisation of Employers (hereinafter "IOE"), with the assistance of its affiliate the *Confederación Española de Organizaciones Empresariales* (CEOE), submits the present observations.

Introduction

4. The IOE reiterates the importance it attaches to the application of the Charter at national level. Employers are very attentive to the respect and implementation of the Charter's provisions within States.

5. This is why employers attach great importance to communicating their observations to the ECSR, either in the context of collective complaints or in the context of regular reports sent by States.

6. This growing involvement of the IOE (and its members - the more representative employers' organisations at national level) is also a very useful tool for the ECSR, as it provides the Experts with key information about the application of the Charter at national level.

7. The IOE thanks the ECSR in advance for the attention it will give to these observations.

Preliminary point on the subject matter of the claim

8. As a preliminary point, it is necessary to delimit the subject matter of the claim, which, from the outset, is obviously incoherent.

9. Both in the subject matter of the collective claim (section 1) and in the petitions section, only individual dismissals and Article 56 of the Workers' Statute (WS) and Article 110 of the Law Regulating the Labour Jurisdiction (LRLJ) are mentioned, in the following terms:

10. *"Declare that the Spanish law on **individual dismissals** without just cause (Article 56 WS and Article 110 LRLJ, as well as the concordant legislation) is in breach of Article 24 CSER, with regard to the provision of a legally-predetermined system of calculation, disconnected both from the real damages sustained by the employees as a result of an abusive, arbitrary or without just cause dismissal decision (…)."*

11. Therefore, it is crystal clear from the literal wording of the claim that it is not called into question that the compensatory regime for collective dismissals (Article 51 WS), whose minimum compensation is 20 days' salary per year's service, with a ceiling of 12 monthly payments, is calculated based on identical parameters as those established in Article 56 WS (employee's salary and length of service).

12. Based on this legal minimum, provided for in Spanish law for objective dismissals, both individual and collective (Article 53.1 b) WS), it is established, with regard to the latter, that a consultation period should be duly held, the purpose of which is for the parties to negotiate in good faith the possibility of avoiding or reducing collective dismissals and minimise the consequences through the use of accompanying social measures, including the improvement of the legal minimum compensation. Trade Unions usually consider this improvement based on equal parameters for the entire workforce, generally increasing the number of days' compensation per year worked, without different formulas in view of the personal circumstances of each employee (as verified in many Judgments, like the ones delivered by the Supreme Court on 26 March 2019, 21 March 2017, 20 October 2015, and by the National Court on 24 January 2017).

13. However, reverting to the strict subject matter of the claim -the compensatory parameter of individual dismissals-, it is worth highlighting an additional point, i.e. it refers to a figure, that of dismissal without just cause, which does not exist in Spanish law.

14. In Spanish law, dismissal is always causal, either based on the objective causes established in Article 52 WS or on the disciplinary causes established in Article 54 WS (and the applicable collective bargaining agreement), and the existence and sufficiency of such causes are subject to judicial control by the Labour Courts and Tribunals. The foregoing is confirmed, for example, in the Judgment delivered by the High Court of Justice for Andalusia on 14 October 2021:

15. *"In general, it should be recalled that the dismissal of an employee by his/her employer, in accordance with law and the applicable case law doctrine, is an act that is unilateral (as a declaration of intention on the part of the employer, which makes the decision to dismiss irrespective of the employee's wish), constituent (as a result of producing extinctive effects per se, albeit subsequently declared unfair or unreasonable), receptive (…) and causal (as a result of requiring the disciplinary or objective grounds provided for by Law to be declared fair)."*

16. Objective dismissal, with its different types (due to the employee's unexpected incompetence, due to the lack of adaptation to the technical modifications introduced in

the post, or for economic, productive, organisational and technical reasons, following the suppression of the dismissal due to absenteeism), is in any case compensated because, if it is declared fair, the minimum and unavoidable parameter of 20 days' salary per year's service, with a ceiling of 12 monthly payments (plus the legal minimum notice of 15 days' salary) is applied. Furthermore, this compensation must be made available to the employee on the same day as the delivery of the letter of dismissal, irrespective of whether or not he/she agrees with the extinctive act and subsequent complaint, where appropriate.

17. If the objective dismissal is declared unfair, the employer may opt between termination of contract, applying the same compensatory parameter established for unfair disciplinary dismissal (45/33 days' salary per year's service), and the reinstatement of the employee, in that case paying back pay. And, if it is unreasonable, the unavoidable effect is the reinstatement of the employee, also paying the back pay not received from the date of dismissal up to the date on which notice of the Judgment is served. In certain cases, the employee has the option (for example, in the case of workers' representatives and the like).

18. Disciplinary dismissal, based on an employee's gross and negligent breach, according to the classification of causes established in Article 54 WS and the applicable collective bargaining agreement, could be fair (without compensation), unfair (applying the compensatory parameter in dispute or reinstatement, depending on the option selected by the employer, except in cases in which the employee has the option), or unreasonable (with compulsory reinstatement).

19. Indeed, if one takes into account the literal wording of the Articles, the tailoring to the European Social Charter called into question (Article 56 WS and Article 110 LRLJ), the categories of dismissal without just cause, or abusive dismissal, or arbitrary dismissal are not contemplated. And, based on the foregoing, the aim of the collective claim remains a mystery: is it questioning the compensatory parameter for all events of unfair dismissal, or only for the dismissals that the claimants classify as unjust, abusive or arbitrary?; under which of these categories would a dismissal with real and sufficient cause, but based on prescribed facts, fall?; and a dismissal without complying with the formal, legal or conventional prerequisites?; therefore, is the parameter of days' salary for time worked

considered valid for these cases and not for the unjust, abusive or arbitrary dismissals that these terms wish to convey or can hypothetically include?

20. Undoubtedly, and to conclude this preliminary point, as the collective claim is raised, it is unquestionable that the compensatory parameter of days for time worked is not called into question for collective dismissals, only for individual dismissals, even if they are coincident. However, if the estimated compensation is not deemed to be "adequate" in individual dismissals, how could it be maintained in collective dismissals? And if it is not maintained in the latter, if they are declared unlawful by the Courts, would it be necessary to fix the compensation on an individual basis, in accordance with the personal circumstances or the estimated damage sustained by each employee?; would that be feasible in dismissals affecting hundreds of employees? It is sufficient to consider the foregoing to observe the inconsistency of the claim.

21. And, with regard to individual dismissals, compensation is only called into question for cases in which the dismissal is based on "unjust, abusive or arbitrary" causes, cases in respect of which it is deemed that compensation which is not linked to the real damages sustained by the employee is insufficient and inadequate, precisely due to such unjust, abusive or arbitrary action. The arbitrary or abusive dismissals, to which the claimants refer, may, in all probability, fall under a breach of fundamental rights, consequently resulting in annulment, or under a breach of other rights also conducive to the annulment of the dismissal, rights that, as we shall see, are widely provided for in Spanish law. Unfair dismissal is not, *per se*, abusive, unjust or arbitrary; it is simply one in which the alleged cause has not been proven or in which the Judge deems that such cause is insufficient. It should be considered that Spanish law does not directly deem that the employee's incompetence or lack of performance are grounds for dismissal. Such lack of performance must be qualified, very serious and voluntary and continual, which is interpreted in rather restrictive terms by the Courts. It is sufficient to refer to a recent Judgment delivered by a Labour Court, which has been widely publicised in the press, declaring unfair the dismissal of an employee who had been late for work 176 times.

