EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

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Case Document No. 3

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

SUBMISSIONS OF THE GOVERNMENT ON THE MERITS

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MINISTERIO
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ABOGACÍA GENERAL DEL ESTADO
DIRECCIÓN DEL SERVICIO JURÍDICO DEL ESTADO

SUBDIRECCIÓN GENERAL DE CONSTITUCIONAL Y DERECHOS HUMANOS

TO THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

OBSERVATIONS ON THE MERITS

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COLLECTIVE COMPLAINT
No. 207/2022

Unión General de Trabajadores de España (UGT)

v. Spain

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On 20 April 2022, a collective complaint was notified to the Kingdom of Spain, submitted by the trade union *UNIÓN GENERAL DE TRABAJADORES* (UGT), registered on 24 March 2022 with reference number 207/2022.

On 14 september 2022 the Committee, to which we respectufully address, has adopted a decision declaring the complaint admissible under Article 7.1 of the Additional Protocol of the Revised European Social Charter ("the Charter") providing for a system of collective complaints, and inviting the Spanish Government to submit their written observations on the merits by 30 November 2022, time-limit that has been extended to 31 January 2023 at the request of this party.

Accordingly, on behalf of the Kingdom of Spain and with regard to the collective complaint lodged, we hereby submit our observations on the merits of the complaint within the time-limit granted.

I. DESCRIPTION OF THE COMPLAINT. PRELIMINARY REMARKS TO BE ASSESSED.

1. The complainant organisation has requested to the European Committee on Social Rights (hereinafter, "the Committee" or "ECSR") to declare that the Spanish labour legislation regarding the regulation of the regime to calculate the compensation provided for in Article 56 of the Workers' Statute and Article 110 of the Law regulating Social Jurisdiction, when the dismissal has been declared "unlawful"[1], is inconsistent/incompatible with Article 24 of the Revised European Social Charter ("the Charter").

   In particular, it is argued that inasmuch as **the system of calculation of the compensation in certain cases of "unjustified" dismissal** is legally predetermined "purely automatically", based exclusively –they state- on seniority and fixing a upper ceiling, **the resulting compensation "is unrelated to the reddress of the damage caused", there being no "effective possibility for a court body to assess and recognise a greater damage suffered by the worker as a result of the dismissal"**,

[1] As we shall see, the complainant organisation uses different terminology throughout its submission to refer to the situation of dismissal that allegedly constitutes the factual basis of its claim. In Spanish labour law, however, there are only two categories when it comes to "illegitimate" dismissal: "unfair" dismissal [*despido improcedente*] and "null and void" dismissal. Further on, we will go into this in more detail.

which, in practice, results in a "standarization of a reduced compensation" considered "insufficient to wholly repair the damage resulting from the dismissal" and lacking the "dissuassive effect of the compensation with respect to illegal dismissals".

2. The Spanish Government considers that, for the reasons that we will explain throughout this submission, although it is true that the labour legislation does indeed provide for a system of automatic calculation of compensation based on predetermined factors (salary, seniority), without taking into account the amount of the actual damage caused in each case to the dismissed worker, as the complainant organisation maintains, this does not imply however that the calculation system is not "adequate" within the meaning of Article 24 of the Charter (or that the redress that the system provides to the worker is not "appropriate" in that same sense). As we shall explain, the protective measures that our system articulates for the worker who is subject to dismissal - in particular, dismissal "without a valid reason" -, allow to provide the worker with a remedy that conforms, as we shall see, to the requirements of "adequacy" laid down by the aforementioned provision in its letter (b).

3. Before examining the issues raised, we consider it appropriate, in order to properly focus the subject at issue, to make two preliminary remarks, which are set out below.

Introductory remarks on the terminology used in the complaint.

4. Throughout the text of the complaint, different terminology is used when the complainant refers to the categorisation of the forms of dismissal in the Spanish system.

   Thus, it is stated that in the Spanish system "dismissal without a valid reason or [with] fictitious or unrealistic reason is classified as unfair dismissal" [*despido improcedente*]*, and throughout the text it generally identifies the category of "illegitimate dismissal" with the category of "unfair dismissal" in Spanish law - which is not accurate-, since in the Spanish system, as we shall see, dismissal agreed without the existence or accreditation of a legal cause that justifies it can be classified as unfair dismissal or as null and void dismissal [*despido nulo*], with very different consequences in both cases).

**N. of the T.*: the term *despido improcedente*- translated as "unfair dismissal"- is used throughout this submission within the meaning of Article 56 of the Workers' Statute.

5. It is also striking that different and varied terms are used in an apparently indistinct manner throughout the text to refer to what, according to the complainant organisation, would amount to "unfair dismissal", such as the following:

> "Dismissal without a valid reason or for artificial or feigned reason"
> "Wrongful dismissal"
> "Dismissal declared unlawful"
> "Dismissal without a valid reason, without reason or with an unrealistic or fictious cause"
> "Unjustified dismissal"
> "Unfair dismissal or without sufficient or actual cause"
> "Dismissal without reason"
> "Fraudulent or abusive dismissal"
> "Arbitrary or abusive dismissal"
> "Unjustified, arbitrary or wrongful dismissal"
> "Unjustified or arbitrary dismissal"
> "Arbitrary dismissal or without actual cause"
> "Abusive, unrealistic or fraudulent dismissal"

The lack of uniformity in the use of terminology makes it difficult for the complaint to be properly understood - even more so for the Committee, which is less familiar with the Spanish labour system -, raising doubts as to whether the complainant organisation is referring to the same reality with different terms – that is, the "unfair dismissal" of the Spanish system, in which case and for the sake of clarity, it is not understood that the term is not used directly, or at least one and the same term throughout the text-, or whether it is referring to different categories or realities - in which case the difference between them should be made absolutely clear.

6. Nonetheless, in order to facilitate the Committee's understanding of the issue raised in the complaint, we consider it important to start from the following concepts, which will be developed throughout the present submission:

i. In the Spanish system there are two categories of dismissal, which are perfectly defined by the regulations: "unfair dismissal", and "null and void dismissal", the latter category covering a broad group of cases of termination of the contractual relationship not based on a legally established dismissal ground, which are considered "aggravated" by the concurrent circumstances.

   The complaint raised by the complainant only questions the compatibility of the Spanish regime with Article 24 of the Charter in relation to the treatment of compensation in case of unfair dismissal, recognising the perfect alignment of the

Spanish system with the Charter in relation to the treatment of null and void dismissal.

ii. Many of the situations included in the description made by the complainant as "abusive" dismissal, "fraudulent" dismissal, "arbitrary" dismissal, in reference to the most serious cases of the employer's conduct when unilaterally breaking the employment relationship with the worker, could in practice be included in the category of "null and void dismissal" in the Spanish system.

Moreover, it should be borne in mind that "unfair dismissal" [*despido improcedente*] in the Spanish system encompasses both cases in which the breach of the rules at the time of dismissal is "minor" -such as mere formal irregularities-, as well as cases in which the breach is of a greater significance.

7. In view of the above, in order to examine the complaint, it is not possible to start (as the complainant organisation somewhat ambiguously claims) from the equivalence between "unfair dismissal" in the Spanish system and the different situations referred to as "unlawful dismissal", "unjustified dismissal", "arbitrary or abusive dismissal", etc.

8. Having established that, and for the sake of clarity and better understanding by the Committee to which we respectfully address ourselves, in the present observations we will generally use the terminology corresponding to the existing categories in the Spanish system of "unfair dismissal" and "null and void dismissal"".

Previous remark on the subject-matter of the complaint

9. Throughout the text of the complaint, the complainant organisation makes a number of statements about the Spanish system of protection in the event of dismissal, with regard to different aspects of the Spanish legislation which are criticised in the complaint, such as, in addition to the system for calculating compensation in the event of dismissal - which it considers inadequate because it is legally predetermined and does not take into account the individual situation of the dismissed worker -, the regulation of the right to choose between reinstatement or compensation in the case of "unlawful" dismissal (which generally corresponds to the employer in the case of unfair dismissal, with certain exceptions, while in the case of null dismissal, reinstatement is mandatory), or the regulation of the company's obligation to pay **lost wages** accrued between the dismissal and the judgment declaring it "unlawful" (which takes place in any case when the dismissal is declared null and void, and,

after the 2012 reform, only in the case of an option for reinstatement when the dismissal is declared unfair).

10. Despite making reference to these various aspects, in defining the purpose of the complaint - Part Five "Conclusions and Petitum" - it is requested that "*the Spanish legislation on individual dismissals without just reason ... be declared incompatible with Article 24 of the Charter, as regards the provision of a legally predetermined system of calculation that is not linked both to the real damage suffered by workers as a result of a decision of dismissal that is abusive, arbitrary or without a valid reason dismissal decision or to its chilling effect*".

11. Therefore, the examination to be carried out by the committee must be limited to the **system for calculating compensation for dismissal**, apart from other aspects which are also criticised, and in particular to assessing whether the fact that this system of calculation is legally predetermined, being detached from the "real damage" suffered by the worker, determines its incompatibility with Article 24 of the Charter.

12. We will therefore focus our arguments mainly on this issue.

II. RELEVANT DOMESTIC RULES

1. Regulatory framework of the Spanish system concerning compensation for dismissal.

1.1 Types of dismissal in the Spanish system

1.1.1 Dismissal within the Spanish system of labour relationship:various categories

13. Within the Spanish system of labour relations the dismissal, or the termination of the employment relationship at the will of the employer, is regarded as a "causal" act: the decision to dismiss (whether individual -disciplinary or for objective reasons- or collective), in order to be lawful, must always be based on a legally established cause and must comply with the formal requirements established by law.

The Spanish law does not provide –as in the majority of States, with some well-known exceptions as the USA- for the employer to freely agree to dismiss an employee ("free dismissal"), unless such decision is grounded on a reason provided for in the law.

