EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

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Case Document No. 1

***Confederación Sindical de Comisiones Obreras* (CCOO) v. Spain**
Complaint No. 218/2022

COMPLAINT
(English translation)

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COLLECTIVE COMPLAINT
(COMPLAINT)

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SUBJECT MATTER

Collective complaint by the CCOO (Spain) alleging violation by the Spanish State of Article 24 of the European Social Charter (Revised)

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I. BACKGROUND TO THE COMPLAINT

1. APPLICABILITY OF THE REVISED EUROPEAN SOCIAL CHARTER AND THE ADDITIONAL PROTOCOL OF 1995 IN SPAIN

On 23 October 2000, Spain signed the European Social Charter (revised) – hereinafter referred to as the Charter or RESC – done in Strasbourg on 3 May 1996. The instrument of ratification was adopted on 29 April 2021 and published in the Official State Gazette on 11 June 2021. The instrument of ratification was adopted on 17 May 2021, with all 98 paragraphs being accepted. Pursuant to Article K.3 of the Charter, it entered into force on 1 July 2021.

Spain accepted the collective complaints procedure by a declaration made at the time of ratification of the revised Charter on 19 May 2021, and this procedure entered into force with respect to Spain on 1 July 2021. In its instrument of ratification, it included the statement that, "With reference to Part IV, Article D, paragraph 2, of the European Social Charter (Revised), Spain declares that it accepts the supervision of its obligations under the Charter in accordance with the procedure laid down in the Additional Protocol to the European Social Charter providing for a system of collective complaints, done at Strasbourg on 9 November 1995."

The Protocol has therefore been applied by Spain since 1 July 2021, the date of entry into force of the European Social Charter (revised).

These considerations have already been assessed by the Committee in relation to Spain, in the Decision on Admissibility of 14 September 2022, in relation to Collective Complaint No. 207/2022, which states the following:

> *3. The Committee observes that Spain accepted the collective complaints procedure by a declaration made at the time of ratification of the Revised Charter on 19 May 2021 and that this procedure entered into force in respect of Spain on 1 July 2021. In accordance with Article 4 of the Protocol, the complaint has been submitted in writing and concerns Article 24 of the Charter, a provision accepted by Spain when*

it ratified this treaty on 19 May 2021. Spain has been bound by this provision since the entry into force of the treaty in its respect on 1 July 2021.

In accordance with Article 4 of the Protocol, the complaint has been submitted in writing and concerns Article 24 of the Charter, a provision accepted by Spain when it ratified this treaty on 19 May 2021. Spain has been bound by this provision from the entry into force of the treaty on 1 July 2021.

2. THE RIGHT OF CCOO TO LODGE COLLECTIVE COMPLAINTS

Article 1(c) of the Protocol recognises the right to bring collective complaints for "representative national organisations of employers and trade unions within the jurisdiction of the Contracting Party against which they have lodged a complaint."

The CCOO Trade Union Confederation of Workers is the most representative trade union in Spain, with one million members and a total of 97 684 delegates elected in trade union elections, representing 35.6% of the representatives elected among all workers, in both the private and public sectors. It therefore enjoys the status of the most representative trade union at state level, as it meets the requirements established in Article 6 of Organic Law 11/1985 of 2 August 1985 on Freedom of Association, which determines, inter alia, the right to institutional participation as well as the exercise of the right to collective bargaining.

Specifically, the CCOO participated in the negotiation of over 854 collective agreements signed in 2021, affecting 98.5% of the workforce.

The CCOO Trade Union Confederation of Workers is a member of international organisations with Participatory status with the Council of Europe.

The European Committee of Social Rights has consistently accepted the allegations submitted by the CCOO in relation to the reports on compliance with the European Social Charter and its Protocols, and, in fact, we have regularly made allegations in relation to compliance with these instruments.

Following the entry into force of the Revised European Social Charter, it has standing to bring collective complaints in relation to its implementation in our country.

The complaint is signed by the person who has standing to represent the organisation (Article 32 (a) of the Statutes of the Confederation) legally and publicly, as its Secretary General, currently Mr Unai Sordo Calvo. Among the powers conferred by the Statutes and the Appendix to the Statutes is the power to appear before any national or international body to bring, pursue and terminate, as a party, or in any other capacity, all kinds of files, lawsuits, formalities and proceedings, including any type of complaint or collective action.

The complaint complies with Article 4 of the Protocol, since it is lodged in writing, refers to a provision of the Charter accepted by Spain, namely Article 24, and specifies to what extent Spain has not ensured satisfactory implementation of that provision, as set out in the reasoning detailed in this document under the heading grounds of the complaint.

The complaint is addressed, as provided for in Article 5 of the Protocol, to the Secretary General of the European Committee of Social Rights.

3. CONSIDERATION OF THE SUBJECT MATTER AND OBJECTIVE OF THIS COMPLAINT, AND ITS IMPACT ON SPAIN'S PENDING COLLECTIVE COMPLAINT (NO. 207/2022) ON THE VIOLATION OF ARTICLE 24 OF THE REVISED EUROPEAN SOCIAL CHARTER (RESC)

By way of necessary background, a collective complaint was already lodged on 21 March 2022, No. 207/2022, Unión General de Trabajadores (UGT) v. Spain, before the European Committee of Social Rights of the Council of Europe, and was declared admissible at the Committee's session of 14 September 2022.

That complaint alleges a violation by the Spanish State of Article 24 of the Revised European Social Charter, insofar as Article 56 of Royal Legislative Decree 2/2015 of 23 October 2015, approving the amended text of the Law on the Workers' Statute (hereinafter Workers' Statute) and Article 110 of the Ley Reguladora de la Jurisdicción Social [LRJS – Law governing employment courts] (Law 36/2011 of 10 October), establish a predetermined method of calculation that does not allow adjustments to the legally stipulated or statutory compensation so as to reflect the totality of the damage sustained, nor does it guarantee its dissuasive effect.

Indeed, many of the points raised in that complaint which question the impossibility of claiming for actual damage suffered by the workforce may coincide with those raised in the present complaint.

A decision ordering the joinder of the two complaints may therefore be justified so the Committee can address them together.

However, the present complaint discusses instances of infringement of Article 24 of the Charter which go beyond the impossibility of proving additional damage. This gives the Committee the opportunity to outline in more specific terms the scope of Article 24 of the Charter in relation to the protection of workers against unfair dismissal, at least from the perspectives raised in the present complaint:

1) Firstly, the Committee will be able to assess the possibility that the judicial authority may find that reinstatement in the case of unfair dismissal is appropriate, something not permitted under Spanish labour legislation or judicial practice in respect of unfair dismissal.

   This complaint alleges a violation of Article 24 of the Charter insofar as courts are not permitted to assess reinstatement as an adequate form of compensation following an unfair dismissal, regardless of the circumstances and conduct of the parties. This is true even when the dismissal is a fraudulent act intended to expel a worker from his or her job to prevent him or her from exercising the rights to which they may be entitled. The situation is particularly serious when the grounds invoked by the company are fraudulent, and it is proven that the dismissal is intended to preclude the exercise of the labour rights set out in the European Social Charter and in the Revised European Social Charter or its Protocols.

   The Committee will be able to examine in greater depth the mechanisms for protecting the labour rights set out in the Charter when exercised by individuals in the context of an employment relationship, and the business practice consisting of agreeing to dismissal as a mere means of terminating the contract, without the judicial authority being able to impose reinstatement. In this way it will be possible to extend the system of protection of the labour rights enshrined in the Charter, with the same guarantees as other rights enshrined in international instruments and, in particular, the list of fundamental rights.