Opposition to the premises on which the collective claim is based

22. The premises listed and described in section 2 of the claim are, in whole or in part, inaccurate.

On reinstatement as an allegedly exceptional solution.

23. It is mentioned that reinstatement, as opposed to compensation, is a solution which, in Spanish law, has, subsequent to successive reforms, an absolutely exceptional nature, and is limited to cases of dismissal which are unreasonable on the grounds of a violation of fundamental rights, the unfair dismissal of workers' representatives and when the applicable collective bargaining agreement recognises the right of option between compensation and reinstatement in favour of the employee.

24. The first one is not correct because cases of annulment and compulsory reinstatement, as previously stated, have gradually increased in the latest statutory reforms, and also as a result of the evolution of the Doctrine laid down by the Spanish Courts, precisely in keeping with the Doctrine laid down by the Court of Justice of the European Union (CJEU).

25. Irrefutable proof that the enumeration is distorted is the very wording of Article 55.5 WS, which regulates many other cases in which the dismissal is unreasonable:

26. *"5. The dismissal, the motive of which is any of the causes of discrimination prohibited in the Constitution or in the Law, or occurs in violation of the employee's fundamental rights and public liberties, shall be unreasonable.*

27. *<u>The dismissal shall also be unreasonable in the following cases</u>:*

a) the dismissal of employees during periods of suspension of the contract of employment due to birth, adoption, guardianship for the purposes of adoption, fostering, risk during pregnancy or risk during breastfeeding referred to in Article 45.1.d) and e), or for illnesses caused by pregnancy, labour or breastfeeding, or the dismissal notice of which is served on a date in such a way that the notice period granted ends in such periods;

b) the dismissal of pregnant employees, as of the date of commencement of the pregnancy up to the commencement of the suspension period referred to in letter a); the dismissal of employees who have requested one of the periods of leave referred to in sections 4, 5 and 6 of Article 37, or are enjoying them, or have requested or are enjoying the leave provided for in Article 46.3; and the dismissal of employees who are victims of domestic violence or sexual violence for exercising the right to effective legal protection or the rights recognised in this Law in order to render effective their protection or their right to integral social care;

c) the dismissal of employees having been reinstated at work upon the expiry of the periods of suspension of contract due to birth, adoption, guardianship for the purposes of adoption or fostering, referred to in Article 45.1.d), provided that more than twelve months have not elapsed as of the date of the birth, adoption, guardianship for the purposes of adoption or fostering."

28. The cases referred to in letters a), b) and c) of section 5 of Article 55 WS were amended by virtue of Article 2.14 of Royal Decree-Law 6/2019, of 1 March, on urgent measures to guarantee equal treatment and opportunities for women and men in employment and occupation.

29. Letter b) was once again amended by virtue of final provision 14.6 of Organic Law 10/2022, of 6 September, on the integral guarantee of sexual freedom.

30. The extension of the cases of annulment continues with Law 15/2022, of 12 July, integral for equal treatment and non-discrimination, whereby it could be concluded that the dismissal of an employee in the situation of temporary disability, or who is suffering from any illness, could be declared unreasonable, pursuant to the provisions of Articles 2.3 and 9. The former establishes that the illness or health condition may not be conducive to differences in treatment, apart from those derived from the very process for the treatment thereof; the latter prohibits establishing limitations, segregations or exclusions as a result of the causes provided for in the Law itself, for access to employment for an employer, in training, remuneration, working hours and other working conditions, as well as in the suspension, dismissal or other grounds of termination of contract. The Law also establishes

the obligation to redress any damage caused by providing compensation and returning the victim to the situation prior to the incident discriminating him/her due to his/her illness.

31. In sections b) and c) of this allegation, it is added that reinstatement also prevails in cases of unfair dismissal in which the option between this and compensation corresponds to the employee, cases that specifically apply to *"persons who are workers' and/or trade union representatives"*, and in cases in which the collective bargaining agreement attributes the exercise of such option to the employee.

32. With regard to the first group, the Trade Union forgets to mention the case of candidates in the process of election, who still do not hold any representative post, but enjoy the same guarantees; it also forgets to mention the protection of the representatives during the year after the expiry of their term of office (Article 68.c) WS).

33. And, with regard to collective bargaining agreements, it is conspicuous how the *"very reduced"* number of those recognising the right of option between reinstatement and compensation in favour of the employee is reported, when it is the Trade Unions themselves that negotiate them.

34. The Trade Union also forgets to mention all those cases in which the Court of Justice of the European Union has justified a change of judicial doctrine in Spain in favour of annulment. Such is the case of the CJEU Judgment of 1 December 2016, which declared that a long-term illness, albeit temporary, could be considered equal to a situation of disability, determining that the termination of contract that was analysed had a clear discriminatory motive and should be considered unreasonable, granting with it special protection in favour of employees in situations of this type.

35. The Courts, both national and the CJEU, have also extended the scope of action in respect of unreasonable dismissals linked to the enjoyment of the rights derived from the birth, adoption, guardianship or fostering of children and rights of conciliation of work and family life (Article 55.5 WS) to situations not expressly provided for in the rule, but which are deemed to be equally protected by the guarantee of annulment and appropriate reinstatement based on a criterion of reflected discrimination.

36. Thus, departing from the CJEU Judgment of 17 July 2008 (Coleman case), which contains this concept of reflected discrimination (when a person is treated less favourably as a result of his/her link or association with another who possesses one of the protected features or characteristics, despite this not concurring in the person who alleges the discriminatory treatment), the Judgment delivered by Madrid High Court of Justice on 7 February 2022 declared the annulment of the disciplinary dismissal of an employee on the grounds of his future status as a father.

37. There is also a plethora of cases in which the Labour Courts have ruled the annulment of disciplinary dismissals in which the evidence of the accused breaches had been obtained in violation of the employee's fundamental rights (such as the right to privacy, in the case of a computer search, which was unlawful as a result of being invasive, in keeping with the well-known Barbulescu test set out in the Judgment delivered by the European Court of Human Rights on 5 September 2017).

38. There is also a plethora of examples in judicial Doctrine of dismissals classified as unreasonable when the company in charge of the assets of the previous holder of the labour relations, and continues its activity, does not honour the rights of the regimen of company succession established in Article 44 WS and Directive 2001/23/EC of the Council, of 12 March 2001, on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

39. Nor does UGT mention the annulment of individual objective dismissals made surpassing the thresholds of Article 51 WS (collective dismissals), rule which regulates the annulment in the following case: *"When, in successive periods of 90 days and in order to avoid the provisions contained in this Article, the company terminates contracts, pursuant to the provisions of Article 52 c), in a number lower than the stipulated thresholds, and without any new causes existing, to justify such action"*.

40. Therefore, is it not accurate that, with the 2012 reform, the cases of annulment were revoked due to defects of form, not only for the aforementioned case, but because several collective bargaining agreements provide for this effect when certain formalities are not

met. That is the case, for example, of the national collective bargaining agreement for the advertising companies' sector (Official State Bulletin of 3 February 2016), whose Article 67 links the effect of annulment to the dismissals that are not processed in accordance with the contradictory procedure regulated in the same rule.

41. Finally, the *guarantee of compensation*, which protects the employee (declaring his/her dismissal unreasonable) who has filed a complaint or claim against the company, or has requested to exercise his/her labour rights, is playing an ever-expanding role in judicial doctrine.