14. The Spanish system allows the employer to lawfully agree to dismiss an employee in three cases –the first two cases being of an individual nature, while the third one is of a collective nature:

> Disciplinary dismissal, for serious and culpable breach by the workers of their obligations, when any of the reasons provided for in Article 54 of the Workers' Statute apply[2].
>
> Dismissal for objective reasons, when any of the reasons provided for in Article 52 of the Workers' Statute apply[3], in particular, reasons related to

[2] "*Article 54. Disciplinary dismissal.*
1. The work contract may be extinguished by the decision of the employer through dismissal based on a serious and culpable breach by the worker.
2. The following shall be considered instances of contractual breach:
a) Repeated offences, and unjustified absences or lack of punctuality at work.
b) Indiscipline or disobedience at work.
c) Verbal or physical offences to the employer, the persons working in the company, or the family members who live with these.
d) The violation of good faith in contract, as well as abuse of confidence in one's performance of work.
e) Continued and voluntary decrease in normal or agreed-on work performance.
f) Habitual drunkenness or drug dependency where this has negative repercussions at work.
g) Harassment by reason of racial or ethnic origin, religion or convictions, disability, age or sexual orientation and sexual or sexist harassment to the employer or the persons working in the company."

[3] " *Arrticle 52. Contract Extinction for Objective Reasons.*
Contracts may be extinguished:
a) Owing to the worker's known or observed ineptitude subsequent to his actual placement in the company. Any ineptitude existing prior to the completion of a probationary period may not be subsequently raised after the said completion.
b) Owing to the worker's lack of adaptation to technical modifications made on his work post, where said changes are reasonable…
c) Where the objectively-accredited need exists to eliminate work posts for any of the reasons provided for in Article 51.1 of this Law in a number inferior to what is set forth therein …
d) (Repealed)
e) In the case of contracts for an indefinite period of time directly entered into by the Public Administration or by not-for-profit entities towards the execution of certain public plans and programs without stable economic endowments, financed through annual budgetary or out-of-budgetary allocations as a consequence of final external income, due to the insufficiency of the pertinent endowment to maintain the work contract concerned…"

Moreover, Article 51.1 of the WS provides as follows:

> *"[…] **Economic reasons** are understood to exist when the results of the company show a negative economic situation, in cases such as the existence of current or expected losses, or a persistent decline in the level of ordinary income or sales. In any case, the decline shall be understood to be persistent if for three consecutive quarters the level of ordinary income or sales in each quarter is lower than that recorded in the same quarter of the previous year.*
>
> *Technical reasons are understood to occur when there are changes, among others, in the means or instruments of production; organisational reasons when there are changes, among others, in the systems and methods of work of the personnel or in the way of organising production; and*

the worker's behaviour (inability or inadequacy to adapt to work), or for economic, organisational, technical or productive reasons.

Collective dismissal for economic, organisational, technical or productive reasons in compliance with Article 51 of the Workers' Statute[4].

15. In the event of **disciplinary dismissal**, and on the basis that such dismissal is decided because for any of the reasons foreseen for this purpose and in compliance with the formal and procedural requirements laid down by law, the worker's employment relationship is terminated without the right to any compensation payable by the employer.

16. In the event of **dismissal for objective reasons** and **collective dismissal**, also on the basis that such dismissal has been legally determined and complies with the formal and procedural requirements established by law, the employer must compensate the dismissed worker with 20 days of salary per year of service, with a maximum of 12 months, compensation fixed according to the salary and seniority of the worker in the company.

17. **In the event that the worker does not agree with the dismissal,** holding that any of the reasons that lawfully authorise such a decision do not exist –or the formal and procedural requirements laid down by law have not been observed- **the worker may challenge it before the social courts.**

18. The judge hearing the case will deal with the proceedings through the dismissal procedure, which is regulated in Articles 103 to 113 of the Law Regulating Social Jurisdiction[5] (LRSJ, hereinafter), and after due processing must declare a **fair** dismissal, provided that the dismissal has been properly adopted, or otherwise declare the dismissal **unfair** or **null and void**. In particular:

i. **The dismissal will be declared null and void if any of the situations set out in Article 55.5 of the Workers' Statute apply.**

19. In particular, the following are **cases of null and void dismissals**:

productive reasons when there are changes, among others, in the demand for the products or services that the company intends to place on the market… "

[4] In the event of economic, organisational, technical or production-related reasons, and if the dismissal affects a larger number of workers than the number determined in Article 51 of the WS, the dismissal is considered "collective"; otherwise, it is considered "individual". The procedure for agreeing one and the other is different

- **Dismissal based on discriminatory grounds prohibited by the Spanish Constitution or by law**;

- **Dismissal that occurs in violation of the worker's fundamental rights and public freedoms.**

- Dismissal of a pregnant woman, from the date of onset of pregnancy until the date of suspension of the contract due to childbirth[6];

- Dismissal of a worker during the suspension of the contract on grounds of childbirth, adoption, guardianship for the purpose of adoption, foster care, risk during pregnancy or risk during breastfeeding, or sickness caused by pregnancy, confinement or breastfeeding, or notified on a date such that the period of notice granted ends within those periods[7];

- Dismissal of a worker who has applied for or is enjoying any of the permits referred to in Article 37, Sections 4, 5 and 6 of the WS[8][9];

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[5] Law 36/2011, of 10 October, governing Labour Courts .

[6] The dismissal of a pregnant worker can be declared fair if it is proven that one of the legally established reasons is present, and the dismissal is not related to the pregnancy. Otherwise, the dismissal is necessarily null and void, even if the company does not know that the worker is pregnant, or even if the dismissal is not related to the pregnancy. Therefore, the dismissal of a pregnant female worker may be either fair or null and void, but never unfair dismissal

[7] Dismissal agreed during the periods specified may be declared fair if it is proven that one of the legally established causes is present, the dismissal not being related to the exercise of the right to the leave concerned. Therefore, the dismissal of an employee during the periods specified may be either fair or null and void dismissal.

[8] Ídem.

[9] Article 37 of the WS:

> *"4. In cases of birth, adoption, foster care or adoption, in accordance with Article 45.1.d), workers shall be entitled to one hour's leave from work, which may be divided into two periods, to care for the infant until the child reaches the age of nine months. The duration of the leave shall be increased proportionally in cases of birth, adoption, foster care for the purpose of adoption or multiple fostering.*
>
> *The person exercising this right, of their own free will, may replace it by a half-hour reduction in their working day for the same purpose or accumulate it in full working days under the terms provided for in collective bargaining or in the agreement reached with the company, respecting, where applicable, the provisions of the latter.*
>
> *…*
>
> *5. Employees shall have the right to be absent from work for one hour in the event of the premature birth of a son or daughter, or who, for any reason, must remain hospitalised following childbirth. They shall also have the right to reduce their working day up to a maximum of two hours, with a proportional reduction in salary. This leave shall be taken in accordance with the provisions of section 7.*
>
> *6. Whoever, for reasons of legal custody, is charged with the direct care of a child less than twelve years of age or a person with a disability who does not perform any paid activity, shall have the*

- Dismissal of the worker who has applied for or is enjoying the leave provided for in Article 46.3 of the WS[10];

- Dismissal of female workers, victims of gender violence or sexual violence, for exercising their right to effective legal protection or their rights enshrined in the Workers' Statute in order to make effective use of their due protection or their right to comprehensive social assistance;

- Dismissal of workers following their incorporation at work after enjoying the suspension of the contract due to childbirth, adoption, guardianship for the purpose of adoption, foster care.

20. Two aspects regarding the grounds for nullity of dismissal under the Spanish regime should be highlighted:

- In recent years, the legislature has progressively broadened those cases in which dismissal is declared null and void.

  Thus, Law 39/1999[11] has incorporated some cases where the dismissal is rendered null and void linked to pregnancy -since the beginning of it- and maternity and reconciliation of work and family life; a further extension of nullity grounds to periods of suspension of the contract due to paternity, risk during breastfeeding and sickness due to pregnancy, childbirth or breastfeeding, or to a number of permits linked to the work-life balance, with Organic Law 3/2007[12]; or the extension of the period for protection of

right to a reduction of working day, with the proportional decrease in salary of between, at least, one eighth, and at most, half of its duration.
Whoever needs to take charge of the direct care of a family member of up to the second degree of consanguinity or affinity, who, for reasons of age, accident or illness, cannot fend for him/herself and who does not perform any paid activity shall have the same right..
The parent, guardian for the purpose of adoption or permanent foster carer shall be entitled to a reduction in the working day, with a proportional reduction in salary of at least half the duration of the same, for the care, during hospitalisation and continuous treatment, of the minor in their care affected by cancer (malignant tumours, melanomas and carcinomas), or by any other serious illness, involving long-term hospitalisation and requiring the need for direct, continuous and permanent care, accredited by a report from the public health service or administrative health body of the corresponding autonomous community and, as a maximum, until the child or person who has been the object of permanent foster care or guardianship for the purpose of adoption reaches the age of twenty-three …"

[10] Ídem.
[11] Law 39/1999, of 5 November, to promote work-life balance of family and working life for workers.
[12] Organic Act 3/2007, of 22 March, for effective equality between women and men.

objective nullity from 9 to 12 months following the reincorporation of the mother worker provided for in Royal Decree-Law[13].

- A broad interpretation is done by case-law of various cases of nullity provided for by the law in order to ensure the greatest possible protection for workers.

  This pattern appears rather clearly when applying the ground of nullity of the dismissal due to violation of the "indemnity guarantee" recognised in Article 24 of the Spanish Constitution as part of the right to effective legal protection. Indeed, the case-law has made an increasingly broader interpretation of this premise, by applying it not only to those cases in which the dismissal responds to actions taken by the worker such as lodging judicial claims, or preparatory acts previous to the lodging of judicial claims provided for in applicable rules, but also to actions regarding "voluntary" out-of-court complaints –that is, not imposed by labour legislation- lodged by the workers, provided that from the context it can be deduced that is directly aimed at subsequent access to courts, the filing of a complaint with the Labour and Social Security Inspectorate, if it can be regarded as linked to the purpose of preparing or avoiding a court process, or the filing not of an individual claim by the worker (or counsel), but of a collective claim filed by the trade union.

ii) The dismissal is <u>unfair</u> whenever the concurrence of a legal ground justifying it cannot be accredited, or when the formal and procedural requirements are not met, if none of the legally foreseen assumptions that determine the nullity of the dismissal are present.