2) It is also an opportunity to spell out compensation for damage in the form of loss of income from the time of dismissal until the delivery of a judicial decision finding the dismissal to be unfair. This is a remedy that was abolished in Spanish law in 2012 as a way to reduce the protection of victims of unfair dismissal, in contradiction with the case law of the European Committee of Social Rights, which can now be safeguarded through this complaint.

3) Another topic that we consider relevant in this complaint, and which the Committee may assess in greater depth, is that adequate compensation must have elements to allow effective, real and practical access for victims of unfair dismissal.

   Spanish legislation uses length of service and salary as quantification parameters, in keeping with the guidelines set out in Article 12 of ILO Convention 158, as a safeguarding measure against loss of employment, which should naturally form part of the relief for unfair dismissal.

   In this vein, this complaint does not fault Spanish legislation's criteria for setting unfair dismissal compensation by factoring in length of service and salary, as these are legitimate parameters for weighing up the damage that can be incurred upon termination of employment.

   Specifically, this collective complaint alleges – in addition to the above points relating to reinstatement – that the compensation recognised in Spanish legislation and judicial practice is an unavoidable maximum, regardless of whatever damage is proven; that it does not include back pay for the period between dismissal and the judgment declaring it unfair; and that it does not, by any means, update the amount of compensation over the course of that period.

   The complaint further alleges that such quantifying criteria should be applied to cases in which the individual is the one who initiates termination of employment in the face of serious breaches by the employer, and that in Spanish law such cases are treated in the same manner as unfair dismissals, since they essentially amount to unfair indirect dismissals prompted by the non-payment of wages or the violation of the basic rights of the worker, justifying termination of contract due to serious misconduct on the part of the company.

4) This complaint also argues that the amount of compensation should be remedial and dissuasive. Otherwise, in cases of lower salaries or shorter length of service, the

company would not be under any financial constraint in terms of following through with dismissal, which particularly affects young, temporary workers and, in general, new recruits. This also affects individuals on part-time contracts, primarily women, who, because their wages are proportional to the hours they work, generate compensation entitlements without any significant financial cost, and without any remedial effect, in the event of unfair dismissal.

5) Finally, we note that legislation and judicial practice recognise compensation for unlawful dismissal in cases of unfair dismissal, without including any type of compensation in cases where the person has been systematically subjected to fraudulent or abusive temporary contracts, with the threat of unfair dismissal, and without being able to exercise the right to job stability before the contract is unlawfully terminated. This complaint provides the Committee with an opportunity to determine whether being subjected to a repeated practice of fraud in recruitment, when an individual's employment is terminated, should be factored into the amount of compensation, insofar as this constitutes damage to be compensated in a specific manner upon termination of employment.

II. THE PROVISION OF THE REVISED EUROPEAN SOCIAL CHARTER THAT THE ALLEGED INFRINGEMENT CONCERNS: ARTICLE 24 THE RIGHT TO PROTECTION IN CASES OF TERMINATION OF EMPLOYMENT WITHOUT A VALID REASON AND THE CRITERIA LAID DOWN BY THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS ON ITS EFFECTIVE SCOPE

1. REGULATION OF THE RIGHT TO PROTECTION IN CASES OF TERMINATION OF EMPLOYMENT IN THE REVISED EUROPEAN SOCIAL CHARTER DONE AT STRASBOURG ON 3 MAY 1996

The subject matter of this complaint focuses on the allegation of non-compliance with Article 24 of the Charter, which provides as follows:

Article 24. The right to protection in cases of termination of employment

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

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

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

*To this end, the Parties undertake **to ensure** that a worker who considers that he/she has been dismissed without valid reason has the **right to appeal** to an impartial body.*

The Appendix, which forms part of the Treaty – Article N of the Revised European Social Charter – contains the following clarification of the scope of Article 24:

APPENDIX
Appendix to the European Social Charter (Revised)

Article 24

1. It is understood that for the purposes of this article the terms "termination of employment" and "terminated" mean termination of employment at the initiative of the employer.

2. It is understood that this article covers all workers but that a Party may exclude from some or all its protection the following categories of employed persons:

(a) workers engaged under a contract of employment for a specified period of time or a specified task;

(b) workers undergoing a period of probation or a qualifying period of employment, provided that this is determined in advance and is of a reasonable duration;

(c) workers engaged on a casual basis for a short period.

*3. For the purpose of this article the following, in particular, **shall not constitute valid reasons for termination of employment**:*

(a) trade union membership or participation in union activities outside working hours, or, with the consent of the employer, within working hours;

(b) seeking office as, acting or having acted in the capacity of a workers' representative;

(c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;
(d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
(e) maternity or parental leave;
(f) temporary absence from work due to illness or injury.

4. It is understood that compensation or other appropriate relief in case of termination of employment without valid reasons shall be ***determined by national laws or regulations, collective agreements*** *or other* ***means appropriate to national conditions****.*

Article 24 of the Charter applies in Spain, which has not excluded from its protection any of the categories of employed persons referred to in Article 24(2) of the Appendix.

2. PRECEDENTS IN THE CASE LAW OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS ON THE INTERPRETATION AND APPLICATION OF ARTICLE 24 OF THE CHARTER IN COLLECTIVE COMPLAINT PROCEDURES

The Committee has ruled on the scope of Article 24 RESC repeatedly, through interpretative observations, findings in reports on compliance, as well as in various decisions on the merits in relation to collective complaints.

The first collective complaint is No. 106/2014 brought by the Finnish Society of Social Rights v. Finland. The country redrafted the Employment Contracts Act 55/2001 to produce Act 398/2013. The Finnish Society for Social Rights argued that the situation in Finland was contrary to Article 24 of the Charter for two reasons.

1. First, the law governing employment contracts provided that the amount of compensation that could be awarded by the courts in the case of unfair dismissal could not exceed the equivalent of 24 months' salary.
2. Secondly, the law did not provide for any possibility of reinstatement in the event of unfair dismissal.

The ECSR ruled on the admissibility and merits in a decision adopted on 8 September 2016, holding that it was incompatible with the requirements of Article 24 RESC.

Due to the systematic nature of the ruling, which dealt with problems that largely coincide with this complaint, we refer to the case law established in that decision.

Specifically, in its decision, the Committee set out the following considerations: (Paragraphs 45 et seq.):

> *45. The Committee recalls that under the Charter, employees dismissed without valid reason must be granted adequate compensation or other appropriate relief.*
>
> *Compensation systems are considered appropriate, if they include the following:*
>
> *- reimbursement of financial losses incurred between the date of dismissal and the decision of the appeal body;*
>
> *- possibility of reinstatement and/or*
>
> *- compensation at a level high enough to dissuade the employer and make good the damage suffered by the employee (Conclusions 2012, Turkey).*
>
> *46. Any upper limit on compensation that may preclude damages from being commensurate with the loss suffered and sufficiently dissuasive is in principle, contrary to the Charter. However, if there is such a ceiling on compensation for pecuniary damage, the victim must be able to seek compensation for non-pecuniary damage through other legal avenues (e.g. anti-discrimination legislation).*
>
> *(Conclusions 2012, Slovenia).*

(i) Adequate compensation

> *48. The Government states that employees may in addition to the Employment Contracts Act seek compensation for unlawful dismissal under the Non-Discrimination Act and the Act on Equality between Women and Men. However, the Committee notes that only persons who were dismissed on discriminatory grounds may seek compensation under these pieces of legislation. In a case of unfair dismissal, not having a discriminatory element, it is not possible to claim compensation under them.*

49. The Committee considers that in some cases of unfair dismissal an award of compensation of 24 months as provided for under the Employment Contracts Act may not be sufficient to make good the loss and damage suffered.