42. In conclusion, the statement that reinstatement is a totally residual option in Spanish law is not formulated in a realistic way, and with a clear omission of numerous cases comprised in law and in judicial doctrine.

On back pay.

43. It is stated that, as a result of the 2012 reform, the obligation to pay back pay in cases of unfair dismissal, was revoked, limiting it to cases of unreasonable dismissal.

44. This statement is also not totally accurate, because such obligation subsists in some cases of unfair dismissal, for instance, if the dismissal is of a workers' representative who opts for compensation, as well as in cases in which the dismissal is declared unfair and in the same Judgment it is agreed to terminate the labour relations with right to compensation because reinstatement is impossible as a result of the closure of the company or the cessation of the company's activity, in which cases it is possible to order back pay, in view of a systematic and finalist interpretation of Article 110.1 b) LRLJ, provided that the employee has raised the request referred to in the said rule (Supreme Court Judgment of 17 February 2021).

45. It is also stated that back pay *"were part of the compensation as a specific type of "lucrum cessans" (loss of profit)"* and that *"to a large extent, this rule entailed Spanish law's attempt to honour the right to compensation tailored to the damages sustained, provided for in Article 10 of ILO Convention 158"*. This association is absolutely incorrect, insofar as back pay does not form part of compensation, as a result of constituting a different and separate

heading, and since the calculation thereof is in no way related to the employee's specific personal circumstances and the greater or lesser damage that the dismissal has caused him/her -the formula, like compensation, is standard, the same for everyone-.

46. Indeed, the deletion of this heading as a result of the 2012 reform, implemented by Royal Decree-Law 3/2012, of 10 February, on urgent measures to reform the labour market, was explained as follows in the Preamble:

47. *"Together with the deletion of "express dismissal" other amendments are introduced in the rules referring to back pay, maintaining the company's obligation to pay it only in cases of the employee's reinstatement, either because the employer has opted for the it in view of a dismissal declared unfair, or as a result of the classification of annulment thereof. In the event of unfair dismissal, in which the employer opts for compensation, the non-payment of back pay is justified on the fact that <u>the duration of the legal proceedings does not appear to be an adequate criterion to compensate the damage entailed in the loss of employment and, furthermore, the employee can access unemployment benefit as of the date on which the decision to terminate becomes effective. Moreover, back pay occasionally acts as an incentive for procedural delaying strategies, in addition to the fact that it ends up becoming a partially-socialized cost, given that the employer can claim from the State the part of such back pay that exceeds 60 days</u>."*

48. In other words, the reason why this heading was revoked was because it depended on the greater or lesser speed with which the legal proceedings for dismissal were settled, as of the filing of the complaint, which is a subject that has nothing whatsoever to do with the specific circumstances of the employee and of the dismissal, with the more or less unfair, more or less abusive or arbitrary nature thereof. And not to mention the lack of connection with the alleged deterrent effect of compensation when it is possible to claim from the State the refund of back pay in the terms of Article 56.5 WS:

49. *"When the Judgment declaring the unfairness of the dismissal is delivered more than ninety working days after the date on which the complaint was filed, <u>the employer may claim from the State the payment of the economic amount referred to in section 2, corresponding to the time exceeding that period of ninety working days</u>."*

50. Not only the legislator, but also the Labour Courts precisely refer to this relationship between the greater or lesser delay in settling the legal proceedings and the figure of back pay, upon validating the revocation thereof, beginning with the Ruling given by the Constitutional Court on 12 February 2014, followed by consolidated Doctrine establishing along the same lines; for all, the Judgment delivered by Madrid High Court of Justice on 3 November 2020, which also discards, based on the following line of reasoning, that the revocation of back pay is a way to make compensation prevail over reinstatement:

51. *"With regard to the recognition of back pay in the option for reinstatement and the omission thereof in the option for compensation, this does not mean, in the opinion of the Constitutional Court, a disproportionate or unreasonable difference in treatment, but rather constitutes an opinion that the ordinary legislator can legitimately adopt without breaching the requirements of the principle of equality, as a result of having an effect on clearly different situations from the perspective of the purpose contemplated.*

52. *(…) Lastly, is it not also possible to deem that the pro labore principle is affected. The alleged incentive effect of the termination as a result of requiring back pay in reinstatement and not in compensation is a presumption of the proposing authority, but under no circumstances constitutes a necessary consequence of the disputed rule, and at no time is the possibility of opting for reinstatement prohibited. On the contrary, the classic option between reinstatement or compensation having been maintained by Royal Decree-Law, in the selection between one or the other the employer may assess very different aspects, without the cost of the back pay in reinstatement -the scope of which is furthermore limited under Article 56 WS- being the only factor to be considered, or leading automatically to a decision to opt for paying compensation, the quantum of which, calculated in view of each employee's salary and length of service, shall constitute another of the possible elements to be taken into account in the decision of each specific case."*

53. Furthermore, in these proceedings the claimants omit any reference to the default interest established in Article 576 of the Spanish Law on Civil Procedure, applicable in the Labour Jurisdiction under Article 251 LRLJ, which accrues *"as of the date on which any Judgment or*

decision ordering the payment of a cash amount was delivered at first instance" in accordance with the *"legal interest of money, plus two points"*.

54. Finally, the revocation of back pay is a subject that really has no bearing on the judgment of adequacy of the compensatory parameter in Spanish law, which is the specific subject-matter of the collective claim. The revocation of back pay in cases in which, subsequent to the dismissal, the termination of the contract of employment is maintained, with payment of compensation, corresponds to the aforementioned criteria of opportunity, and also to a strictly legal criterion, i.e., precisely the extinctive nature of the act of dismissal in Spanish law. The termination of the labour relations is not derived from the Judgment declaring the dismissal fair, but rather from the act of dismissal itself. Only in cases of annulment, or reinstatement of the labour relations subsequent to the unfairness of the dismissal, the termination has not taken effect or the effects thereof have been reverted and, therefore, back pay is due up to the date of the effective reinstatement of the labour relations.

On the reference to the reduction in the amount of unemployment benefit.

55. In addition to the circumstance of the reform of the figure of back pay, is the reduction, implemented by Royal Decree-Law 20/2012, of 13 July, on competitive measures to guarantee budget stability and encourage competitiveness, of unemployment benefit, which drops from 70% of the regulatory base during the first 180 days and 60% as of day 181, to 50% in this second tranche (remaining unchanged in the first).

56. However, once again a relevant part of the subject is omitted, i.e. the fact that, in this same rule, the headings that should be included in the contribution base and, therefore, in the regulatory base, were extended, in order to eliminate the differences that persisted between the tax rules and regulations and Social Security rules and regulations, in such a way that those headings which were considered as income under the tax rules and regulations and, as such, were already taxed, were also included in the contribution base.

57. First, the set of products in kind voluntarily granted by companies was deleted from the list of headings excluded from the contribution base. In 2013 (Royal Decree-Law 16/2013, of 20 December, on measures favouring stable hiring and improving the employability of

employees), there was a second reduction of the headings excluded from the contribution base, i.e., an extension of the contributable and computable headings and, therefore, in the regulatory base (with regard to expense allowances and travelling expenses, and also with regard to the improvements in Social Security benefits, limiting the exclusion to the improvements in the benefit for temporary disability).

58. In any case, once again we are dealing with a subject which has nothing whatsoever to do with the legal dispute as to whether or not the compensatory parameter in Spanish law constitutes an adequate formula with regard to Article 24 of the European Social Charter.