21. Therefore, it can be stated that in the Spanish regime, **when the dismissal decision is not in conformity with the law**, either for formal or material grounds, the **dismissal** may be declared **null and void**, provided that any of the legally foreseen assumptions for nullity are present, or otherwise declared **unfair**.

22. The average processing duration of a dismissal at first instance in Spain, from the beginning to the end and according to the most recent available information is 7.4 months[14].

[13] As well as those arising from the necessary changes in the Spanish labour law that will bring about the forthcoming transposition of Directive (EU) 2019/1152 on transparent and predictable working conditions in the European Union, as well as Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU.

[14] Information published at the Judiciary web, available at: https://www.poderjudicial.es/cgpj/es/Temas/Transparencia/ch.Estimacion-de-los-tiempos-medios-de-

As per the appeal for reversal[15], the average processing duration is 5 months[1617].

1.1.2 Consecuencias de la calificación del despido como improcedente o como nulo en la normativa vigente

Unfair dismissal

23. In the case where the dismissal has been declared unfair, the employer may generally choose between reinstatement of the worker and compensation for lost wages (that is, the unpaid wages from the date of dismissal until the dismissal is declared unfair), or payment of compensation equivalent to 33 days of salary per year of service with a maximum of 24 monthly payments[18]. In this case, the employment relationship shall be extinguished from the date of termination.

    This is laid down in Article 56, sections 1 and 2 of the WS, and Article 110 of the LRJS.

24. In some cases, the worker has the right to choose between reinstatement or compensation when:

    - The dismissed worker is a legal representative of the workers or a union delegate;
    - The applicable Collective Agreement so provides.

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[15] In accordance with the Spanish procedural system, judgments handed down by Labour Courts in matters of dismissal may be appealed against in an appeal for reversal before the Social Chamber of the High Court of Justice of the corresponding Autonomous Community.

[16] https://www.poderjudicial.es/cgpj/es/Temas/Transparencia/ch.Estimacion-de-los-tiempos-medios-de-duracion-de-los-procedimientos-judiciales.formato1/?idOrg=17&anio=2021&territorio=Espa%C3%B1a&proc=Recursos%20suplicaci%C3%B3n%20Juzgados%20de%20lo%20Social

[17] No specific information is available on the duration of the appeal in dismissal proceedings, which will normally be shorter than the average for other proceedings.

[18] Prior to the 2012 Labour Reform, as we shall see, the amount of compensation was 45 days per year of service, with a maximum of 42 monthly payments, and the employer was also obliged to pay "lost wages" even if the worker choosed compensation instead of reinstatement.
The 2012 Labour Reform therefore brought about a reduction from 45 to 33 days' salary per year of service, and the abolition of the obligation to pay "lost wages" in the case of choosing to pay a compensation for dismissal.

25. Regarding the calculation of the **"regulatory salary" for the purposes of dismissal** (i.e. the amount of the "salary" referred to in Article 56 of the WS when establishing the system for calculating compensation based on 33 days of salary per year of service), which must necessarily be established in the judgment handed down in the dismissal proceedings, numerous doubts have arisen over time, which have been resolved by the courts of justice.

    The case-law on this issue is flexible and favourable to the worker as regards the definition of the concept of "salary" concerning compensation for dismissal. Thus, the Supreme Court holds that the concept of salary for these purposes includes "everything that the worker receives for the provision of his services", regardless of its formal denomination, its composition or its form of payment, recognising in dismissal proceedings, for the purposes of fixing the compensation, the salary nature of different concepts which, during the term of the employment relationship, had not been considered as such[19].

26. The compensation paid for unfair dismissal, as has been pointed out, is automatically calculated in our system –33 days of salary per year of service- being a set amount (it is a fixed amount that does neither admit modulations nor does it operate as a minimum or as a maximum).

27. Rather frequently, it has been requested to the courts that to the amount resulting from the formula legally set out in Article 56 of the WS will be added, in the particular case, a supplemntary amount based on the subsidiary application of civil rules regarding contractual liability (Article 1101 of the Civil Code) justifying this request on the grounds that the specific case has caused special damages in excess of the amount corresponding to the compensation, although case-law has traditionally rejected the possibility of obtaining such additional compensation through the aforementioned means, justifying the specificity of the labour regime with respect to the civil regime, and the impossibility of applying the civil regime as subsidiary legislation.

[19] In this respect, among other concepts that have raised doubts in this respect, the following concepts have been found to be part of the salary concerning the compensation for dismissal:

- The amount of the premium corresponding to a life insurance policy paid by the company;
- The amount of medical insurance;
- The amounts contributed to a retirement plan;
- “Stock options", considering for these purposes salary as the "difference between the price of the share on the market at the time of acquisition and the price of exercising the agreed right" (judgment of the Hight Court of Justice of Madrid of 4/05/2007);
- The "commissions" received;
- The "annual bonus" or incentives for meeting objectives;

28. Nevertheless, with regard to the eventual recognition of additional compensation, it is worth highlighting **the recent inclusion of an avenue, in our system, through the action of courts of justice for a worker affected by unfair dismissal to obtain a compensation higher than that provided for in Article 56 of the WS, in those exceptional cases in which it is found that the actual damage caused is manifestly greater than the compensation payable under that provision**.

It concerns the direct application of Article 24 of the ECSR –or, as the case may be, Article 10 of the Convention no. 158 of the ILO – by the courts hearing the dismissal proceedings, by way of the so-called "conventionality control" which is their responsitility to carry out on domestic legislation. This avenue will be examined in detail below.

Null and void dismissal.

29. In this case, the employer is forced to reinstate the dismissed worker, without the possibility to replace the reinstatement with the compensation. In addition, it implies paying lost wages to the worker:

> As laid down in Article 55.6 ("*Null and void dismissal shall produce the immediate reinstatement of the worker, along with the payment of those wages that s/he stopped receiving*").

30. In the event that the null and void dismissal is carried out with violation of fundamental rights or public freedoms, the legislation also provides for the court to establish, in the judgment issued, an award for damages suffered by the worker, both material and non-pecuniary in nature.

Thus, according to Article 183 of the LRJS:

> *"Article 183. Compensations.*
>
> *1. Where the judgment declares that an infringement has taken place, the court shall rule on the amount of any damages that may be payable to the applicant for discrimination suffered or any other infringement of his/her fundamental rights and civil liberties, on the basis of both the non-material damage linked to the infringement of the fundamental right and the additional damage and losses arising therefrom.*
>
> *2. The court shall rule on the amount of the damage, making a careful determination of it where it is too difficult or costly to prove the exact amount, in order to compensate the victim sufficiently and, so far as*

possible, fully restore him/her to the position he/she was in prior to the damage, and to contribute to the objective of preventing damage.

3. This compensation shall be compatible, where applicable, with that which may correspond to the worker due to the modification or termination of the employment contract or in other cases provided for in the Workers' Statute and other labour regulations.

4. …"

With respect to the calculation of the additional compensation to be imposed on the company in case of violation of fundamental rights, two elements should be highlighted:

i) On the one hand, it should be pointed out that the most recent case-law has been giving a very flexible interpretation of the requirement of accreditation of damages when a violation of a fundamental right is found and the worker invokes non-pecuniary damages. In these cases, it holds that it is sufficient to allege the existence of the damages, "not necessarily requiring greater detail in the statement of objective parameters that are very difficult to meet given the very nature of the non-material damages claimed" (Supreme Court Judgment of 23/02/2022.).

Moreover, in its judgment 61/2021 of 15 March, the Constitutional Court stated that it is *mandatory* for the courts to *always* pronounce on the amount of additional compensation in the event that a violation of fundamental rights is established, as well as to determine how this compensation should be calculated.

ii) On the other hand, in its judgment of 17/12/2015 (case C-407/14), the European Court of Justice assessed in particular whether in a case of discriminatory dismissal (on grounds of sex, in that case), the compensation to be recognised ex Article 183 LRJS should be limited to the damages suffered by the female worker dismissed, or it also should comply a dissuasive function and additionally include "punitive damages" in order to serve as an example to her former employer and others.

The conclusion reached by the Court was to rule out this second option, on the basis that the institution of "punitive damages" forms part of the legal culture only of certain States, and taking into account that this concept is alien to Spanish law. Therefore, in the opinion of the Court of Justice of the European Union, the appropriate remedy as a consequence of

discriminatory dismissal is full compensation for the damage caused to the victim, but without incorporating an additional punitive component into that compensation.

1.2. Historical origin and evolution of the current system for establishing compensation for unfair dismissal.

31. As we will explain below, the system of legal predetermination of compensation for unfair dismissal based on automatic factors (salary and seniority) has been applied in Spain for more than 40 years.

1.2.1 The Workers' Statute

32. The Workers' Statute of 1980 - Law 8/1980, of 10 March -, the result of consensus with the social partners on the fundamental economic and social principles that were to govern the new model of employment relationship, regulated a system of legal determination of compensation for unfair dismissal based on automatic factors (salary and seniority), overcoming the system that had governed in previous stages, of discretionary determination by the judges at their "prudent discretion" according to the different circumstances of each case.

33. According to the new regime (Article 56 of the WS), in case of unfair dismissal, the employer could choose between reinstatement of the worker or the payment of a **compensation of 45 days' salary per year of service**, and the payment of "lost wages".

1.2.2. The 2012 Labour Market Reform

34. The 2012 Labour Reform brought about two important changes in the regulation of the consequences of unfair dismissal:

    i) On the one hand, although the system of lawful predetermination of the compensation for dismissal was maintained, the latter was reduced from 45 to 33 days' salary per year of service, for working periods after 12 February 2012 – for working periods prior to that date the compensation for dismissal of 45 days' salary per year of service remains applicable).

ii) On the other hand, the employers' obligation to pay "lost wages" following unfair dismissal, where employers chose to pay a compensation for dismissal instead of reinstatement, has been abolished.