51. [...]The Committee notes that the Tort Liability Act does not apply in all situations of unlawful dismissal, and may only be applicable in restricted situations. In particular, it notes that the Tort Liability Act does not apply in respect of contractual liability or liability provided for in another act, unless otherwise specified.

52. The Committee finds that the Tort Liability Act does not provide a fully-fledged alternative legal avenue for the victims of unlawful dismissal not linked to discrimination.

53. The Committee considers that the upper limit to compensation provided for by the Employment Contracts Act may result in situations where compensation awarded is not commensurate with the loss suffered. In addition, it cannot conclude that adequate alternative other legal avenues are available to provide a remedy in such cases.

54. Therefore the Committee holds that there is a violation of Article 24 of the Charter.

(ii) Reinstatement

55. As regards the second allegation; the lack of a possibility for the court to order reinstatement, while Article 24 does not explicitly refer to reinstatement, it refers to compensation or other appropriate relief. ***The Committee considers that other appropriate relief should include reinstatement as one of the remedies available to national courts or tribunals*** *(see Conclusions 2003, Bulgaria). The possibility of awarding the remedy recognises the importance of* ***placing the employee back into an employment situation no less favourable than he/she previously enjoyed****.* ***Whether reinstatement is appropriate in a particular case is a matter for the domestic courts to decide.*** *The Committee recalls it has consistently held that reinstatement should be available as a remedy under* ***many other provisions of the Charter as interpreted by the Committee, for example under Article 8§2 and 27§3.***

56. The Committee recalls that in Conclusions 2012 it found the situation not to be in conformity with Article 24 of the Charter ***on the grounds that legislation makes no provision for reinstatement in cases of unlawful dismissal****. There has been no change to this situation (Conclusions 2012, Finland).*

..

58. Therefore, the Committee holds that there is a violation of Article 24 of the Charter.

The application of Article 24 of the Charter was addressed again in the Decision on the Merits of 11 September 2019, Complaint No. 158/2017, Confederazione Generale Italiana del Lavoro (CGIL) v. Italy.

This complaint examined the adequacy of compensation for unlawful dismissal in the private sector following Legislative Decree No. 23/2015 *Disposizioni in materia di contratto di lavoro a tempo indeterminato a tutele crescenti (plafond progressivo*) ['Provisions on permanent contracts of employment offering a level of protection that increases with length of service']. It was amended after the complaint was lodged, with the delivery of the key Constitutional Court Judgment No. 194/2018, which enabled courts to take into account not only length of service but also other factors (number of workers, company size, and conduct and situation of the parties).

With regard to other types of dismissal without valid reason, the Committee noted that not only did the contested measures not allow for reinstatement, but they also provided for compensation which did not cover the reimbursement of financial losses actually incurred, as its **amount was subject to an upper limit of 6, 12, 24 or 36 times the reference monthly remuneration, as the case may be**.

The Committee noted that the Government had not provided any examples of cases in which compensation had been granted for unlawful dismissal on the basis of the rule on civil liability or under Article 1418 of the Civil Code.

More recently, in the **Decision on the Merits of 23 March 2022, Complaint No. 160/2018 (CGT-FO v. France) and Complaint No. 171/2018 158/2017 (CGT v. France)**, the Committee unanimously held that there was a breach of Article 24.b of the Charter.

This stemmed from the collective complaint lodged by the French trade union organisations, CGT-FO and CGT, in which they alleged that the reforms in the regulations on dismissals implemented by Order No. 2017-1387 of 22 September 2017 to Article L 1235-3 of the Labour Code, violated Article 24 of the Charter and, more specifically, the right of workers whose employment was terminated without a valid reason to adequate compensation or other appropriate relief.

The previous legal framework relating to the termination of employment contracts and the provisions concerning dismissal without real or serious cause did not provide for an upper limit on compensation, but for minimum sums, which could not be less than 6 months' salary (until the Order of 22 September 2017).

According to Article L.1235-3 (and its paragraphs) of the Labour Code as amended by Article 2 of Ordinance No. 2017-1387 and Article 11 of Law No. 2018-217:

> "If an employee is dismissed for a reason that is not real and serious, the court may propose that he or she be reinstated, with the retention of all of his/her accrued benefits.
>
> If either of the parties objects to such reinstatement, the court shall award the employee compensation, to be covered by the employer, and whose amounts shall lie between the lower and upper limits set in the table below:
> …
>
> In the event of a dismissal from a company ordinarily employing fewer than eleven employees, the minimum amounts below shall be applicable, by derogation from those set above:"

This was a scale which set the maximum limit at 20 months and which only applied after 29 years of service. The scale was lower for employees with a shorter length of service and for those working in companies employing fewer than eleven employees.

This regulation provided for another system of compensation for cases of dismissals that were rendered invalid because they were discriminatory, contrary to fundamental freedoms, or in retaliation for legal proceedings relating to gender equality, or which affected persons in need of special protection.

On the scope of the safeguard of reinstatement, it was stated that insofar as reinstatement was a possible means of reparation in the case of unfair dismissal, the situation was in accordance with Article 24 of the Charter (156). The Committee noted the criterion laid down in its decision in Complaint No. 106/2014.

On the adequacy of the compensation, the Committee stated that there had indeed been a violation of Article 24 of the RESC: *"The Committee recalls that in Finnish Society of Social Rights v. Finland, Complaint No. 106/2014, op. cit., a ceiling of 24 months provided for by Finnish legislation was considered insufficient by the Committee, as it did not allow for adequate compensation within the meaning of Article 24 of the Charter.*

The Committee notes that in French legislation the maximum ceiling does not exceed 20 months and only applies for 29 years of seniority. The scale is lower for workers with low seniority and working for companies with fewer than 11 workers. For these workers both minimum and maximum amounts of compensation that they can claim are low and sometimes close together, which means the compensation range is not wide enough."

It also noted that the ***'predictability' resulting from the scale might rather serve as an incentive for the employer to unlawfully dismiss workers****. Indeed, the established compensation ceilings could prompt employers to make a pragmatic* ***estimation of the financial burden*** *of an unjustified dismissal on the basis of cost-benefit analysis.* ***In some situations, this could encourage unlawful dismissals****.*

The Committee further noted that the ceiling on the compensation scale **did not allow higher compensation to be awarded on the basis of the worker's personal and individual situation**, and that the court could order compensation for unjustified dismissal only within the lower and upper limits of the scale, unless the application of Article L.1235-3 of the Labour Code was excluded.

The Committee considered that the ceilings provided for in Article L.1235-3 of the Labour Code were not high enough to remedy the harm suffered by the victim and to dissuade the employer. Moreover, the courts did not have broad discretion in examining the individual circumstances of unjustified dismissals. Therefore, the actual harm suffered by the worker in light of the individual circumstances of the case could be overlooked and therefore not remedied. In addition, other legal remedies were limited to certain cases. Therefore, the Committee considered, in light of all the above elements, that there was no safeguard for the right to adequate compensation or other appropriate relief within the meaning of Article 24 b) of the Charter.

Accordingly, the Committee found that there was a violation of Article 24 b) of the Charter.