On the alleged non-existence of feasible or effective alternative legal channels.

59. Another erroneous premise from which the collective claim filed by UGT departs is the one regarding the alleged non-existence of *"feasible or effective alternative legal channels"*, which allow for expanding the compensatory parameter established in Article 56 WS (*vide* section 2.3 of the collective claim).

60. The following is mentioned in the claim:

"In Spanish law there are no real and effective alternatives to obtain a valuation of the damages that have been specifically produced as a result of the unfair dismissal, or the unreasonable dismissal (save in exceptional cases -violation of fundamental rights strictu sensu -Articles 14 to 30 SC-, which do not include either a person's right to health or right to dignity). Indeed, theoretically and formally it would be possible to initiate some channel to that end, but either the practical application thereof has been closed by case law, which discards them generally -also for particular cases- as a result of being the special and exclusive labour rule compared to other civil rules, or, even if they are accepted particularly, for very exceptional cases, up until now there is no record of one single case in which it has been applied in a final Judgment."

61. This statement is totally inaccurate, not only with regard to unreasonable dismissals which are linked, in an infinite number of occasions, to compensation for damages, but also with regard to unfair dismissals. Many Judgments refute UGT's statement that, in Spain, it is not

possible to compensate the damages actually sustained by the employee outside the applicable scale (except in cases of compensation for pain and suffering as a result of the violation of fundamental rights *strictu sensu*) and, naturally, invalidate the statement that there is no record of even one single case ruling along these lines.

62. Thus, for example, the following Judgments refute such statements:

63. Judgment delivered by Madrid High Court of Justice on 8 July 2022, which, subsequent to referring to the existence of estimated compensation in Spanish law, clarifies that it does not represent a necessary, full and integral redress of the damages caused, but rather is an adequate compensation, which therefore does not require any evidence whatsoever, admitting the possibility of compensating pain and suffering in the event of unfair disciplinary dismissal (as, in fact, the Judgment ends up recognising for the plaintiff employee):

d) *"(…) traditional case law has found that such compensation legally provided for in those Articles for unfair dismissal has the status of compensation previously estimated by law, which valuation presupposes a regulatory predetermination of the amount of all the damage caused by the illegal loss of the employment, assuming that such system does not correspond to the idea of restitutio ad integrum of the damages caused, but rather to what the legislator considers as "adequate" compensation, without, precisely due to that, having to prove any damage whatsoever derived from the employer's illegal act, but rather applies in any case because it is considered that it is adequate in every case, irrespective of the particular circumstances.*

e) *(…) In view of the aforementioned line of argument, and as already advanced in our initial statement of facts, we understand that, <u>in view of the specific circumstances that have taken place here, including the also unfair enrichment to which we have just referred, Mr. Ángel is entitled to complimentary and reasonable compensation</u> recognised at the time at first instance."*

64. Judgment delivered by the High Court of Justice for Catalonia on 4 July 2022, referring also to another earlier Judgments delivered by the same Court, which rules out that it is a one-off pronouncement:

f) *"In short: we accept that, based on the expounded regulatory substratum, which our legislator itself has already cracked open and admits extensions, it shall be possible, in exceptional circumstances like the one expounded, which incidentally is the one at hand, in which legal and estimated compensation is notoriously insufficient, to fix higher compensation, compensating all of the damages (consequential damage, loss of profit, pain and suffering…) that the unlawful act of dismissal may have caused, in order to eliminate thus the total harmful effects thereof from the legal world.*

g) *However, in any case, to avoid any inkling of arbitrariness regarding the possibility of extending the legal compensation or the specific fixing of the quantum thereof, thus preserving the equality of parties and any possible situation of lack of proper defence, the damages to be compensated and the evidence contradicting the quantum thereof should be specified in the petition of the dismissed employee's complaint.*

h) *We should state, furthermore, that this Court has applied the aforementioned doctrine in later Judgments, such as, for example, the Judgments of 14.7.2021 (appeal 1811/2021) and 13.05.2022 (appeal 500/2022)."*

i) Other Judgments delivered by the same Court ruling along the same lines are the Judgments dated 23 April 2021 and 16 September 2022.

65. Galicia High Court of Justice, in its Judgment of 27 May 2022, has also agreed with the line of reasoning laid down by the High Court of Justice for Catalonia:

j) *"That said, in principle we agree with the interpretation set out in the recent Judgment cited, and therefore we understand that it is possible to carry out a conventional control, which fixes additional compensation in exceptional cases."*

66. Some pronouncements have even used, as a valid criterion for fixing additional compensation, the one established in Article 281 LRLJ, which establishes, for cases of

unfairness and irregular reinstatement, the possibility of the Judge agreeing to the termination of the labour relations, paying compensation for unfair dismissal and back pay, plus additional compensation of 15 days' salary per year's service with a ceiling of 12 monthly payments.

67. Finally, the statement that, in cases in which it is the employee who requests the termination of the contract of employment on the grounds of the employer's breach (under Article 50 WS), the only compensatory scale possible is the same one established for unfair dismissal of 45/33 days' salary per year's service, is also totally inaccurate. Amongst others, the Judgment delivered by the High Court of Justice for Catalonia on 23 April 2021, contradicts the foregoing:

68. *"It is also worth recalling here and in that respect that cassational doctrine in cases of termination under Article 50 WS has been finding -revising its earlier interpretation- that the estimated legal compensation would be insufficient in these cases to redress the damage caused (for all: SSTS UD 07/02/2007 Appeal 1867/2004, 20/09/2007 Appeal 3326/2006, etc.)."*

69. In conclusion, all of the foregoing invalidates UGT's statement that, in Spain, compensation is not possible for the damages caused to the employee as a result of his/her dismissal (save in the case of unreasonable dismissal on the grounds of a violation of fundamental rights).

Historic framework of the evolution of the Spanish regulatory framework with regard to the subject of compensation in dispute.

70. In the collective claim filed by UGT, the entire "historic" analysis of the subject is limited to the regulatory amendment implemented by Royal Decree-Law 3/2012, placing the emphasis on the reduction of the compensatory parameter from 45 to 33 days' salary per year's service (but without mentioning the transitional regimen provided for in the rule itself).

71. However, it is omitted that, traditionally in Spanish law, both at the corporate stages (Primo de Rivera dictatorship, Franco regime) and at the democratic stage (Second Republic),

compensation in cases of unjustified dismissal was fixed either by the Judge or by the corporate bodies (which were maintained, under another name, in the Second Republic), at their free or prudent discretion. The law provided for, in a non-exhaustive manner, some criteria to fix the compensation and established, as a general rule, a minimum and a maximum of the quantum thereof.

72. An objective and automatic compensatory scale was established, for the first time, subsequent to the 1978 Constitution, in the Workers' Statute of 1980. Therefore, **to the use of a predetermined scale for compensation for unfair dismissal (which operates as a penal clause, with early and predetermined liquidation of damages) is something that is linked to the re-establishment of democracy and to the configuration of a fully democratic system of labour relations.**

73. Indeed, it is in the framework of the new democratic system where that scale is established, precisely because it was considered, without divergent statements in that respect, that it constituted a safer, more objective and more beneficial route for employees, to redress the damages caused by unlawful ("unfair" in our terminology) dismissal.