35. The complainant organisation focuses the object of the complaint on questioning of the conformity of the Spanish system for determining the compensation for dismissal –in particular that resulting from the 2012 Reform- with Article 24 of the Charter, persistently insisting throughout the submission on the reduction of rights that said Reform has entailed for workers.

The formulation of the complaint suggests that the complainant organisation would actually be implicitly acknowledging that the system prior to the 2012 Reform was in line with Article 24 of the Charter, and thus, in turn, it acknowledges that a system which - like the Spanish system prior to the 2012 Reform - does not calculate compensation on the basis of the actual damage suffered by the worker is not necessarily contrary to the Charter.

1.2.3. Assessment of the 2012 Labour Reform by the Spanish Constitutional Court

36. The Spanish Constitutional Court has endorsed the system for determining compensation in the event of unfair dismissal resulting from the 2012 Labour Reform, in the decision [*auto*] of the Plenary of the Constitutional Court of 12/02/2014 (decision no. 43/2014).

37. The origin of the case is to be found in the exception of constitutionality raised by the judge of the Madrid Labour Court no. 34 who, hearing a case for the dismissal – unfair, in the opinion of the court - of a female worker, which occurred after the entry into force of the new dismissal regime - on 30/06/2012-, considered that the regime introduced with the reform suffered from various unconstitutional defects, and was also contrary to certain international instruments for the protection of social rights.

In particular, it questioned, *inter alia*, the compatibility with various provisions of the Constitution, and with Article 10 of ILO Convention No. 158, of the establishment of a system of fixed compensation, based on the application of only two criteria - length of service and salary - "with no margin for the judge to establish [compensation] in accordance with what is established in the proceedings", considering it contrary to the principle of equality to establish different treatment for damages arising from civil liability (contractual or non-contractual) when there is serious misconduct, which must be compensated "with a tendency towards integrity", compared to

damages established in the labour sphere, in which a fixed compensation is established.

38. The Constitutional Court, in Legal Ground 5 of the aforementioned decision, carries out a detailed analysis of the questions raised by the labour court regarding the system for calculating the compensation established in Royal Decree-Law 3/2012, concluding that the doubts as to its constitutionality are unfounded.

39. On the one hand, the Court expressly endorsed the compliance of the system with Article 10 of ILO Convention No. 158, "which, in addition to reinstatement, provides for the payment of adequate compensation as one of the possible responses to unjustified termination", stating that the legislator's choice of a system for establishing compensation with fixed calculation elements (as well as the option for their regulatory review) is lawful, without any arbitrariness in any of the elements considered by the legislator being discernible[20].

40. The Court particularly emphasises that the "current system of fixed compensation for unfair dismissal has been in force in the labour law since the approval of the Workers' Statute Law in 1980", pointing out the advantage of this system of the "removal for the worker in proving damages", or the "unification of the criteria to be applied by the judge and the simplification of the judicial calculation, as well as the legal certainty".

41. Attention is also drawn to the fact that "the legislator itself specifically assesses the situations in which the unlawful dismissal decision of the employer entails qualified damage due to discrimination or violation of fundamental rights and public freedoms, in which case the law orders the dismissal to be classified as null and void, with the right of the worker to the mandatory reinstatement, payment of the lost wages, and compensation derived from this violation to be determined in court".

42. Concerning the alleged violation of the principle of equality, the following passages of the abovementined decision are highlighted:

> *"…We must reject that this rule incurs in "class-biased discrimination ex Article 14 CE …"*

[20] With regard to the factors for calculating compensation, the Court states that: "[...] It is not unreasonable to take into account the worker's salary and length of service in the company as elements of compensation, nor is it unreasonable to apply to those elements a multiplier factor prefixed by law which, in view of the employer's culpability in the termination, is higher in unfair dismissals - in the contested provision, 45 or 33 days". It adds that "nor does this legal formula conflict with Article 10 of ILO Convention No. 158, which limits itself to providing, among other possibilities, for the payment of "adequate compensation", without specifying the elements for its determination".

The "class-biased" argument is made by the court in view of the result derived from comparing the consequences of a wilful or culpable breach of contract in the common and labour law. Such an approach seems to be based on the assimilation of the condition of "worker" - without further details - to "any other personal or social condition or circumstance" to which Article 14 CE extends the prohibition of discrimination. ... It is sufficient to emphasise that, in any case, the differences established in civil and labour law with regard to compensation for termination of contract find objective justification in the autonomous and separate nature of both branches of the legal system. It should not be forgotten that employment contracts are governed by their own rules and principles, different from those applied to civil contracts, and therefore the legal regime for compensation for damages may be different, in particular when it comes to the termination of both contractual links [...] There is no objective inequality, but subjective differences of regime within different and legitimate systems of law as they contemplate subjective positions which are not identical and which therefore share different legal treatment."

43. The regime of unfair dismissal resulting from the 2012 Labour Reform has also been examined by the International Labour Organisation in its Report of 11 June 2014, issued on the basis of Article 24 of the ILO Statute in response to the complaint of non-observance of ILO Convention No. 158 made by the trade union organisations UGT and CCOO after the adoption of the 2021 Labour Reform.

This report, among other aspects which are the subject of complaint, assesses the abolition of the employer's obligation to pay lost wages in the event of unfair dismissal, when the employer opts for compensation instead of reinstatement of the worker, together with the reduction of compensation for unfair dismissal from 45 to 33 days' salary per year of service, and concludes that the measures introduced with the Reform on this point do not mean that the Spanish system violates the standard of protection defined in Article 10 of the Convention, without considering in particular that the compensation set out in Article 56 of the Workers' Statute does not comply with the requirement of adequacy.

2. Different measures adopted by public authorities in the framework of the labour market that result in better worker protection, which are relevant for the overall assessment of the Spanish system of protection against dismissal (and against unfair dismissal, in particular)

44. Article 24 of the Charter, whose violation is imputed to the Spanish system, deals with the right of workers to protection in cases of termination of employment, recognising on the one hand the right of workers to not having 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”, and, on the other, the right of workers whose employment is terminated without a valid reason “to adequate compensation or other appropriate relief”.

45. The concept of “adequate compensation” used by Article 24 of the Charter, as we will see, is a broad concept, which does not identifies itself with the “compensation” to be payed by the employer author of the extinctive decision, in order to assess whether a State's system provides workers with the adequate "redress" required by that provision, the range of protective measures available to workers who lose their jobs must be examined.

46. We also consider that the assessment of the "adequacy" of the compensatory measures in a given system is not complete if it is not accompanied by a supplementary analysis of the measures implemented in that system to favour employment stability and to avoid, precisely, situations of dismissal, thus directly attacking the origin of the problem (the fact that unlawful dismissals occur). In this regard, the complainant organisation refers throughout the complaint to the problem of the "precariousness" of employment in Spain, to low wages, to the high rate of temporary employment in the labour market, and to the fact that, in its view, the Spanish system - in particular, the system for calculating compensation unrelated to actual damages - encourages employers to dismiss.

47. Therefore, in order to make an assessment of the system of protection against dismissal (in particular unfair dismissal) in the Spanish system, which in turn allows an assessment of the "adequacy" of the compensation given to the worker affected by a dismissal decision in the light of Article 24 of the Charter, in addition to taking into account the specific system for calculating the compensation to be received by the worker affected by the dismissal decision, it is necessary to know the set of measures referred to in the two preceding paragraphs: both the existing measures to favour employment stability and avoid situations of dismissal, and the existing measures to protect those who have lost their job.

    With regard to the former, the Spanish Government wishes to highlight the major importance of the recent 2021 Labour Reform, to which we will refer below (section 2.1).

    Regarding the latter, the existence of a sound system of social protection against unemployment in Spain should be highlighted (section 2.2).

2.1 The 2012 Labour Market Reform

48. The complaint, as mentioned above, describes the Spanish labour market as "highly precarious", and specifically refers to the "high temporary nature" of the labour market as a structural problem of the Spanish system, an aspect to which the complainant organisation attaches particular importance when contextualising the complaint.

49. Indeed, with the main idea of fighting against precariousness in the labour market, in 2021 an important reform was promoted, which resulted in *Royal Decree-Law 32/2021, of 28 December, on urgent measures for labour reform, the guarantee of stability in employment and the transformation of the labour market*, which pursues the aforementioned objective -attacking precariousness in employment- through a set of measures.

50. The Reform was adopted in the framework of a process of **social dialogue**, through which **a consensual agreement was reached between the Government and the social partners, in particular with the trade union organisation which is the author** of the present complaint.

51. With regard to the aspects that more specifically affect the guarantee of employment stability - closely related to the protection provided to workers against dismissal -, it should be pointed out that the Reform advocates **the generalisation of the permanent contract, eliminating one of the most widely used contractual modalities in the practice of fixed-term contracts** - the contract for work or service - which is often used fraudulently.

52. On the other hand, **internal flexibility mechanisms** have been strengthened through the new *expediente de regulación de empleo* [labour force reduction scheme] (ERTE, by its Spanish acronym) - incorporating many of the solutions that were adopted during the health crisis and which have enabled a large number of jobs to be maintained in Spain - and the incorporation of a new permanent mechanism that allows companies to adapt to the requirements of the economic situation at any given time, combining the maintenance of employment with staff training and retraining policies, and exemptions and bonuses on social security contributions as a support measure for this maintenance, either through the technique of reduced working hours or through the suspension of the contractual relationship for a duly justified cause.

53. This necessarily results in a reduction in the number of dismissals, ensuring greater employment stability.

54. The highly positive assessment that the UGT trade union has been making of the Reform and its effects is public. By way of illustration, we attach the study carried out by this organisation on "First effects of the labour reform 2021. A blow to temporary employment and improvement of rights" in July 2022[21], in which it is generally stated that the reform is having a very positive impact, increasing the rationality and efficiency of the functioning of labour relations, increasing employment stability and reducing job insecurity.