3. SUMMARY OF ECSR CASE LAW ON THE PROTECTION OF PERSONS AFFECTED BY UNJUSTIFIED DISMISSAL

In short, there is a body of rulings by the European Committee of Social Rights that has established a whole series of criteria on the scope of Article 24 of the RESC, and compensation systems are considered to comply with the Charter when they provide for:

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

- the possibility of **reinstatement** of the employee **and/or**

- compensation at a **sufficiently high level to dissuade** the employer and make good the damage suffered by the employee (Finnish Society of Social Rights v. Finland, Complaint No. 106/2014, Decision on Admissibility and the Merits of 8 September 2016, para. 45); Conclusions 2016, Bulgaria, Italian General Confederation of Labour (Confederazione Generale Italiana del Lavoro, CGIL) v. Italy, Complaint No. 158/2017, Decision on the Merits of 11 September 2019, para. 87, Decision on the Merits of 23 March 2022 (para. 153). Complaints 160/2018 (CGT-FO v. France) and 171/2018, 158/2017 (CGT v. France).

Concerning the possibility of reinstatement of the employee, the Committee has stated that:

- **The Committee considers that other appropriate relief should include reinstatement as one of the remedies available to national courts or tribunals** (see Conclusions 2003, Bulgaria). The possibility of awarding the remedy recognises the importance of **placing the employee back into an employment situation no less favourable than he/she previously enjoyed**. **Whether reinstatement is appropriate in a particular case is a matter for the domestic courts to decide.** The Committee notes it has consistently held that reinstatement should be available as a remedy under **many other provisions of the Charter as interpreted by the Committee, for example under Article 8§2 and 27§3.** (Paragraph 55, Decision on

the Merits of 23 March 2022, (paragraph 153) Complaints 160/2018 (CGT-FO v. France) and 171/2018, 158/2017 (CGT v. France).

Specifically in relation to the determination of compensation, the Committee has issued the following considerations:

- Compensation in the case of unfair dismissal should be **commensurate with the prejudice** suffered by the victim and **sufficiently dissuasive** for the employer (see Conclusions of 2016, North Macedonia, Article 24).

- Any **upper limit** on compensation that may preclude damages from being commensurate with the prejudice suffered and which is not sufficiently dissuasive violates Article 24 of the Charter (Finnish Society of Social Rights).

- If there is a ceiling on the compensation awarded for material damage, the victim should be able to claim compensation for the **non-pecuniary damage suffered through other legal avenues**, and the competent courts should render decisions awarding compensation for the material and non-pecuniary damage suffered within a **reasonable time** (Decision 2012, Slovenia; Decision 2012, Finland).

- In specifying this amount, the Committee stated in its decision in Finnish Society for Social Rights v. Finland, Complaint No. 106/2014, op.cit., that **the 24-month upper limit** provided for by the Finnish legislation was insufficient because it did not allow for adequate compensation within the meaning of Article 24 of the Charter. (As quoted in paragraph 158 of complaints 160/2018 and 171/2018)

  In the Decision on the Merits of 11 September 2019, complaint 158/2017, (CGIL v. Italy), it was held that the financial losses actually incurred were not covered, as the **amount was limited to 6, 12, 24 or 36 monthly reference payments depending on the case**.

  In the Decision on the Merits of 23 March 2022, Complaints 160/2018 (CGT-FO v. France) and 171/2018, 158/2017 (CGT v. France), the national regulation was found not to be in line with the Charter, as it contained a scale setting the maximum limit at 20 months, which only applied after 29 years of service. The scale was lower for employees with a shorter length of service and for those working in companies employing fewer than eleven employees. This was despite the fact that this regulation provided for another system of compensation for cases of dismissals

that were rendered invalid because they were discriminatory, contrary to fundamental freedoms, or in retaliation for legal proceedings relating to gender equality, or which affected persons in need of special protection.

- If there was a cap on **compensation for material damage**, the victim should be able to claim **compensation for non-pecuniary damage** through other legal avenues, and the courts competent to **award compensation for material and non-pecuniary damage** should decide within a **reasonable time** (Finnish Society of Social Rights v. Finland, Complaint No. 106/2014, Decision on Admissibility and the Merits of 8 September 2016, para. 45; Conclusions of 2012, Slovenia and Finland).

- The Committee considered that, insofar as compensation for non-pecuniary damage caused by dismissal without real or serious cause was already included within the ceiling on compensation, the possibility for unjustifiably dismissed workers to claim, in addition to the upper limit on compensation, unemployment benefits or compensation for damage related, for example, to procedural violations in the case of redundancy, did not represent a fully-fledged alternative legal avenue. (Decision of 22 March 2022 (Complaints 160/2018 and 171/2018).

III. REGULATION OF PROTECTION AGAINST UNFAIR DISMISSAL IN SPANISH LAW

In Spanish law, protection given to dismissals considered unfair is not limited, strictly speaking, to dismissals for disciplinary reasons, but has a much broader scope, and applies at a minimum in these areas, as described below:

- Dismissals on disciplinary grounds that are considered unjustified for lack of cause or guarantees. A dismissal is deemed unfair when it is not done in written form, setting out the reasons for dismissal, or when the justifying cause for dismissal invoked in the letter of dismissal has not been demonstrated.

- Objective dismissals due to the skills of the worker or for reasons relating to operational requirements of the undertaking, when it is found that there is a lack of cause or guarantees.

- Collective dismissals, including for economic, technological, organisational or production-related reasons, when there is no justifiable cause for the dismissal.

- Termination of employment at the request of the employee for serious breach of the employer's obligations to pay wages or of basic labour rights.

- The unjustified termination of temporary contracts, or where safeguards are lacking, including cases of irregular or abusive temporary contracts, which are legally considered permanent and the termination of which is characterised as unlawful dismissal. This same scheme applies, by extension, to all cases in which the employment contract is terminated, at the company's request, without there being a legal basis for termination, as is the case with the termination of fraudulent temporary contracts, which do not comply with the legal requirements for temporary contracts.

The classification of the **dismissal as unfair** has the following consequences:

- The company is given the right to choose between reinstatement, with payment of post-dismissal remuneration during proceedings, or termination of employment, with payment of the statutory compensation of 33 days' salary per year of service, with a maximum of 24 months.

- The right to choose can be exercised freely by the company, without providing reason or justification, and the judicial authority cannot verify the reasons that lead the company to choose to terminate the contract, nor whether the effects of the termination will lead to a situation of a special lack of protection for the worker.

- By way of exception, as a mechanism for protecting workers' representatives, the right to choose is given to a representative who has been unfairly dismissed, so that the company does not, in such cases, have the power to terminate the contract if the representative opts for reinstatement, in which case he/she is also entitled to back pay for the period between the date of dismissal and the date of actual reinstatement.

On the other hand, the situation is different for **dismissals declared invalid**.

- A dismissal may be declared invalid in the following cases:

1. Discriminatory dismissals or dismissals that infringe the list of fundamental rights laid down in the Constitution in Articles 14 to 29, including the right to equality and prohibition of discrimination (Article 14), the protection of the freedom of association and the right to strike (Article 28), the right to effective judicial protection (Article 24) or, in general, dismissals that violate the guarantee of compensation in relation to the exercise of a fundamental right.

2. Those affecting specially protected persons, on the grounds of pregnancy or the exercise of rights to conciliation procedures.

3. In the case of dismissals made on economic, technical, organisational or production grounds, when, due to exceeding a certain number of affected personnel, they are characterised as collective and the mandatory intervention of the workers' representatives in a consultation period has been omitted.

The legal consequence of declaring a dismissal invalid is that it imposes on the company an obligation to reinstate the employee in the same conditions as prior to the dismissal, and the employee becomes entitled to back pay for the period between the date of dismissal and the date of reinstatement.