74. At the corporate stage of the Primo de Rivera dictatorship, the Decree Law of 26 November 1926 created the National Corporate Organization. Therein, the Joint Committees heard labour disputes (Decree of 22 July 1928), and, for the dismissal cases processed by them, reinstatement in the case of unjustified dismissal was established as a general rule. However, if such reinstatement did not take place, it was replaced by compensation of between **15 days and 3 months' salary,** specified by the corresponding Committee**.**

75. In the Second Republic, a democratic parenthesis between the Primo de Rivera dictatorship and the Franco regime, the Law on the Contract of Employment established the principle that the damage caused by the unjustified dismissal should be compensated (Article 93). However, the corporate structure was maintained, changing the name of the Joint Committees to Mixed Juries. The Law regulating them (dated 27 November 1931) established, in the case of unjustified dismissal, **compensation of between 15 days' salary and 6 months' salary**. The option between reinstatement or compensation corresponded to the employer, and the specific amount of the compensation was fixed by the President

of the Jury, at **his/her prudent discretion**, the legislator stipulating, as criteria to be taken into account, the nature of the employment, the time over which the services were rendered, the employee's dependants and his/her possibilities of finding a job.

76. In the Franco regime, the 1944 Law on the Contract of Employment, continued to entrust the Judge (Employment Tribunal Judge), now at his/her **prudent discretion**, with compensation, which had to comply with a series of circumstances (ease or difficulty in finding another adequate job, dependants, length of service with the company, etc.), without being able to exceed **one year's salary or minimum wage**. The 1973 Law on Labour Procedure conferred upon the Employment Tribunal Judge the power to fix the compensation, between 15 days' salary and one year's salary.

77. In the democratic transition, the 1976 Law on Labour Relations established the reinstatement of the labour relations, as a general rule, allowing the Judge to replace it with economic compensation of not less than 6 months' salary or 2 months per year's service (multiplying it by 1.5 or 2 in the case of large families, elderly employees and disabled employees).

78. For its part, Decree Law 17/1977, on Labour Relations, introduced for the first time the figure of objective dismissal, compensated, if it was deemed fair, with 1 week's salary per year's service. For unfair or objective dismissal or dismissal on the grounds of a breach of contract, the compensation was fixed by the Employment Tribunal Judge, at his/her **prudent discretion**, in view of a series of criteria (employee's length of service, working conditions, possibility of finding a new job, size and nature of the company, employee's personal and family circumstances), with a **minimum of 2 months' salary and a maximum of 5 years.**

79. As observed, throughout the historic process the fixing of the compensation was entrusted to the "prudent discretion", either of the Judge or of the acting corporate authority. A series of criteria are established (which take into account not only the employee's length of service and his/her salary, but also his/her family circumstances or the possibility of finding another job) and minimums and maximums are fixed. These have evolved from 3 to 6 months and, finally, one year. Only exceptionally, in 1977, a maximum of 5 years was

established, strictly for political reasons because, in the rules during the transition, prior to the democratic Constitution, the regime that disappeared wanted to leave its "social conscience" embedded, in order to try and somehow realize its claims before the new democratic stage. It was a totally preposterous regulation, which had to be revoked rather quickly in order to avoid the damaging effects on employment that immediately began to emerge.

80. During the democratic stage initiated by the 1978 Constitution and, in the legislative field, the 1980 Workers' Statute revoked, for the first time, the judicial discretion in fixing the compensation for unjustified (unfair) dismissal, and established a predetermined objective scale, quantifying the damage derived from the termination of the contract of employment, depending on objective criteria (not subjective criteria, such as the employee's family circumstances, or the more or less foreseeable possibility of finding another job). The foregoing avoids judicial discretion, the lack of compensation for losing a job in cases in which it is not possible to identify or quantify damage (consider the employee who is dismissed having already reached retirement age, which he/she could access with full rights, or the employee who immediately finds another job, if appropriate, with better remuneration conditions), and the problems derived from the difficulty entailed in proving the existence of damage and the quantum thereof. In our tort law , compensation for damage requires that the person seeking compensation should prove the existence of the damage, the quantum thereof and that the person allegedly responsible for the damage actually caused it. In order to avoid these problems, it is possible to reach an agreement, through a *penal clause* (Article 1.152 of the Civil Code), for an early liquidation of damages, releasing the claimant of the damage from having to prove the existence and quantum thereof.

81. And this is what the democratic legislator does: establish through the law a type of penal clause fixing an objective, automatic and predetermined liquidation of the damages derived from unjustified dismissal. The compensation for unjustified dismissal (the justified objective is compensated with 20 days' salary per year's service with a ceiling of 12 monthly payments) becomes 45 days' salary per year's service with a ceiling of 42 months and this

is a fully valid legislative option, which complies with the international mandates requiring adequate compensation in the case of unjustified dismissal.

82. The subsequent reduction of the compensatory scale to 33 days' salary per year's service with a ceiling of 24 monthly payments shall be discussed at a later stage in these allegations.

83. At this stage, it is sufficient to state the paradox that the claim filed by UGT attempts to reverse the democratic legislator's option, to return to the guidelines established in the corporate system and in the Franco dictatorship. It would not be a minor paradox for a decision given by the European Committee of Social Rights, applying the European Social Charter, to introduce a change in the parameters regulating the Spanish system, reversing the democratic legislator's option to return to the regulating options in the dictatorship.

The merits: adaptation of compensation for unfair dismissal regulated in Spanish labour law

Preliminary clarification.

84. Having explained the inaccuracies contained in the collective claim, it is appropriate to revert to the subject matter itself of the petition, which is precisely for the Court to declare that the compensatory parameter established in Article 56 WS is not adequate and, therefore, not in keeping with the wording of Article 24 of the European Social Charter, which provides for the right of employees dismissed without a valid reason to *"adequate compensation"* or other appropriate repair.

85. The *leit motiv* of the claim filed by the Trade Union UGT is that the compensatory parameter established in Article 56 WS cannot be classified as "adequate", insofar as it is equivalent to automatically predetermined compensation based on two parameters alone (salary and length of service), without linking it to the repair of the damage caused.

86. Having thus fixed the subject matter of the claim, it is essential to clarify once again UGT's statement of facts, because it distortedly refers to the 2012 labour reform and how the compensatory module was reduced from 45 to 33 days' salary per year's service, as well as the legal maximum ceiling, in the case of unfair dismissal.

87. And the foregoing is because it does not mention the transitional regimen of the reform whereby the modification of the scale from 45 to 33 days took effect as of 12 February 2012 and honouring the "acquired rights" up to that date as follows (Fifth transitional provision of Royal Decree-Law 3/2012, of 10 February, on urgent measures to reform the labour market):

88. *"Compensation for unfair dismissal of contracts formalised prior to this Royal Decree-Law coming into force, shall be calculated at 45 days' salary per year's service for the period over which the services were rendered prior to such entry into force date and at 33 days' salary per year's service for the period over which the services were rendered thereafter. The resulting amount of compensation may not exceed 720 days' salary, unless a higher number of days results from the calculation of the compensation for the period prior to the entry into force of this Royal Decree-Law, in which case this shall be applied as the maximum amount of compensation, but under no circumstances may such amount be higher than 42 months."*

89. Therefore, for the employees hired prior to 2012 a mixed scale of 45/33 days' salary per year's service is still being used.

Relevant background facts.