We highlight the following conclusions contained in the final section of the study:

"…The statistical information available [with the caution required by the short period of time that has elapsed] allows us to draw some ***initial conclusions****, essentially in terms of temporary employment and stability of employment, on which there is* ***broad consensus among the main analysts that they are very positive****, even better than initially expected.*

o There is a strong increase in permanent contracts and a simultaneous fall in temporary contracts, thus significantly reducing the temporary employment rate and increasing the weight of stable employment, and further benefiting some of the population groups and branches of activity that traditionally had more precarious contractual conditions.

o So far in 2022, one in three contracts has been permanent (almost one in two if the April to June quarter is taken into account), while the annual average from 1985 to 2021 was only 8.1%, and the year with the highest percentage was 2007, with only 11.9%. ***The weight of permanent contracts has increased fivefold****.*

o ***The temporary employment rate falls to its lowest level, or, in other words, permanent employment is gaining weight****. The rate has fallen steadily since the beginning of the year, reaching its lowest level of 20.2% in June. In the six months of the year the average rate is 23.8%, also the lowest annual rate since the beginning of the series in 2005.*

o ***This positive impact is even greater among young people*** *(under 29), whose temporary employment rate in June 2022 (33.9%) has fallen by 18 points since December 2021, and by 20.4 points compared to June 2019.*

o While the number of employed people with permanent contracts has increased, ***there has been a significant drop in part-time temporary contracts - the most precarious type of contract*** *- which have fallen by 35% (-528 thousand less) since the labour reform came into force.*

[21] https://www.ugt.es/sites/default/files/no_40_-_220718_primeros_efectos_de_la_reforma_laboral.pdf

o As expected, there is a greater quantitative impact on those activities that traditionally employ more temporary workers, such as catering industry, commerce and construction.

o This is by far the reform that has had the best results in the first six months of the last four years (2006, 2010, 2012 and 2021). Permanent contracts increased by 14.7% and the temporary employment rate fell by 7.8 points, in contrast to the worst of the four, that of 2012, after which the temporary employment rate rose by 1.6% while the number of workers with stable contracts fell by 2.6%

*o The open-ended contract [*fijo discontinuo*] is gaining prominence, generating stability and rights over the previous temporary ones …*

o Short-term contracts are losing weight. Those lasting less than one month fell by 7.1 percentage points compared to the pre-Pandemic stage, and those lasting less than 7 days fell by 8 points.

o With regard to ***internal flexibility****, there seems to be a -still emerging-* ***preference among companies for ERTEs as a mechanism for adjustment and internal flexibility, replacing dismissals****. In a scenario marked by the economic slowdown and uncertainty in the international context, collective dismissals fell by 61.7% in the first four months of 2022 compared with the previous year, while since the new RED mechanism came into force (17 March) there has been a certain increase in the use of ERTEs.*

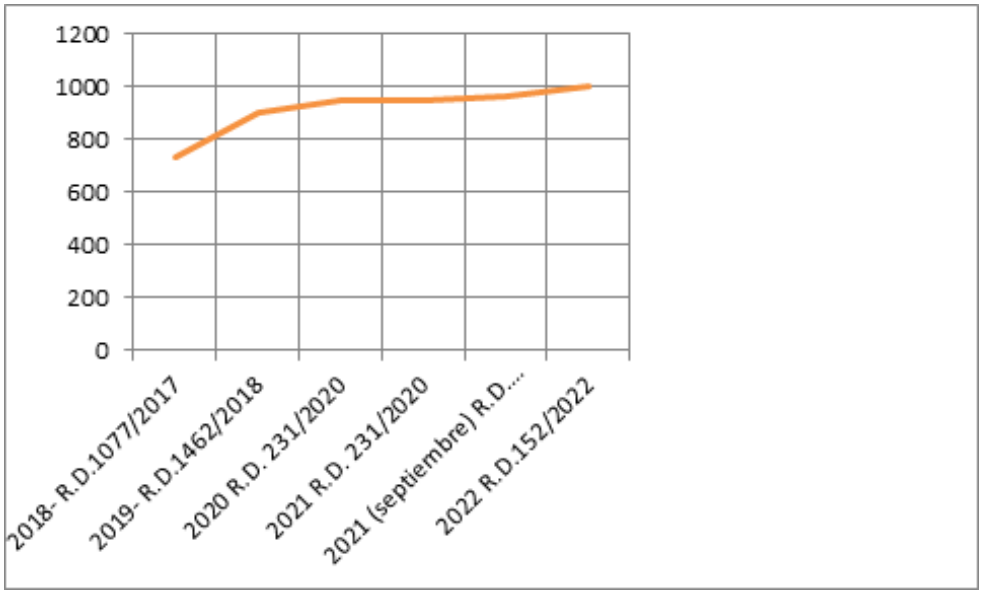
o In terms of wages, the reform has already improved conditions for many workers in multiservice companies. These companies will now have to apply the wage conditions of the sectoral agreements that correspond to the activity carried out in the contract or subcontract in which they perform their tasks, which are generally higher than those of multiservices, referenced in many cases to the minimum wage. This wage increase could be between 1,000 and 7,000 euros per year, depending on the agreement in question.

On balance, and even taking into account the short time the new regulations have been in force and the scarce and imperfect information available, there is sufficient information to affirm that ***the labour market reform agreed in December 2021 is having a very positive impact on the reduction of temporary employment and the increase in employment stability****, even more than expected."*

2.1 Increase in minimum wage

55. Additionally, it is necessary to take into account the significant progress that has been made in Spain in recent times in improving the pay conditions of workers – which in turn has a direct impact on the amount of the compensation for dismissal.

56. The following graph shows the evolution of the minimum wage between 2018 and 2022, showing how from 735.90 euros gross per month in 2018, the amount of the minimum wage has risen to 1,000 euros per month in 2022.



2.3 Other disincentives to unfair dismissal provided for in the Spanish system

57. The Spanish system has been, and still is, contemplating different measures that specifically seek to discourage an employer from adopting dismissal decisions without legal grounds (unfair dismissal).).

58. Thus, for example, *Law 43/2006, of 29 December, for the improvement of growth and employment,* came to sanction with the loss of the possibility of obtaining public subsidies or bonuses in general to companies "that have terminated or terminate due to recognised or declared unfair dismissal" in a certain previous period, and on the other hand to prohibit companies that had terminated indefinite contracts due to recognised or declared unfair dismissal in the previous twelve months from using a certain type of temporary hiring contemplated in the aforementioned law.

59. For its part, *Law 3/2012, on urgent measures for the reform of the labour market*, temporarily incentivised the measures adopted for the suspension of contracts and reduction of working hours by providing for a 50% refund on employer' Social

Security contributions, provided that companies had not terminated contracts due to recognised or declared unfair dismissal in the 12 months prior to the application of the refunds (Article 15).

60. At present, the measures adopted in this area include the following:

- The obligations to maintain employment, and consequent prohibition of dismissals that are declared or recognised as unfair, imposed in order to obtain the bonuses and incentives for indefinite-term employment contracts regulated in Royal Decree-Law 1/2023, of 10 January, Article 9 of which provides for the loss of the corresponding benefits in such cases.

- The benefits in social security contributions applicable to temporary redundancy plans (ERTEs) and the RED Mechanism regulated in Additional Provision 44 of the General Social Security Law, which favour the use of internal flexibility mechanisms as opposed to dismissal.

2.4 The State's actions taken regarding unemployment protection.

61. In order to assess a State's system of protection from dismissal from a comprehensive perspective, it is necessary to take into account a perspective that is complementary to that corresponding to the compensation to be received by the worker from the employer who breaks the contractual link -or, in general, consequences to be assumed by the employer-, such as the social protection that the State offers to the person who is in a situation of unemployment as a consequence of the breaking of the contractual link.

62. Attached herewith is a presentation on the Spanish public unemployment protection system, which shown the set of measures and actions that make up the unemployment system protection at bpth the contributory and welfare levels.

63. In particular, it should be noted that despite the fact that the 2012 Labour Reform, as stated in the complaint, had an impact on the amount of umployment benefits reducing it from 60% to 50% after 6 months, the percentage to be applied to the regulatory base as of the 181st day of unemployment has been recently –as of 1 January 2023- further increased to 60% (Law on the State General Budget for 2023). The amount of the contributory unemployment benefit is currently determined by applying the following percentages to the regulatory base: 70% the first 180 days,

and 60% as of the 181st day (although a 50% before 01 January 2023). The new percentage also apply to those persons receiving unemployment benefits on 01 January 2023.

III. MERITS OF THE CASE: THE SPANISH SYSTEM COMPATIBILITY WITH ARTICLE 24 OF THE EUROPEAN SOCIAL CHARTER (REVISED)

1. Relevant international law

- Article 24 of the European Social Charter (Revised)

Article 24, under the heading "The right to protection in cases of termination of employment", provides as follows:

"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."

- Interpretation given by the European Committee of Social Rights to Article 24 of the Charter

The European Committee of Social Rights has ruled on several occassions[22] on the meaning and scope of Article 24, in particular on the provision contained in its

[22] *Confédération Générale du Travail Force Ouvrière (CGT-FO) v. France* and *Confédération générale du travail (CGT) v. France* (complaints no. 160/2018 and 171/2018) – Decision on the merits of 23 March 2022.
Syndicat CFDT de la métallurgie de la Meuse v. France (complaint no. 175/2019)– Decision on the merits of 5/07/2022.
Confederazione Generale Italiana del Lavoro (CGIL) v. Italy (complaint no. 158/2017) – Decision on the merits of 11/09/2019.

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

According to the Committee, for a national system to be compatible with Article 24 of the Charter, the following conditions must be met (Decision on the merits of 23 March 2022):

> *"a) Provide for reimburserment of financial losses incurred between the date of dismissal and the decisión of the appeal body;*
> *b) Provide for the possibility of reinstatement of the worker; and/**or***
> ***c) Provide for the compensation of a high enough level to dissuade the employer and make good the damage suffered by the victim"***

It follows from the Committee's doctrine that the imposition of statutory ceilings on compensation does not, *per se,* render the system in breach of Article 24 of the Charter provided that it can be established that the compensation is of such an amount that it can be considered *of a high enough level.*

- Further relevant international provisions concerning protection in case of unjustified dismissal.