In the case of an invalid dismissal, in addition to reinstatement, compensation may be awarded for the damage caused by the infringement of a fundamental right, which is not expressly regulated in the substantive and procedural rules for dismissal, but rather in the special proceedings for the protection of fundamental rights, of which the safeguards apply to dismissal proceedings in which a violation of this type of right is invoked.

To provide the Committee with a delimitation of the national legal framework, we will set out below the positive rules that determine when a dismissal is qualified as unfair, as well as the statutory scheme that establishes the rights of persons affected by a dismissal.

1. Dismissal on disciplinary grounds – Articles 54, 55 and 56 of the Workers' Statute – arising from an alleged breach by the employee of his or her employment obligations

According to the Workers' Statute:

Article 55. Form and effects of disciplinary dismissal

1. Dismissal shall be notified in writing to the employee, stating the facts giving rise to the dismissal and the date on which it is to take effect.

Other formal requirements for dismissal may be laid down by means of a collective agreement.

If the worker is a workers' legal representative or a trade union representative, there will be formal adversarial procedures during which the worker and other members of the union to which he or she belongs, may be heard.

If the worker is a member of a trade union and the employer is aware of this fact, representatives of the corresponding trade union must be heard in advance.

2. If the dismissal is in breach of the provisions of the previous paragraph, the employer may carry out a new dismissal in which the requirements omitted in the previous one are met. Such a new dismissal, which shall take effect only on the date on which it occurs, must take place within twenty days from the day following the date of the first dismissal. In doing so, the employer shall make available to the worker the wages accrued during that period and keep him/her registered with Social Security.

3. The dismissal will be characterised as fair, unfair or invalid.

*4. The dismissal shall be deemed **fair** when the breach alleged by the employer in its written notification is proven. It shall otherwise be deemed **unfair**, or if its form does not comply with paragraph 1.*

*5. Dismissal shall be deemed **invalid** if it is based on any of the grounds of discrimination prohibited by the Constitution or by law, or if it occurs in violation of the fundamental rights and public freedoms of the worker.*

*Dismissal shall also be **invalid** in the following cases:*

a) Workers during periods of suspension of the employment contract due to birth, adoption, foster care, risk during pregnancy or risk during breastfeeding as referred to in Article 45.1 (d) and (e), or due to illness caused by pregnancy, childbirth or breastfeeding, or notified on a date such that the period of notice granted ends within those periods.

b) Pregnant workers, from the date on which the pregnancy begins until the start of the suspension period referred to in letter (a); workers who have requested one of the

leaves of absence referred to in Articles 37.4, 5 and 6, or are taking such leaves of absence, or have requested or are taking the leave of absence provided for in Article 46.3; and female workers who are victims of gender violence or sexual violence for exercising their right to effective judicial protection or the rights recognised in this law to make their protection effective or their right to comprehensive social assistance effective.

c) Workers after having returned to work at the end of the periods of suspension of the contract due to birth, adoption, foster care or adoption, as referred to in Article 45.1 (d), provided that no more than twelve months have elapsed since the date of birth, adoption, foster care or adoption.

The provisions of the preceding paragraphs shall apply unless, in such cases, the dismissal is declared to be justified for reasons unrelated to pregnancy or to the exercise of leave entitlements.

6. An invalid dismissal will have the effect of immediate reinstatement of the worker, with reimbursement of back pay.

*7. A **fair** dismissal will validate the termination of the employment contract that occurred with the dismissal, without the right to compensation or post-dismissal remuneration during proceedings.*

2. Dismissal on objective grounds – Articles 51 to 53 of the Workers' Statute, related to the skills of the person or linked to the company's operational requirements, establishment or service, and collective dismissal

The Workers' Statute provides the following:

Article 53. Form and effects of termination on objective grounds

1. The adoption of a decision terminating the employment contract under the provisions of the preceding article must meet the following requirements:

a) written notification to the worker giving the reason for termination.

b) the employer must make available to the worker, at the same time as it gives written notification of termination, compensation equivalent to twenty days per year of service, periods of less than one year being calculated pro rata on a monthly basis, up to a maximum of twelve monthly payments.

When the termination decision is based on Article 52 (c), with an alleged economic cause, and as a consequence of such economic situation it is not possible to provide the worker with the compensation referred to in the previous paragraph, the employer, stating this in the written communication, may cease to do so, without prejudice to the worker's right to demand payment from the employer when the termination decision becomes effective.

c) The employer must give a period of notice of 15 days, from delivery of the personal notification to the worker until termination of the employment contract. In the situation referred to in Article 52(c), a copy of the written notice must be sent to the workers' legal representatives.

2. During the period of notice, the employee, or his or her legal representative in the case of a disabled person, shall be entitled, without loss of pay, to six hours' leave per week in order to seek new employment.

3. The dismissal decision may be appealed against as if it were a dismissal for disciplinary reasons.

4. When the employer's decision to terminate the employment contract is motivated by any of the grounds of discrimination prohibited by the Constitution or by law, or was adopted in breach of the worker's fundamental rights and public freedoms, the dismissal decision shall be invalid, in which event it shall be for the judicial authority to make a declaration to that effect, ex officio.

Decisions to dismiss shall also be void in the following cases:

a) That of workers during periods of suspension of the employment contract due to birth, adoption, foster care, risk during pregnancy or risk during breastfeeding as referred to in Article 45.1 (d) and (e), or due to illness caused by pregnancy, childbirth or breastfeeding, or when the decision is notified on a date such that the period of notice granted ends within those periods.

b) That of pregnant workers, from the date on which the pregnancy begins until the start of the suspension period referred to in point a); that of workers who have requested one of the leaves of absence referred to in Articles 37.4, 5 and 6, or are using them, or have requested or are using the leave of absence provided for in Article 46.3; and that of female workers who are victims of gender violence or sexual violence for exercising their right to effective judicial protection or the rights recognised in this law to make their protection effective or their right to comprehensive social assistance.

c) That of workers after having returned to work at the end of the periods of suspension of the contract due to birth, adoption, foster care or adoption, as referred to in Article 45.1 (d), provided that no more than twelve months have elapsed since the date of birth, adoption, foster care or adoption.

The provisions of the foregoing paragraphs shall apply except where, in those cases, the decision terminating the employment relationship is declared valid for reasons unconnected with the pregnancy or with the exercise of the right to the leave, paid or unpaid, referred to above. To be considered fair, it must be sufficiently demonstrated that the objective ground on which the dismissal is based specifically requires the termination of employment of the person concerned.

In all other cases, the dismissal decision shall be considered valid when the cause on which the termination decision was based is proven and the requirements established in paragraph 1 of this article have been met. Otherwise it shall be deemed unfair.

Failure to give notice or excusable miscalculation of the compensation does not, however, result in a dismissal being unfounded, without prejudice to the obligation of the employer to pay the wages corresponding to that period or the correct amount of compensation, irrespective of the other consequences thereof.

5. A decision of the court declaring the dismissal decision to be invalid, valid or lacking foundation has the same effects as those set out for disciplinary dismissals, subject to the following modifications:

(a) When the dismissal decision is declared to be valid, the worker shall be entitled to the severance payment provided for in paragraph 1, which retains its validity if already received, and shall be considered unemployed for reasons beyond his or her control.

***b) When the dismissal is declared invalid** and the employer reinstates the worker, the worker shall be required to reimburse the compensation received. If financial compensation is substituted for reinstatement, that compensation shall be reduced by the amount of the compensation received.*

This same regulation applies to collective redundancy for economic, technical or organisational reasons or reasons related to production – Article 51 of the Workers' Statute, when it is declared unjustified (Article 51.4 of the Workers' Statute and 128.13 of the LRJS).