90. Secondly, it is necessary to clarify that the immediate precedent of this compensatory parameter of 33 days is to be found precisely in the Interconfederal agreement for employment stability entered into in 1997 between the Employers' Associations (CEOE and CEPYME) and the Trade Unions, UGT and CC.OO. The figure of the contract to encourage permanent hiring, which entailed compensation, in the case of unfair dismissal, of 33 days' salary per year's service, with a ceiling of 24 monthly payments, emerges from this Agreement. In other words, **the germ of the current compensatory regimen in dispute is**

precisely to be found in an Agreement entered into between the Employers' Associations and the Trade Unions, UGT and CC.OO.

91. And, just as this agreed precedent is omitted from the current compensatory regimen, it is omitted that the evolution of the Spanish regulatory system on the subject has been the one described in section 2.5 above. The current regimen is the result of historic evolution in our country: departing from a system in which the fixing of compensation depended on the Judge's free discretion, with the consequent burden of proof and lack of legal certainty for the employee, it shifted, coinciding with the arrival of democracy, to an objective and estimated system, releasing the employee from adducing any evidence whatsoever of the damages caused, which are taken for granted and compensated by virtue of an automatic formula.

92. As well as omitting this evolution, other relevant subjects are omitted, such as the Labour Courts' continual tendency to increase the list of salary headings, which, as such, are computable for the purposes of compensation. One of the most paradigmatic examples is the Judgment delivered by the Supreme Court on 3 May 2017, amending the Doctrine existing up to that date to consider voluntary improvements of Social Security contributions, the contributions paid into life and accident insurance, health insurance, as well as contributions to social welfare plans, and, therefore, not computable as salary for the purposes of compensation, as follows:

93. "That, to be specific, the possible quality of voluntary improvement of Social Security, which indeed can be attributed to the three headings in dispute (life insurance; health insurance; retirement plan) can only be said of the benefits obtainable by virtue of the corresponding insurance, but not attributed to the corresponding premiums, which are salary in kind from which the employee may hypothetically benefit (…)."

94. It is also surprising that an attempt is made to state the bases of the judgment of insufficiency or inadequacy of the compensatory parameter, the fact being that this subject was not discussed at the negotiating *table* prior to the latest labour reform implemented by Royal Decree-Law 32/2021, of 28 December, on urgent measures for labour reform, the guarantee of employment stability and the transformation of the labour market.

95. In the preamble of this Royal Decree-Law it is stressed that this reform resulted from the agreement reached between the Employers' Associations and the Trade Unions, UGT and CC.OO., specifically:

96. "In this ambitious reform, there is also another element differentiating it from the previous ones, which allows for conceiving greater hope in its stability and in achieving the desired effects. The changes are supported by social dialogue. After a long negotiation process, the trade unions and employers' associations CC.OO., UGT, CEOE and CEPYME agreed with the National Government the measures contained in this Royal Decree-Law, thus giving rise to the first labour reform of great importance in the Democracy, with the support of social dialogue."

97. Indeed, it is clear from the claim itself that the parties decided to give priority to the modification of the system for hiring, firmly committing to permanent hiring to reduce the levels of temporary hiring, by revoking the main type of temporary contract in force to that date and restricting the rest, the agreement reached being the result of the equilibrium of expectations and renunciations on both sides in the *"long negotiation process"*. Therefore, the fact that it now attempts, through this claim, to change what was refused (it was in fact agreed not to change it) in such social dialogue process, is but a rupture in the equilibrium reached.

On the judgment of adequacy.

98. Having expounded the foregoing, we shall now fully discuss the dispute on the adequacy of the compensation provided for in Article 56 WS (33 days' salary per year's service, with a ceiling of 24 monthly payments, except for the period prior to February 2012 when a higher ceiling was applicable, up to 42 months at most).

99. It should be recalled that the only thing that the European Social Charter establishes is that the compensation must be *"adequate"* without linking this adjective to the need for compensation dependent on the real damages caused to each employee, in each specific case and in view of his/her personal circumstances.

100. Furthermore, if we refer to Article 10 of Convention nº 158 of the International Labour Organization (ILO) on the termination of employment at the initiative of the employer, adopted in Geneva on 22 June 1982, the instrument of ratification by Spain of which is published in the Official State Bulletin of 29 June 1985, it precisely establishes that, in accordance with national law and practice, every employee whose employment has been terminated, shall be entitled to compensation *"the amount of which shall be based inter alia on length of service and the level of wages"*. In other words, the parameter that Spanish law adopts is precisely the one mentioned by ILO itself for illustration purposes, and not exclusive of others, which may be considered by each national legislator.

101. And, in terms of comparative law, the Spanish compensatory scale is above the one in force in the majority of our neighbouring countries' systems; to be specific:

Portugal:

102. In Portugal, subsequent to the intervention of the European Union, the global costs inherent in terminating contracts of employment were reduced (Law 69/2013, of 30 August). In the case of collective dismissals, or the like, the compensation is twelve days' salary per year's service, with a ceiling of twelve months of the employee's remuneration (the value of which remuneration cannot be higher than twenty times the guaranteed monthly minimum remuneration; if this limit should operate, the maximum compensation is 24 times the guaranteed monthly minimum remuneration). In the case of unlawful or unjustified dismissal, the general rule is the reinstatement of the employee, although the latter can opt for compensation, which the Court fixes in an amount between 15 and 45 days' remuneration per year's service. Standard practice has fixed compensation of 30 days' salary per year's length of service. In any event, the minimum value of the compensation is three months' remuneration.

103. In micro companies, however, the employer can ask the Judge to substitute reinstatement for compensation. If such substitution were legally accepted, the compensation is fixed between thirty and sixty days' remuneration. The full redress of the damages sustained is possible, but proof thereof is required.

France:

104. The French rules on dismissal were reformed by the Regulation dated 22 September 2017. According to such Regulation, in the event of dismissal without a "real and serious" cause, it is appropriate to pay compensation, varying between a minimum of three months and a maximum of twenty months, which is achieved after a length of service of thirty years. In companies with less than eleven employees, the minimum compensation varies between 0.5 and 2.5 months (after ten years' length of service).

Italy:

105. In Italy, subsequent to the latest reform of Article 18 of the Workers' Statute, in the event of unreasonable dismissal it is appropriate to reinstate the employee and pay compensation equivalent to the salary not received as of the date of dismissal up to reinstatement, with a minimum of five months' remuneration. Without prejudice to this compensation, the employee may request, instead of reinstatement, compensation equivalent to fifteen months of the last *de facto* total remuneration (not subject to Social Security contributions), which determines the termination of the contract of employment.

106. In the case of unfair dismissal, either reinstatement paying back pay (with a ceiling of twelve months' *de facto* global salary), or termination of contract paying compensation with a minimum of twelve and a maximum of twenty-four months, which the Judge shall fix, based on good grounds, in view of the employee's length of service, and taking into account the number of employees, the size of the economic activity and the parties' conduct and conditions, is possible, depending on the circumstances.

107. The specific rules on dismissal only apply to companies that employ, in the affected work centre, more than fifteen employees (five in the case of agricultural companies), or also more than fifteen employees in the same municipality. In any event, the rules on dismissal apply to companies employing more than sixty employees.

Germany:

108. The general rule is the reinstatement of the employee in the case of unlawful dismissal. If the employee does not accept reinstatement, it is substituted for compensation with a maximum of twelve months. The very decision substituting reinstatement for compensation can be adopted by the Judge at the request of the employer. In these cases, the Judge's decision is usually in favour of compensation, except in cases of gross or manifest invalidity of the dismissal. Frequently, in practice, negotiations are held between the employer and the employee to reach a higher compensation.