The protection of workers against "unjustified" dismissal is granted in other international instruments applicable in Spain, in addition to Article 24 of the Charter, among which it is worth mentioning:

> Article 10 of the ILO Convention no. 158, stating that when the termination is found "unjustified" and, in accordance with national law and practice, is not applicable to declare the termination invalid and order reinstatement of the worker, they shall be empowered to "order payment of adequate compensation or such other relief as may be deemed appropriate."
>
> Article 30 Charter of Fundamental Rights of the EU, headed "Protection in the event of unjustified dismissal" states that every worker has the right to "protection against unjustified dismissal, in accordance with Community law and national laws and practices."

As per Article 10 of the ILO Convention no. 158, the Spanhis system in force of protection in the event of unjustified dismissal provided for in Article 57 of the

Finnish Society of Social Rights v. Finland (complaint no. 106/2014) –Decision on admissibility and the merits of 8/09/2016.

Workers' Statute is regarded as compatible with such provision, as set forth above (2014 ILO Report).

With regard to Article 30 of the Charter of Fundamental Rights of the EU, there is no record of any pronouncements by the European Court of Justice sentencing Spain (or other States with a similar system for calculating compensation for unfair dismissal) for failure to comply with it, merely because the compensation has been legally predetermined or because its sets maximum limits on its amount.

2. Assessment on the merits of the case

64. In the following lines we will explain how, in the Spanish Government's view, the Spanish system for fixing the compensation for dismissal is in line with the standard of protection resulting from Article 24(b) of the Charter -as well as, moreover, with other international provisions such as those cited above, on protection for dismissal-, so that the complaint must be dismissed.

65. The following aspects will be assessed to reach this conclusion:

A. The **limited scope of the complaint** raised by the complainant organisation when applied in practice, verifying that, although it describes a situation in which apparently the majority of cases of "wrongful" dismissal would fall within the scope of the object of the complaint, in fact there are few cases in which abusive or fraudulent actions by the employer, which represent an extra seriousness that makes their conduct particularly reprehensible, are treated as "unfair" dismissal in the Spanish system.

B. The **advantages offered by the Spanish system**, in which compensation is established on the basis of predetermined objective factors, for which the reasons justifying the maintenance of this system, peacefully accepted, since the approval of the Workers' Statute must be taken into account, without prejudice to the fact that the specific determination of the number of days of salary (33 days, since 2012) is disputed.

C. The set of **measures adopted to fight against precariousness in employment**, verifying how important advances have been made which, among other aspects, have favoured stability in employment, improved their remuneration conditions, and have notably increased the protection of workers, also with regard to situations of illegitimate termination of the employment relationship.

D. The set of benefits and actions that make up the so-called "**protective action against unemployment**", which shows an intense state intervention for the protection of people who have lost their job until they find a new job.

E. The recent creation, within the legal system of protection against dismissal in the case-law of the High Courts of Justice, of an avenue that allows the unfairly dismissed worker to claim a higher amount than that resulting from the system of calculation established by law.

A. THE LIMITED NATURE OF THE SCOPE OF THE COMPLAINT

66. The complainant organisation raises the present complaint in relation to a specific issue - the system for calculating the compensation for dismissal - raised not in every situation of dismissal, but in situations of dismissal described in different ways throughout the submission, but in general as "abusive", "arbitrary" or "without cause"".

67. At this point it should be noted that the scope of the complaint is certainly restricted, since it would not cover all the situations which in the Spanish system are classified as 'unfair dismissal', but only a set of situations within the dismissals which can be classified as unfair and which involve **particularly reprehensible conduct on the part of the employer**. Moreover, it should be borne in mind that **many of these cases involving particularly serious circumstances in the employer's conduct will be included in the Spanish system in the category of null and void dismissal,** in which case the complainant organisation does not criticise the regulatory treatment of the consequences of the dismissal.

68. At this point, it is worth highlighting the tendency of the Spanish system, as mentioned above, towards a progressive extension of the cases of dismissal declared null and void, as well as, especially, the extensive jurisprudential interpretation of the concurrence of such cases.

This means that, for example, the system offers maximum protection - by classifying the dismissal as null and void - to workers who show a critical attitude towards the company with a view to exercising their rights before the channels of complaint provided for by the regulations, thus "shielding" their permanence in the company; As well as "shielding", among many other cases, people who exercise their rights to reconcile work and family life, or pregnant women, whose protection is produced from the very moment the pregnancy begins, whether or not the company is aware of

this fact (even if the worker herself is not aware of it); also noteworthy is the extension of protection by this means -declaration of nullity of dismissal, in this case through infringement of the right to personal privacy- against technological control in the workplace.

69. Therefore, there is a very large group of cases referred to in the complaint as "abusive dismissal" or "fraudulent" and which involve greater reproach towards the employer's actions, in which the Spanish system offers the guarantees of maximum protection to the dismissed worker: compulsory reinstatement, payment of lost wages, and - in cases of violation of a fundamental right - payment of additional compensation, which has been broadly interpreted by case-law in favour of the worker.

B. ADVANTAGES OF THE SYSTEM OF FIXED COMPENSATION SUCH AS THE SPANISH SYSTEM

a) Consensual nature of the Spanish system of fixed compensation

70. As explained above, the system of legal predetermination of compensation for unfair dismissal based on automatic factors (salary and seniority) has been applied for more than 40 years in Spain; indeed, since the approval of the Workers' Statute in 1980.

71. This system was, at the time, peacefully accepted by the social partners, both at the time of its implementation and afterwards.

72. Indeed, trade union organisations have been calling in recent years for the repeal of the 2012 Labour Reform. As far as the issue under examination is concerned, for an increase in the number of days' pay to be taken into account for the calculation of compensation and the reinstatement of wages for processing in the event of unfair dismissal. However, the model for calculating compensation based on fixed factors such as salary and seniority has not been challenged.

73. In this respect, this party respectfully requests that the Committee takes this aspect into account in a very particular way, since it constitutes an important difference with other cases that have been examined by the Committee, in which States that traditionally had established a different system of compensation for dismissal, have in recent times, as a reaction measure to economic crisis situations, proceeded to introduce maximum limits on the amount of such compensation.

74. For example, in the case of France, the most recent case examined by the Committee, prior to 2017 the rules for fixing compensation in the event of "unjustified dismissal"

provided for a minimum amount of 6 months' salary if the worker had been employed for more than two years, with no maximum amount, the courts having to determine the compensation to be fixed in each case; for companies with fewer than 11 employees, there was no minimum or maximum amount.

This system was reformed in 2017 for dismissals effective as of 23/09/2017, the most important novelty being, in addition to the revision of the minimum amount - fixed for all companies, but in different amounts depending on the size of the company and the salary and seniority of the worker - the setting of a maximum limit on compensation in the case of "unjustified dismissal" fixed according to the seniority of the worker (the maximum limit ranges from 1 month's salary, in the case of seniority of less than one year, to 20 months' salary in the case of seniority equal to or greater than 29 years of service).

The social partners reacted immediately by opposing the new system for fixing compensation, which had not been agreed with them, and the trade union organisation *Confédération Générale du Travail Force Ouvrière (CGT-FO)* went to the European Committee of Social Rights shortly after the reform was adopted, lodging a collective complaint, followed by other organisations lodging similar complaints.

b) Advantages of a system of fixed compensation

75. As examined above, the decision to establish a system of compensation established by law was a decision justifiable at the time by the aim of providing the worker with a higher compensation than that obtained through the application of the compensation calculation system in force up until then.

76. The reasons why the Spanish authorities consider that there are advantages to this system are varied. Thus:

    i. In the event of unfair dismissal, the workers are exempted from the burden of proving the actual damages that such a decision has caused them;

    ii. The system offers certainty and security for all parties involved in the employment relationship -employer and employee-, who can know in advance the consequences of the termination of the employment relationship adopted by the employer when there is no cause to justify it or when it is adopted without following the formalities or procedures provided for in the regulations, and can direct their actions and adopt decisions based on better information.

From a theoretical and empirical point of view[23], firing costs are found to directly affect employers' hiring decisions, especially in random contexts where employers must form rational expectations about the variables affecting hiring and firing. In other words, in a context where dismissal is uncertain (it may or may not happen), employers, taking into account all available information, make their current hiring decisions on the basis of possible future dismissals and their associated costs. Therefore, greater predictability about dismissal costs can have a positive effect on employers' hiring decisions.

77. It should be added that, if, as the complainant organisation claims, subjective factors relating to the personal and/or family circumstances of the dismissed person -such as age, sex, family situation or (lack of) training- were to be taken into account when determining the amount of compensation, as the damage caused by the dismissal is greater when the dismissed worker belongs to certain particularly vulnerable groups in terms of their ability to find a new job - and dismissal in such cases should consequently be more expensive -, this would undoubtedly affect the hiring decisions of companies, which would try to minimise the risk of facing a higher compensation for dismissal, preferably choosing to hire groups that do not have these higher costs associated with them..

78. In short, associating higher dismissal costs to certain groups with respect to others results in a greater problem of employability difficulties for vulnerable groups, generating - or intensifying, as the case may be - problems of discrimination.

79. Indeed, in order not to bias companies' hiring decisions, Spain prefers to give greater protection against unemployment to people who form part of these more vulnerable groups.

Thus, as explained above, in the case of contributory unemployment benefits, the maximum and minimum amounts are adjusted according to the number of children. And in the case of the assistance level, both access to benefits and their duration and amount are modulated according to vulnerability factors: general unemployment benefit, benefit for people over 52, family allowance or Active Insertion Income for groups with special economic needs and difficulties in finding a new job.

Likewise, the State Public Employment Service (SEPE, by its acronym in Spanish), taking into account the subjective elements that affect the reinstatement of dismissed workers, gives priority to training and guidance for vulnerable groups.

[23] [23] Zylberberg A., Cahuc P. and Carcillo S. (2014). Labour Economics. MIT Press.