3. The termination of fraudulent temporary contracts, which are legally assigned the status of permanent contracts, is considered unlawful dismissal – Article 49.1 (c) of the Workers' Statute

Where temporary contracts do not meet the legal requirements, in particular where there is no legal cause for fixed-term contracts or the contract is considered fraudulent, or does not contain the essential elements to verify its legality, the same protection is offered as applied to unfair dismissal for disciplinary reasons.

The termination of a temporary contract, which according to the law should be characterised as permanent, implies the existence of a dismissal without justified reasons, which Spanish judicial practice treats as unfair dismissal.

In these cases of unfair dismissal, protection is granted in the legal form of unlawful dismissal, or unjustified dismissal, except for cases in which invalidity (nullity) may be declared because dismissal violates fundamental rights, affects persons protected by maternity or paternity leave or conciliation measures, or violates the numerical limits established for collective redundancy that would have required a period of consultation with workers' representatives.

The termination of fraudulent temporary contracts is the most common form of unlawful dismissal in Spain. This stems from the widespread use of temporary contracts to cover permanent employment needs in companies and public administrations.

Specifically, the essential purpose of the hiring reform implemented through the recent **Royal Decree-Law 32/2021 of 28 December 2021 on urgent measures for labour reform, guaranteed stability in employment and transformation in the labour market** was to drastically reduce the use of temporary contracts and to strongly reinforce the procedural requirements in hiring so that the legitimacy of the grounds cited for temporary hiring could be subject to review. This legal reform is the result of an agreement between the trade unions, CCOO and UGT, with the most representative business organisations at national level, and the Spanish government itself.

Its explanatory memorandum states that "*Despite successive amendments to Spanish labour legislation, the institutional framework has not been able to effectively address the problem of the excessive rate of temporary employment, which is systematically well above the European average*. *The use of unjustified temporary contracts is a practice that is deeply*

rooted in our labour relations and widespread across sectors, generating inefficiency and economic instability, as well as unacceptable social precariousness." It further states *"... Spain leads the European ranking in terms of temporary employment, with a difference of almost 12 percentage points above the European Union average."*

Its essential aim is to ensure that permanent employment needs in the company are covered by permanent staff, and above all, to reduce the possibility of companies and public administrations continuing to resort to fraudulent temporary contracts as an ordinary form of business management.

This has allowed millions of workers who had been systematically employed on temporary contracts to move from situations of temporary hiring to fixed-term contracts with a higher level of stability and protection.

There is no specific rule that qualifies fraudulent temporary contracts as unlawful; by law, they are regarded as open-ended employment contracts. As it is considered by judicial practice to be an unjustified dismissal, given that termination cannot be justified by the expiry of a temporary contract deemed fraudulent, the same protection should be granted as in the case of unfair disciplinary dismissals.

This occurs when temporary contracts are concluded in breach of the obligation that contracts set out the reasons justifying the temporary nature of the contract, or when it is proven that the reasons invoked by the company are untruthful, and it is established that the company actually intends to cover permanent labour needs, fraudulently, with temporary contracts to be able to terminate the contract without bearing the costs associated with unfair or invalid dismissals.

4. Applying limits on compensation for unlawful dismissal to 'indirect dismissals', or termination of the contract due to serious breach by the company of its obligations (Article 50 of the Workers' Statute)

It is important to note that other terminations are not directly attributable to a company decision, but are caused indirectly, such as when a company merely fails to honour the employment contract, or breaches its essential contractual obligations, in which case the worker may request termination as a response to the company's non-compliance.

According to Article 50 of the Workers' Statute:

Article 50. Termination at the employee's will

1. The employee may request termination of employment for the following just causes:

a) Substantial changes in working conditions made in disregard of the provisions of Article 41 and adversely affecting the dignity of the worker.

b) Non-payment or continuous delays in the payment of agreed wages.

c) Any other serious failure by the employer to fulfil its obligations, except in cases of force majeure*, as well as the employer's refusal to reinstate the worker to his or her previous working conditions in the cases provided for in Articles 40 and 41, when a court ruling has declared them to be unjustified.*

2. In such cases, the employee shall be entitled to the compensation specified for ***unfair dismissal*****.**

The persons concerned therefore receive the same level of protection as in the case of unfair dismissals: the amount of compensation, the basis for calculation and the quantitative limit are identical. The obvious difference is that the company cannot opt for reinstatement.

5. Statutory regulation of the rights of victims of unfair dismissal: in particular, the non-existence of the right to reinstatement and the limited amount of compensation

Rights deriving from unfair dismissal are set out in Article 56 of the Workers' Statute as follows:

Article 56. Unfair dismissal

1. Where a dismissal is declared to be unfair, the employer, within 5 days of notice of the judgment being served, ***may choose*** *between* ***reinstating*** *the employee* ***or paying compensation equal to 33 days' remuneration per year of service, periods shorter than a year being calculated pro rata on a monthly basis up to a maximum of 24 monthly payments.*** *If the employer opts to pay compensation, the employment contract shall be*

terminated, which will be regarded as having occurred on the date of effective cessation of work.

*2. **If reinstatement is chosen, the employee is entitled to post-dismissal remuneration during proceedings.** The latter shall be equivalent to an amount equal to the sum of the remuneration unpaid between the date of dismissal and the date on which notice of the judgment declaring the dismissal to be unfair is served or the date on which the worker takes up other employment, if he is recruited before judgment is delivered and if the employer is able to furnish evidence of the sums paid so that these may be deducted from the outstanding remuneration.*

3. If the employer does not opt for reinstatement or compensation, it is understood that the former is applicable.

*4. If the dismissed person is a **legal representative of the workforce or a trade union representative, the option shall always lie with this person**. Where no choice is made, the dismissed person is deemed to have opted for reinstatement. Where the option, express or presumed, is for reinstatement, reinstatement shall be compulsory. Whether the dismissed person opts for compensation or reinstatement, he or she will be entitled to post-dismissal remuneration during proceedings referred to in paragraph 2.*

*5. Where the judgment declaring the dismissal to be unfair is handed down more than **ninety working days** after the date on which the complaint was lodged, the employer may claim from the State the payment of the financial benefit referred to in paragraph 2 for the period exceeding the said ninety working days.*

In cases of dismissal in which, in accordance with this paragraph, the State is responsible for the payment of post-dismissal remuneration during proceedings, the corresponding social security contributions shall be borne by the State.

The LRJS specifies the procedural rules for unfair dismissal, and this provision is relevant:

Article 110. Effects of unfair dismissal

*1. **If the dismissal is declared unfair**, the employer shall be ordered to reinstate the worker under the same conditions that applied prior to the dismissal, as well as to pay the post-dismissal remuneration during proceedings referred to in Article 56(2) of the amended text of the of the Workers' Statute Law or, at the employer's choice, to pay compensation, the amount of which shall be set in accordance with the provisions of Article 56(1) of the said Law, with the following specific features:*

(a) During the hearing, the party having the choice between reinstatement or compensation may make his or her decision in advance, in the event of a declaration of invalidity, by expressly stating so, in which case the court shall issue a decision, without prejudice to the provisions of Articles 111 and 112.

(b) At the request of the plaintiff, if it is established that reinstatement is not possible, it may be decided, if the dismissal is invalid, to consider the option for compensation in the judgment, declaring the termination of the employment in the judgment itself and ordering the employer to pay severance pay, calculated up to the date of the judgment.