109. If the employee accepts another job, the employer has to pay him/her back pay up to the date of the new employment.

110. Dismissal for corporate reasons, more or less equivalent to our objective dismissal, entails, if it is not challenged by the employee, compensation of fifteen days per year's service.

111. In companies with less than 10 employees, the German Civil Code (BGB) applies. According to such Civil Code (Article 622), the employer can terminate the contract of employment, without requiring a cause, by simply honouring a one-month notice period, if the employee has worked for two years, two months if he/she has worked for five years, three months if he/she has worked for eight years, four months if he/she has worked for ten years, five months if he/she has worked for twelve years, six months if he/she has worked for fifteen years and seven months if he/she has worked for twenty years. If there is just cause for the termination, a two-week notice period is sufficient.

The Netherlands:

112. In The Netherlands, the general rule on compensation is fifteen days per year's service; in 60% of the cases, six months are not exceeded. The maximum compensation is twelve months, rising to fifteen if the employee has at least fifteen years' length of service and 50 years of age, and to eighteen if he/she is older than 50 years of age and has more than 20 years' length of service. In the case of reinstatement, the employee may opt for compensation of fifteen months, disconnected from the length of service.

Great Britain:

113. The system in Great Britain is rather complex, where a basic compensation exists, the maximum of which is one and a half week's salary per year worked, as of 41 years of age, and complimentary compensation in respect of which a maximum ceiling of 52 weeks' salary or 89,493 pounds Sterling, is fixed. The compensation can be reduced to zero, if the employee accepts another job. And it is for the Judge to decide on the possibility of reinstatement.

114. All of these rules, however, only apply to the employees who have rendered services for, at least, two consecutive years.

115. It is important to point out that, of the countries considered, only Spain applies the protection for dismissal to all dependent employees, without qualifications or exclusions, depending on the size of the company. And it is important to take this into account when judging whether our rules on dismissal are tailored to the requirements of international rules (European Social Charter and ILO Convention nº 158).

116. In Great Britain, the protection for dismissal requires that the employee has at least two years' length of service. In Germany, the rules on dismissal only apply to companies with more than ten employees (formerly more than five and, over a certain period of time, the limit was even more than twenty). In France, the rules on dismissal require that the company has more than ten employees and the employee, two years' length of service. In Italy, the threshold is fifteen employees per work centre (the rules on dismissal applying, in any case, to companies with more than sixty employees). In Portugal, micro companies are excluded.

117. In view of the foregoing, we wish to sum up the points raised in the second section above in order to classify correctly the Spanish compensatory scale adequately:

118. It is not true that reinstatement is an absolutely exceptional measure limited to cases of a violation of fundamental rights *strictu sensu*. Many more cases have been mentioned in which the annulment of the dismissal is imposed and, with it, the reinstatement, apart from

the case cited in the claim itself, in which the option between reinstatement and compensation corresponds to the employee as a result of him being a representative;

119. It is not true that the payment of back pay depends on the wish of the employer, because it is under the obligation to pay the same in the case of reinstatement;

120. It is not true that there are no pronouncements proving that a compensatory formula in addition to the one estimated by law is in fact viable. The Judgments cited in these allegations are solid proof thereof;

121. It is not true that the Spanish model encourages or promotes the compensated termination of the contract of employment *vis-à-vis* reinstatement, as a result of back pay usually being more costly than compensation in a system in which legal proceedings and the settlement thereof take several months.

k) And this is because, as regulated in Article 56 WS, if the Judgment declaring the unfairness of the dismissal is delivered when more than 90 working days have elapsed as of the filing of the complaint, the employer is entitled to claim from the State the payment of back pay for the time exceeding such 90-day period.

l) Furthermore, it should be stressed that, whilst the proceedings are being processed, the employee lacks income, is a fallacy, because he/she can rely on unemployment benefit, on the one hand, and because, since it is objective dismissal, the employer is under the obligation to make available to the employee the legal minimum compensation of 20 days' salary per year's service, with a ceiling of 12 months, upon the delivery of the letter of dismissal. In other words, in our system, for objective dismissal, a formula is established covering immediate compensation for the employee, without having to wait for the proceedings to be settled. Objective dismissal, fair or unfair, is always compensated (with at least 20 days per year and up to 45/33 in the case of unfair dismissal).

m) It is also a fallacy to allege that the situation is aggravated when the company decides to appeal to the High Court of Justice, given that, in that case, LRLJ establishes the obligatory

allocation of compensation (replaceable with a bank guarantee), the accrual of procedural interest and, naturally, formulas including provisional enforcement.

n) In short, the model is that of a dismissal (objective) warranting immediate compensatory protection (in addition to unemployment benefit), and another (disciplinary) in which, in the majority of the cases, companies recognise the unfairness during administrative conciliation (before the conciliation, mediation and arbitration authorities, which summon the parties in a short period of time) or during judicial conciliation, if they are in any doubt whatsoever about the competence of their defence. In addition, the data on judicial statistics on dismissals reveal that the compensation agreed in conciliation is, on average, lower than that fixed at Court applying the law, which constitutes a highly relevant piece of circumstantial evidence that the damages sustained by employees as a result of the dismissal are usually less than the compensation resulting from the legal scale and, therefore, entirely covered by it.

o) The way in which effectiveness is detracted from this twofold formula to avoid legal proceedings (administrative conciliation and judicial conciliation, which should obligatorily be implemented by the counsel for the Administration of Justice on the same day as the oral hearing), is totally unreal and devoid of any means of evidence and reliable numerical data.

122. The line of reasoning that the estimated compensation leads companies to make<u>habitual adjustments to the workforce</u> is, to say the least, simplistic.

p) And it is simplistic to accuse companies of resorting to compensated dismissal, with the automatic expense thereof, as a normal and habitual way to adjust the workforce because, in cases of the adjustment of workforce, it is habitual that the thresholds established in Article 51 WS (10 employees in companies with less than 100, 10% in companies with 100 to 300 employees, and 30 employees in companies with a workforce in excess of 300, which limits also apply to work centres with at least 20 employees), are reached or exceeded, which renders it necessary to honour the procedure for collective dismissals and the appropriate consultation period with the workers' representatives. In addition, in this scenario of collective dismissals, added to the compensatory regimen are other economic

charges and non-compensatory improvements (such as paying contributions to the Treasury and the financing of the special agreement with the Social Security for employees aged 55 or over).

q) And, if the option is to implement individual objective dismissals "in dribs and drabs" in an attempt to defraud the application of such thresholds and the guarantees of the collective dismissal process, our law precisely establishes annulment as an automatic effect.

123. Moreover, throughout the claim the claimant plays with statistics and calculations, which are totally misleading.

124. Indeed, upon inserting, on page 11, the table of compensation from this year up to 22 years' length of service, reference is made to the Annual Salary Structure Survey ("*Encuesta Anual de Estructura Salarial*") for 2019, but the minimum wage referred to corresponds to 2022. Not to mention the fact that it identifies the amount of 1,695.92 Euros, i.e., 20,361.04 Euros per annum, as the "average" wage, when the NEI Survey refers to a higher annual average wage in 2019 (24,395.98 Euros).