C. THE SET OF MEASURES ADOPTED FOR FIGHTING PRECARIOUSNESS IN THE LABOUR MARKET, FAVOURING EMPLOYMENT STABILITY AND AVOIDING DISMISSALS

80. As explained in Section II, in Spain in recent years the public authorities have been making a major effort to set up a regulatory framework for the labour market that provides the greatest possible guarantees of employment stability, avoiding the use of dismissal and promoting other internal flexibility formulas, and encouraging permanent contracts to the detriment of temporary contracts.

    A good example of this is the Labour Reform that has been carried out, in agreement with the social partners, in 2021, to which we have referred in Section II.

81. In our view, the actions undertaken in this regard should be taken into account when assessing, as a whole, the Spanish system of worker protection against dismissal situations. **What better protection can be provided to workers who may find themselves in a situation of dismissal, than precisely to *prevent* such dismissal from taking place?**

82. In this regard, it should be noted that issue of compensation for dismissal was not included in the framework of the social dialogue undertaken to implement the 2021 Labour Reform, since the negotiating agents - in particular, the complainant organisation - gave preference to other means of protecting workers in the event of dismissal, which they considered more convenient when agreeing on a regulatory reform.

83. In short, an assessment of the Spanish system of protection against dismissal must include an analysis of these complementary aspects regarding the compensation for dismissal, taking into account the very significant advances that have taken place in Spain with the 2021 Labour Reform, as well as other measures adopted in recent times for the greater protection of workers and improvement of their conditions.

D. THE SET OF BENEFITS AND ACTIONS INCORPORATING THE SO-CALLED “PROTECTIVE ACTION AGAINST UNEMPLOYMENT", WHICH SHOWS AN INTENSE STATE INTERVENTION FOR THE

PROTECTION OF PEOPLE WHO HAVE LOST THEIR JOBS, UNTIL THEY FIND A NEW JOB.

84. In order to assess the Spanish system of protection in the event of dismissal, it is also appropriate, as stated above, to analyse the public action that is developed for the protection of the worker who has lost his job, an aspect that must necessarily be taken into account in order to assess the "sufficiency" of the redress required by Article 24 of the Charter.

85. Thus, attention is drawn to the fact that ILO Convention No. 158 on termination of employment deals in Section E, under the heading "Severance allowance and other income protection", with the situation of workers at the time of termination of their employment relationship -whether the termination of employment is lawful or unlawful-, the right of the worker to obtain a compensation –including length of service and salary within those factors to be taken into account in establishing such compensation- and benefits (contributory or welfare) regarding unemployment protection, expressly providing for the possibility of such protection to be granted to the worker being made up of "a combination of such allowance and benefits". This is **a clear recognition of the supplementary nature of the two aspects** in determining the standard of worker protection required.

Indeed, according to Article 12.1, which forms Section E:

"A worker whose employment has been terminated shall be entitled, in accordance with national law and practice, to:

(a) a severance allowance or other separation benefits, the amount of which shall be based inter alia on length of service and the level of wages, and paid directly by the employer or by a fund constituted by employers' contributions; or

(b) benefits from unemployment insurance or assistance or other forms of social security, such as old-age or invalidity benefits, under the normal conditions to which such benefits are subject; or

(c) ***a combination of such allowance and benefits****."*

86. Reference is made to Section II, 2.4 above.

87. From the foregoing, it is worth noting the significant protective action that exists in Spain to attend to the needs of workers who lose their jobs, an aspect that, as we have said, cannot be forgotten when assessing the standard of protection that results from Article 24.b) of the Charter from a global point of view.

E. THE DISSUASIVE FUNCTION OF COMPENSATION FOR UNFAIR DISMISSAL AND OTHER MEASURES TO DISSUADE DISMISSAL IN THE SPANISH SYSTEM.

88. In the complaint at the origin of present proceedings, it is repeatedly stated that the compensation provided for in Article 56 of the Workers' Statute is not *dissuasive*, since its amount has been reduced from 45 to 33 days' salary per year of service, and the obligation to pay lost wages when the employer chooses to pay the compensation instead of reinstate the worker, which, it is claimed, would mean a –further- reduction in the compensation to be received by the worker in the event of being dismissed.

89. In contrast, it should be noted that, although it is true that with the 2012 Labour Reform the amount of compensation was reduced from 45 to 33 days' salary per year of service - this being the formula that applies solely for periods of employment after 12/02/2012, since for previous periods the previous calculation system continues to apply - the amount of compensation is in any case higher than the amount of compensation in the case of fair dismissal for objective reasons – whose compensation amounts to 20 days' salary per year of service.

    The **dissuasive nature** of the compensation for unfair dismissal for the employer is precisely due to the **higher cost** that must be assumed when the dismissal is unfair than when it is fair.

90. Together with the compensation itself, the Spanish system contemplates, as has been pointed out in Section II above, a set of measures to encourage, on the one hand, the employer to resort to internal flexibility mechanisms as an alternative to dismissal -in particular, the important effort made in this regard with the 2021 Labour Reform should be highlighted-, and, on the other hand, to discourage employers who carry out dismissals that are recognised as unfair or declared unfair by courts, by depriving them of social benefits or incentives granted to employers who do not carry out unfair dismissals.

    It can therefore be argued that, in general, the Spanish system has mechanisms in addition to compensation for dismissal to dissuade employers from resorting to dismissal, and in particular from undertaking unfair dismissals.

Conclusions reached on the aspects assessed in Sections A, B, C and D

91. All the foregoing shows that a system such as the Spanish one, whose legislation provides for a system of fixed or legally predetermined compensation, is not contrary to Article 24 of the Charter merely because the compensation is not fixed in accordance with the actual damage that the worker proves in each individual case to have been caused by the dismissal.

92. On the contrary, as explained above, in order to assess whether the Spanish system is in line with the standard of protection laid down by the aforementioned provision, it is necessary to take into account, firstly, that in practice **there are few cases of "arbitrary", "fraudulent" or "without cause" dismissal in which the regime of unfair dismissal provided for in Article 56 of the WS** -which is the regime challenged by the complainant organisation- will be applied, since most of the situations in which there is a particularly reprehensible action on the part of the worker will be declared as "null and void dismissal" in our system, being particularly valuable the very broad protection given to workers who have been subject to null and void dismissals, which in fact is not disputed in the complaint.

93. In view of the foregoing, and on the basis of the Committee's case-law, from which it follows, as already pointed out, that the mere fact of determining a system of fixed or limited compensation in its maximum amount, *per se*, is not contrary to Article 24 of the Charter, in our view an overall examination of the national system of protection of the dismissed worker must be taken into account. In respect of Spain, as we have explained, such examination must lead to the conclusion that the protective measures adopted, which together make up the system of "redress" for the dismissed worker, are adequate, without it being possible to claim that they do not meet the minimum standard required by Article 24 of the Charter.

94. In the opinion of the Spanish Government, the above is sufficient to concludethat the Spanish system, contrary to the complainant's complaint, is compatible with Article 24 of the Charter.

95. In addition to the above, despite we consider is sufficient to affirm that the national system is adequate, we must refer to the recent avenue that has been introduced so that, in certain exceptional cases in which the judge hearing the dismissal proceedings considers that, given the circumstances, the compensation resulting from Article 56 of the WS is manifestly insufficient in view of the real damage suffered, an additional compensation may be fixed.

F. Avenue for claiming a higher amount than that resulting from the previous calculation system from the employee who has suffered damages as a result of the unfair dismissal agreed by the employer

96. According to the recent decision issued by the Committee in *Confédération Générale du Travail Force Ouvrière (CGT-FO) and others v. France*, no. 160/2018 (§165), in accordance with the Committee's own doctrine, when assessing whether a system in which labour law establishes a legal ceiling on the compensation that may be awarded in the event of dismissal without real and serious cause is compatible with Article 24 of the Charter, it is essential to assess whether there are other legal avenues, supplementary to those provided for in labour law, through which additional compensation may in certain cases be obtained, such as civil liability, for instance.

97. As noted above, in the Spanish system this *alternative route* currently exists, and consists of the direct application by the court responsible for the dismissal proceedings of Article 24 of the Charter, which enables it, exceptionally, in certain cases in which, in view of the circumstances, it finds that the compensation resulting from Article 56 of the WS is clearly insufficient to compensate for the damage caused by the dismissal decided by the employer, to set a higher compensation than that resulting from the application of the Workers' Statute when the worker proves the existence of a higher damage than that resulting from the said compensation.

98. Until recently, when faced with claims by workers for compensation in excess of that provided for in the Workers' Statute based on the application of the civil regime of contractual liability (Article 1101 of the Civil Code), the response of the case-law[24] has been to deny the possibility of the subsidiary application in the labour sphere of the civil regulations on compensation for damages, and thus to allow additional compensation to be obtained based on the accreditation of damages in excess of those included in the compensation provided for in Article 56 of the WS.

99. Currently, as has been pointed out, the avenue described below has been opened, which allows courts, in exceptional cases in which the insufficiency of the legally assessed compensation is appreciated, to take into account the real damage produced and assess whether it is appropriate to recognise additional compensation to that provided for in the WS, through the direct application of Article 24 of the Charter - or, where appropriate, Article 10 of Convention No. 158 of the ILO - by the courts

[24] There have been occasional, albeit isolated, court rulings in favour of the application of the rules of contractual civil liability in the field of employment.

responsible for the dismissal proceedings and which consider it appropriate to declare the dismissal unfair.

The “conventionality control” by ordinary courts: the judgment no.140/2018 of the Constitutional Court

100. Historically, there has been a debate, both at the doctrinal level -mainly on the part of constitutionalist and public law doctrine- and at the judicial level –in particular, on the part of judges of the social jurisdictional order- about the legitimacy, or not, of "conventionality control" by the domestic courts, understood as the function of domestic judges and courts to ensure the compatibility of the provisions of domestic legislation with international treaties, with different proposals on its scope and effects..

101. In this regard, nothing is indicated in the Spanish Constitution, which in Article 96 recognises the legal force of the provisions contained in international treaties, although it does not specifically rule on the possible preferential application of the provisions contained in international treaties with respect to international law[25].