(c) In the case of unfair dismissals of workers whose employment relationship is of a special nature, the amount of compensation shall be that established, where appropriate, by the rule governing that special relationship.

IV. ALLEGATIONS OF NON-COMPLIANCE WITH ARTICLE 24 OF THE REVISED EUROPEAN SOCIAL CHARTER

This collective complaint seeks to demonstrate that the established legal system in Spain, with respect to the guarantees offered to workers affected by unfair dismissal, in accordance with the current legislation described above, is incompatible with the guarantees under Article 24(b) of the Revised European Social Charter, as interpreted repeatedly, consistently and explicitly by the Committee, from the following perspectives:

- The judicial authority cannot assess the reinstatement of a worker as a form of adequate redress, so it cannot issue a decision in respect of reinstatement in these situations:
    - Irrespective of the company's grounds for dismissal, or the economic or professional situation of the person concerned. (Ground 1)
    - Where the cause invoked by the company is fraudulent, and it is proven that the dismissal is motivated by the exercise of the labour rights set out in the European Social Charter and in the Revised European Social Charter or its Protocols. (Ground 2)

- The compensation system, since the 2012 reform, does not allow compensation for the loss of financial income incurred, because of a dismissal, between the date of dismissal and the judicial decision which establishes the existence of an unjustified dismissal and rules that is unlawful. (Ground 3)

- In the event of termination of employment without just cause, the compensation is set in objective terms, based exclusively on length of service and salary, so that:

    - It does not allow claims for additional damages resulting from non-pecuniary damage, or from professional or material damage, caused by termination of employment without justifiable reasons. (Ground 4)

    - No provision is made for any minimum amount, meaning that, in the case of contracts of short duration, as is particularly the case with temporary hiring, the levels concerned are not sufficient to provide adequate compensation for the damage sustained and they do not have any effective dissuasive function in terms of limiting the employer's decision to dismiss without just cause or on arbitrary grounds. (Ground 5).

    - Compensation does not allow prejudice incurred by staff subjected to prolonged and repeated abusive practices in terms of temporary employment, with denial of the right to job stability, to be included in redundancy compensation, without there being another basis for claiming compensation for such prejudice. This has an even greater impact on workers hired irregularly by public administrations, who do not even have access to compensation for unfair dismissal when they are dismissed after the irregular recruitment due to the post being filled. (Ground 6)

The compensation is also in breach of the international standards set out in a whole range of international instruments and conventions, and the interpretative criteria that have consolidated effective protection against unfair dismissal, as the Committee has also pointed out on the numerous occasions on which it has had to examine allegations of non-compliance with Article 24 of the Revised European Social Charter.

FIRST. - NON-COMPLIANCE WITH ARTICLE 24(B) OF THE REVISED EUROPEAN SOCIAL CHARTER, GIVEN THAT IT IS IMPOSSIBLE FOR

THE JUDICIAL AUTHORITY TO ORDER REINSTATEMENT WHERE THERE IS AN UNFAIR OR UNJUSTIFIED DISMISSAL WITHOUT CAUSE, IRRESPECTIVE OF THE CONDUCT OF THE PARTIES OR THE CIRCUMSTANCES OF THE PERSON AFFECTED BY THE DISMISSAL

1. Impossibility for the judiciary to consider reinstatement as an adequate form of relief for unfair dismissal

In ECSR case law, Collective Complaint No. 106/2014 brought by *Finnish Society of Social Rights* against Finland was lodged because Finland had redrafted the *Employment Contracts Act 55/2001* to produce *Act 398/2013*. The Finnish Society for Social Rights argued that the situation in Finland was contrary to Article 24 of the Charter for two reasons.

- First, the law governing employment contracts provided that the amount of compensation that could be awarded by the courts in the case of unfair dismissal could not exceed the equivalent of 24 months' salary.
- Secondly, the law did not provide for any possibility of reinstatement in the event of unfair dismissal.

The ECSR ruled in its Decision on Admissibility and the Merits, adopted on 8 September 2016, that this regulation was not in conformity with the requirements of Article 24 RESC.

In its decision, the Committee set out these considerations concerning reinstatement as a remedy for unlawful dismissal:

(ii) Reinstatement

> *55. As regards the second allegation; the lack of a possibility for the court to order reinstatement, while Article 24 does not explicitly refer to reinstatement, it refers to compensation or other appropriate relief.* ***The Committee considers that other appropriate relief should include reinstatement as one of the remedies available to national courts or tribunals*** *(see Conclusions 2003, Bulgaria). The possibility of awarding the remedy recognises the importance of* ***placing the employee back into an employment situation no less favourable than he/she previously enjoyed****.* ***Whether reinstatement is appropriate in a particular case is a matter for the domestic courts to decide.*** *The Committee recalls it has consistently held that*

reinstatement should be available as a remedy under ***many other provisions of the Charter as interpreted by the Committee, for example under Article 8§2 and 27§3.***

56. The Committee recalls that in Conclusions 2012 it found the situation not to be in conformity with Article 24 of the Charter ***on the grounds that legislation makes no provision for reinstatement in cases of unlawful dismissal.*** *There has been no change to this situation (Conclusions 2012, Finland).*

..

58. Therefore, the Committee holds that there is a violation of Article 24 of the Charter.

In the Decision on the Merits of 23 March 2022, Complaints 160/2018 (CGT-FO v. France) and 171/2018 158/2017 (CGT v. France), it was stated that the reforms to regulations on dismissals implemented by Order No. 2017-1387 of 22 September 2017 to Article L 1235-3 of the Labour Code, violated Article 24 of the Charter, specifically, the right of the worker to adequate compensation or other appropriate relief in the event of dismissal without valid reasons.

On the scope of the safeguard of reinstatement, it was stated that insofar as reinstatement was a possible remedy in the case of unfair dismissal, the situation was in conformity with Article 24 of the Charter (156). The Committee referred to the criterion laid down in its decision in Complaint No. 106/2014.

156. In this connection, the Committee refers to its decision in Finnish Society of Social Rights v. Finland, Complaint No. 106/2014, op. cit., §55: "…while Article 24 does not explicitly refer to reinstatement, it refers to compensation or other appropriate relief. The Committee considers that other appropriate relief should include reinstatement as one of the remedies available to national courts or tribunals. […] Whether reinstatement is appropriate in a particular case is a matter for the domestic courts to decide." The Committee also recalled that "it has consistently held that reinstatement should be available as a remedy under many other provisions of the Charter as interpreted by the Committee, for example under Article 8§2 and 27§3." The Committee therefore considers that as long as reinstatement is available as a possible remedy in cases of unlawful dismissal, the situation is compatible with Article 24 of the Charter.

This ruling referred to French law, which provided as follows (Article L.1235-3 [and its paragraphs] of the Labour Code, as amended by Article 2 of Ordinance No. 2017-1387 and Article 11 of Law No. 2018-217):

> *"If an employee is dismissed for a reason that is not real and serious, the court may propose that he or she be reinstated, with the retention of all of his/her accrued benefits.*
>
> *If either of the parties objects to such reinstatement, the court shall award the employee compensation, to be covered by the employer, and whose amounts shall lie between the lower and upper limits set in the table below:*
> *..."*

This was a scale which set the maximum limit at 20 months and which only applied after 29 years of service. The scale was lower for employees with a shorter length of service and for those working in companies employing fewer than eleven employees.