125. And the claim is riddled with contradictions when it attempts to use examples because, simultaneous to mentioning the fact that is conducive to a young 25-year-old, without great responsibilities, having the same compensation as a 52-year-old with them and potentially greater difficulty in finding a new job, departing from the same salary and length of service in the company, in order to illustrate the inadequacy of the Spanish compensatory scale, it then adduces the argument of the high rate of unemployment amongst young people in order to highlight the same idea. Not to mention that it is incomprehensible how an employee aged 52 years can have the same length of service as an employee aged 25 years. And if he/she has, it will be because he/she has had other previous jobs, for the termination of which he/she will have also been compensated. This merely proves that a system dealing with the particular circumstances of each case, which may be infinite, without generating a high level of legal uncertainty, as well as place further burdens on the employee himself/herself, as he/she would be under the obligation to prove the specific damages sustained, and could even lead to clearly unfair results, is unviable. For instance, if an attempt is made to redress the damage caused, what would be the risk of the Judge finding

such damage cancelled out in the case of an elderly employee who could directly access retirement after the 24-month unemployment benefit has been exhausted?

126. It is also overlooked that precisely many of the cases in which our system imposes the extraordinary guarantee of annulment and reinstatement are related to the status of father and mother and the exercise of work-family life conciliation rights, i.e., precisely employees with dependants or those about to have dependants are especially protected.

127. The insufficiency of the Spanish compensatory scale is also based on the high rate of temporary work, which has precisely been the main objective dealt with in the last agreement between the Employers' Associations and the Trade Unions, the germ of the reform of December 2021, through the elimination of the most-used temporary contract (for works and certain services), the limitation of the cases in which the contract for production circumstances can be used, and the increase in administrative sanctions for fraudulent temporary hiring (of up to 10,000 Euros per contract executed in fraud of law).

128. Therefore, the problem of the excessive temporary nature in our model of hiring labour in the latest reform having been dealt with and resolved from different perspectives and applying several measures, what is not acceptable is that this same argument is still being used misleadingly to justify the alleged insufficiency and inadequacy of the compensatory scale that the parties (Employers' Associations and Trade Unions) agreed not to discuss (in other words, to maintain) in this latest reform.

129. In conclusion, the foregoing leads us to defend that the fixing of a penal clause to predetermine compensation in cases of unfair or insufficiently justified dismissal (because dismissal without just cause does not exist in Spanish law and arbitrary dismissal shall most likely fall under the cases of unreasonable dismissal) is, undoubtedly, a reasonable way of guaranteeing the principle of adequacy of the European Social Charter, as well as other international instruments (such as ILO Convention nº 158, which precisely cites the same parameters of Spanish law, i.e. the employee's salary and length of service).

130. In addition, it presents unquestionable advantages over uncertain compensation based on the circumstances of each case depending on the damages actually caused, submitted

to the principle of obligatory proof and the discretional evaluation by the competent Court (which would be conducive to a scenario of dispersed criteria given the existence of High Courts of Justice in each Autonomous Community).

131. And, apart from the fact that the Spanish model of compensating unfair dismissal complies with the principles established in the European Social Charter, it is based on higher standards than those established in our neighbouring countries (including the Italian model, the potential inadequacy of which is not comparable to the Spanish system due to everything explained in the body of these allegations).

132. It is obvious that the possibility of receiving for unfair dismissal compensation of up to 42 months (the employees benefiting from the transitional regimen of the reform) and, at least, 24, cannot be classified as inadequate, or insufficient, or totally devoid of deterrent capacity. Furthermore, in the cases in which a violation of fundamental rights is found or there are circumstances related to maternity, with the protection of the feminine status and with personal-family conciliation, the petition, and the grant thereof by the Courts, of additional compensation for pain and suffering, is habitual. And it should not be forgotten that the finding of the annulment of the dismissal in these cases has a true *vis expansiva*: not only do cases of the unlawfulness of the evidence obtained by the company exist, but it is also necessary to point out the extremely wide play of the guarantee of compensation, which determines the annulment of the dismissal in which it is possible to observe some type of response to prior claims or to the claim for the exercise of rights by the employee. The cases in which additional compensation for pain and suffering is possible, contrary to what the claimants would have us believe, are, therefore, extremely extensive.

133. And the statement in the claim that, in Spanish law, it is not viable to obtain additional compensation to redress the damages actually sustained, when the legal compensation can be considered as insufficient is, quite simply, false. It is sufficient to read the Judgments delivered by the High Courts of Justice, which we have cited, to observe that the claim for damages not covered by legal compensation is deemed to be legally feasible, with the simple requirement that such damages are requested and quantified in the complaint.

134. Lastly, it is necessary to stress that international undertakings, expressed through general principles, should be understood as reasonably fulfilled through the national laws that establish a mechanism to that end, which may be considered sufficient as well as reasonable. In addition, the national laws must be assessed as a whole and not through the separate consideration of some of their rules.

135. And, naturally, such international undertakings should not serve to impose certain legislative options on national laws (for example, the one regarding reinstatement *vis-à-vis* compensation, the one regarding a system of free judicial discretion *vis-à-vis* a specific and objective formula, the one regarding even the refund of back pay, as the claim appears to suggest).

136. Even less when what is stated would precisely be the return to a system which already had its moment in the Franco dictatorship, the model of which appears to be the one that the claimants are attempting to recover, overlooking the rules and regulations prevailing in our neighbouring democracies.

137. In short, in the current Spanish legal system:

138. there is no figure of dismissal without just cause. The dismissal decision must always be based on an objective cause or on a disciplinary breach committed by the employee. "Unfair dismissal" is not arbitrary dismissal, but rather dismissal in which it is not possible to prove the alleged cause of dismissal or such cause is not deemed sufficient by the Judge;

139. for compensation for dismissal, the legislator has recourse to a system of predetermined damages and quantum of the compensation, which acts objectively and automatically. In dismissals for objective causes there is always, albeit justified, compensation, and in disciplinary dismissals either reinstatement (in cases of annulment) or the option between reinstatement and compensation (in cases of unfair dismissal) is appropriate;

140. the grounds for annulment have an ever-wider role to play, as previously stated and, therein, it is appropriate to fix compensation for pain and suffering, in addition to

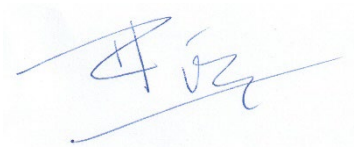
reinstatement or compensation (increased up to 36 months) if reinstatement is impossible; and

141. in cases in which the legal compensation for dismissal can be deemed insufficient to compensate the damages sustained by the employee, it is possible for the Court to fix additional compensation, with the sole requirement that the employee alleges in the complaint the existence of such damages and justifies the quantum of the redress sought in respect thereof.

142. In these conditions, it is incomprehensible how it can be reasonably considered that the Spanish rules and regulations do not comply with the requirements established in Article 24 CSE.

143. And we must point out, in addition to the legal allegations already raised, the claimants' unfair action in breach of good faith, which party, subsequent to signing an important resolution in which, in exchange for other points (mainly, the restriction of the possibility of temporary hiring) it was decided not to modify the rules in force on dismissal, has recourse to this channel to try and obtain claims not dealt with in the social dialogue. The aim of this complaint is to use the European Committee of Social Rights as an instrument to obtain advantages outside the social dialogue process and the corresponding agreements. It would be a disservice to social dialogue and concertation, and therefore to the good governance of labour relations in Spain, if the Committee were to lend itself to such instrumentalization.

144. By virtue of the foregoing, the collective claim filed by the Trade Union UGT should dismissed *in integrum*.



Roberto Suarez Santos
IOE Secretary General

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