102. Law 25/2014, of 27 November, on Treaties and Other International Agreements, took an important step forward by expressly providing in Article 31 for the preferential application of international law over national law, stating that the rules contained in international treaties duly concluded and published "shall prevail over any other rule of domestic law in the event of conflict with them, except for constitutional rules” - from which it follows that in the event of contradiction between law and Treaty, the opposing national rule, whether prior or subsequent, shall be displaced in favour of the application of international law. On the other hand, Article 29 of the same law indicates that "all public authorities and bodies of the State must respect the obligations of the international treaties in force to which Spain is a party and ensure adequate compliance with those treaties.”

103. Despite stating the prevalence of the provisions of the treaties over the rules of domestic law, Law 25/2014 does not specify to whom it corresponds to carry out the control of the adequacy of the latter to the treaties, nor how it should be carried out, as well as its scope and effects. Therefore, it remained open whether, for example, it was the Constitutional Court that should carry out this control, including in its

[25] Article 96 of the SC: “*1. Validly concluded international treaties, once officially published in Spain, shall form part of the internal legal order. Their provisions may only be repealed, amended or suspended in the manner provided in the treaties themselves or in accordance with the general rules of international law. 2. The same procedure shall be used for denouncing international treaties and agreements as that, provided in Article 94, for entering into them*.”

examination of the constitutionality of the legislation the assessment of their conformity with the treaties (in which case, if it were to assess the incompatibility of the rule with a treaty, it should declare it unconstitutional on the grounds of non-compliance with Article 96 of the WS, and "expel" it from the legal system), or whether it is the "ordinary" courts who should carry out this assessment when in the ordinary exercise of their jurisdictional function they find that an internal rule could be contrary to a treaty.

104. The debate has been "settled" by the Constitutional Court in its judgment no. 140/2018, of 20 December, where - 6th Ground of Law - it assesses the question of "whether the analysis of constitutionality can or should include an examination of the compatibility between treaties and domestic law, and whether this possible judgment can lead to the declaration of a domestic law in opposition to a treaty, on the basis of the provision contained in Article 96 of the WS" and thus the question of "conventionality control", and reaches the following conclusions:

- In our system, the analysis of conventionality is not a test of the validity of the domestic rule -or of its close constitutionality-, but a test of the *applicability* of normative provisions or "*selection*" of the applicable law: that is, if it is detected that a domestic legal rule is incompatible with a provision contained in a treaty, the domestic rule should not be applied, and the treaty provision must prevail.

- This function does not correspond to the Constitutional Court, but to ordinary judges: any ordinary judge can "displace" the application of a domestic rule with the status of law in order to apply "preferentially" the provision contained in an international treaty.

Adoption of the conventionality control doctrine by courts in the social sphere

105. The Constitutional Court's doctrine on the conventionality control has been accepted in the social jurisdictional sphere, where examples of direct application by ordinary judges and courts of rules contained in international treaties have begun to emerge.

106. The Social Chamber of the Supreme Court has recently had occasion to rule on this issue in its judgment of 29/03/2022, in which it adopts the doctrine of the Constitutional Court contained in its judgment 140/2018 and, in application thereof, recognises the need to carry out an assessment of the adequacy of various international treaties (Article 6 of ILO Convention No. 158, Articles 4.1 and 5 of ILO Convention No. 155, Article 3 of the European Social Charter and Article 11 of

the CEDAW) of the regulation of dismissal for absenteeism that was regulated in [now repealed] Article 52 d) of the Workers' Statute, with a view to the possible non-application, where appropriate, of the provision in question[26].

107. Regardless of the outcome of such assessment in the present case - the Supreme Court concludes in this case that Article 52 d) of the WS [already repealed at the time of the judgment at issue] was not contrary to the international treaties in force in Spain prior to its repeal[27]; what is relevant is that **the Supreme Court has expressly validated the exercise of the conventionality control by ordinary judges and courts**. Thus, in the Fourth Legal Ground, it states:

> "*The CC Plenary Judgment no. 140/2018 [...] expresses it clearly: "the assessment of conventionality that has a place in our constitutional order is not a judgment of the validity of the internal norm or of its mediate constitutionality, but a mere judgment of applicability of normative provisions; of selection of applicable law, which is, in principle, outside the competences of the Constitutional Court […].*
>
> *Subsequently, the Constitutional Court has reiterated that "**the ordinary courts may decline to apply a legal norm in order to apply in its place a precept contained in an international treaty** [...] the constitutional legal framework therefore makes the control of conventionality in the Spanish system a mere rule of ordinary jurisdiction (STC 120/2021, of 31 May, F.3 among others).*"

Implementation of the conventionality control doctrine in the area of determining compensation for unfair dismissal in particular

108. The doctrine of the Constitutional Court contained in its judgment no. 140/2018, is being received by the labour order courts in the specific area of determining compensation for unfair dismissal, having opened up a way, in certain exceptional cases in which the compensation resulting from the application of Article 56 of the WS is not "adequate" given the circumstances of the specific case, to be able to declare a higher compensation.

109. Despite the short period of time that has elapsed since this doctrine was developed, it is possible to find a number of cases in which it has been applied by various High

[26] The criterion contained in the Supreme Court judgment of 29/03/2022 has been reiterated in its judgment of 2/11/2022.

[27] The Chamber invokes time-related reasons for not considering Article 3 of the Revised European Social Charter to be applicable in this case, since at the time of the termination of the employment contract in dispute, the said treaty had not been ratified by Spain.

Courts of Justice in specific cases in which a worker has claimed recognition of a higher compensation than that resulting from Article 56 of the WS[28].

110. Although not intended to be exhaustive, the following rulings of the High Courts of Justice on the matter should be highlighted. All of them expressly recognise the possibility of the court responsible for the dismissal proceedings to set additional compensation when there are **exceptional circumstances duly accredited by the worker** that make the compensation derived from Article 56 of the WS manifestly inadequate in his case:

- Judgment of the *Castilla y León* High Court of Justice of 1 March 2021
- Judgment of the Catalonia High Court of Justice of 23 April 2021
- Judgment of the Catalonia High Court of Justice of 20 May 2021
- Judgment of the Navarre High Court of Justice of 24 June 2021
- Judgment of the Galicia High Court of Justice of 27 May 2022
- Judgment of the Catalonia High Court of Justice of 14 July 2021
- Judgment of the Catalonia High Court of Justice of 4 July /2022
- Judgment of the Catalonia High Court of Justice of 16 September 2022
- Judgment of the Galicia High Court of Justice of 21 October 2022
- Judgment of the Catalonia High Court of Justice of 25 November 2022

111. It is striking that the complainant organisation - which recognises the existence of a judicial trend open to fixing an additional compensation to that provided for in Article 56 of the WS and which is described as "growing"-, states that it is "a small

[28] It should be borne in mind that, in the area of labour jurisdiction, the High Courts of Justice exercise in their territorial area (the Autonomous Community) a function similar to that of "cassation", by ruling on appeals for reversal against judgments handed down by the labour courts. As the complainant organisation notes, the appeal for reversal is considered to be a "small cassation", and it is difficult for a judgment handed down following an appeal for reversal to have access to an appeal to the Supreme Court, which in the social jurisdiction only exists in the form of "unification of doctrine", requiring the same cases, facts and grounds between two judgments of the High Courts of Justice for the Supreme Court to appreciate the existence of a contradiction that justifies access to cassation for the unification of doctrine.

Hence the importance in the labour field of the doctrine established by the High Courts of Justice, especially in matters on which there is no Supreme Court doctrine.

number of social appeal rulings", and that "a correction of the Supreme Court's case-law can hardly be expected", given that the Supreme Court "has remained very reluctant to apply, as an interpretative doctrine, let alone a binding one, the doctrine of the European Committee".

112. As has been shown, this is a very recent doctrine. This is because of the recentness of the Constitutional Court's doctrine being applied, which is being strengthened by the High Courts of Justice, and which, while not yet available for cassation is because the Supreme Court has not found a conflict of judgments with the identity required by procedural rules that have allowed it to examine the matter. Nevertheless, the Social Chamber of the Supreme Court has already expressly endorsed the fact that ordinary courts carry out the assessment of domestic labour legislation in accordance with international treaties, in particular the ILO Convention No. 158 and the Revised European Social Charter.

113. With the introduction of this avenue, the Spanish system could not be considered contrary to Article 24 of the Charter, since the fact that the system itself empowers judges and courts to directly apply that provision when adjucating a case, displacing if necessary national legislation, is a guarantee of the system's compatibility with that provision.

114. It could be considered whether such avenue would be *appropriate* for this avenue to be expressly transferred, if necessary, to the labour law. In this regard, some voices have been raised in the doctrine that have suggested that it would be advisable to do so. However, this is still an **assessment of suitability** which, in the opinion of the Spanish Government, falls within the State's margin of discretion.

115. In short, unlike what the Committee has detected when assessing other compensation systems with a legal ceiling, there is an alternative avenue in the Spanish system, based on the applicable regulations - the regulatory framework for the exercise of conventionality control by the courts, in particular-, which allows for the recognition in some cases in which it appears that, as an exception, the compensation resulting from Article 56 of the WS could clearly be additional to that resulting from the application of the legally established formula.

FINDINGS

In view of the above, the Spanish Government finds that the Spanish system of protection for workers who have been "unlawfully" dismissed complies with Article 24 of the Charter, providing the worker with adequate compensation, and in any case devising mechanism of redress which is appropriate, allows the worker to be compensated for the damage caused by the loss suffered (compensatory purpose) and seeks to prevent the employer from benefiting from the dismissal (dissuasive purpose)..

Accordingly, the following is respectfully REQUESTED from the Committee:

1. To deem the Kingdom of Spain's observations on the merits of the collective complaint to have been submitted, together with all the attached documentation.

2. To declare that, by virtue of the foregoing, the right under Article 24 of the Revised European Social Charter has not been violated by the Kingdom of Spain.

Madrid for Strasbourg, 31 January 2023

The Agent of Spain	The Co-Agent of Spain
Alfonso Brezmes Martínez de Villareal	Heide-Elena Nicolás Martínez