In such a case, national law did give the judicial authority the possibility to consider that the worker's reinstatement in the company was the most appropriate way to safeguard redress in the face of unfair dismissal. It was true that the rule gave both parties the possibility to object to such reinstatement, and it did not regulate the criteria or grounds on which this could be based. Nor did the rule reflect the judicial criteria on which objections could be based; the Committee nonetheless believed that, without a doubt, the judicial authority was indeed able to consider reinstatement as an appropriate measure.

2. Impossibility in Spanish legislation and judicial practice for the judicial authority to hold that reinstatement is the most appropriate form of redress for unfair dismissal

On the contrary, Spanish law and judicial practice do not allow the judicial authority, when a dismissal has been declared unjustified, to assess reinstatement as an appropriate measure to safeguard the protection of the person affected by the unfair dismissal.

A dismissal with unlawful cause, or without cause, according to the case law, including dismissals not communicated in writing, verbal or tacit, is qualified as unfair dismissal.

Invalidity is reserved for cases of violation of fundamental rights, or situations requiring special protection, precisely to prevent the violation of a fundamental right, that of not suffering discrimination, as provided for in Article 55.5 of the Workers' Statute.

However, invalidity is an insufficient framework of protection, as the right to work, recognised in Article 35 of the Spanish Constitution, does not have fundamental status, as it appears in Section 2 (Rights and Duties of Citizens), of Chapter 2 (Rights and Liberties) of Title I (Concerning fundamental rights and duties); not in Section 1 (Fundamental Rights and Public Liberties). This is not a remedy that is broadly and generally available to victims of unfair dismissal; rather, invalidity is an exceptional measure applicable to very specific cases.

Where unfair dismissals are concerned, companies enjoy an established discretionary power, freely exercised and without the possibility of judicial control, whereby they can decide to terminate employment.

The only procedural burden they must bear is to express their choice within five days of the notification of the judgment, and they are not liable to pay the statutory compensation corresponding to the unlawful dismissal, or even ensure that it is paid at all.

The company's option can even be exercised in advance during the proceedings, if the dismissal is declared unfair, so that the judgment does not need to grant the company the option to choose and can instead directly impose termination of employment and the payment of the statutory severance pay (Article 110.1.(a) LRJS).

The judicial authority is not competent to hold that the employer's decision to terminate the employment in the face of unfair dismissal could be abusive or could imply a serious lack of protection for the person concerned.

Add to this, as set out below, an absolutely insufficient system of compensation for such termination that does not assess the actual damage that the affected person may have sustained beyond the statutory compensation sum; does not provide for minimum compensation amounts; and does not compensate for the loss of wages incurred by the unlawful dismissal until issuance of the judgment resolving the dispute. One can understand the imbalanced position that the legislation offers to the parties to the employment relationship, often depriving the victim of unlawful dismissal of adequate protection.

Unfair dismissal thus becomes an instrument by which the company can – and does – deprive the person of his or her occupation and expel him or her ipso jure from the workplace, without any subjective reasoning, or even with completely illegitimate or abusive reasoning.

3. Failure to apply the rules of protection against fraudulent circumvention of the law or abuse of rights to the concept of unfair dismissal

Workers' lack of protection against unfair dismissal has worsened tremendously ever since the case law, embodied within the case law of the Supreme Court, started refusing to apply protection against fraudulent circumvention of the law and abuse of rights in cases in which the dismissal is a declaration of intent to terminate, either without invoking any justifying cause (discretionary dismissal) or by invoking a bogus cause, with the sole objective of ensuring that the process concludes with a declaration of unfair dismissal. Upon issuance of such a declaration, the law protects the company by allowing the termination of employment, without the judicial authority being able to check for fraudulent behaviour, and without the possibility of finding that reinstatement is the only appropriate way to protect the unlawful dismissal victim in light of the circumstances of the case, e.g. the conduct of the parties, the company's intention in dismissing, and the actual damage caused by the dismissal.

This creates an area completely devoid of judicial control in which the company can impose termination of employment. Moreover, it is unlawful for the judicial authority to inquire into the possible existence of abusive or fraudulent behaviour on the part of the company. This is tantamount to allowing the company to exercise its lawful right to terminate employment through unfair dismissal.

4. Impossibility for courts to impose reinstatement, even where a company voluntarily opts for reinstatement after the unfair dismissal judgment

As a consequence of the procedural vicissitudes of unfair dismissal, when the company is offered the option of termination or reinstatement and chooses reinstatement, but nevertheless decides not to carry it out, the procedural legislation imposes termination of employment, without the judicial authority being able to impose reinstatement on the company, despite its having opted for this, and regardless of the situation in which the worker finds him/herself.

In such cases, Article 281.2 of the LRJS establishes that the judicial authority will declare the employment relationship terminated and award payment to the worker of the sums provided for in sections 1 and 2 of Article 56 of the Workers' Statute.

In such cases, additional compensation is provided for: "Bearing in mind the surrounding circumstances and the harm caused by failure to reinstate or irregular reinstatement, additional compensation of up to 15 days' salary per year of service and a maximum of 12 monthly payments could be established. In both cases, periods of time of less than one year are satisfied pro rata and the time worked will be counted as the time lapsing until the date of the order."

The employer is also ordered to provide back pay for the period between the date of notification of the judgment first stating that the contract was deemed unlawful and the date of the court decision declaring termination of employment.

Here, in effect, there is a higher level of protection than in general against unfair dismissal, as it involves payment of post-dismissal remuneration during proceedings. Moreover, in addition to the compensation of 33 days' salary per year of service, there is additional compensation of another 15 days' salary, depending on the circumstances and damage incurred by the non-reinstatement or irregular reinstatement. It should be noted, though, that this scheme is intended for cases in which the company opts for reinstatement but fails to follow through with it, either completely or by reinstatement under conditions other than those existing prior to the dismissal. Such behaviour causes additional damage to the person concerned, who must be willing to accept whatever reinstatement the company may choose, with all that this implies in terms of renouncing or limiting other employment opportunities, only to find that the reinstatement is jeopardised by the company's non-compliance with its own choice.

This model is totally exceptional and is intended to rectify practices of procedural bad faith on the part of the company, such as when it opts for reinstatement in the expectation that if the person does not accept it, it will be released from any obligation to pay compensation due to the dismissed worker's voluntarily renouncing of employment. A limit is also set on compensation, even though the actual damage sustained, not only by the loss of employment, but also by the act of non-compliance with the reinstatement commitment, may be much greater.

5. Allowing of termination of employment, even in the absence of actual payment of compensation by the company

The system's imbalance is aggravated in instances where the mere decision by the employer to terminate the employment, in the exercise of the right to choose in cases of unfair dismissal, does not require, as a requirement for termination, that the employer actually pay whatever statutory compensation it may owe. On the contrary, in the legal model, followed seamlessly by case law, termination occurs by mere choice of the company, and the obligation to pay compensation is a mere financial debt that the worker will have to receive, either from the company at its own will, or through legal action to enforce the sentence so that the payment is made from the company's assets, if the latter has the solvency for this to take place. This results in an inherent delay in the actual receipt of compensation, which weakens the protection of the person who has already irreversibly lost his or her job through unfair dismissal.

6. Precedents in Spanish case law on the need to recognise the right to reinstatement as an adequate form of protection against unfair dismissal

In judicial practice, the serious lack of protection that this entails for the workforce has been detected, and in case law (in an absolute minority of cases) of some Labour Courts, a judgment compatible with Spanish legislation has been rendered. This leads one to conclude that this legislation is incompatible with the international guarantees set out in ILO Convention 158, using the guiding criteria – not in force in Spain at the time, the Revised European Social Charter. The result is that the company can freely impose termination of employment in the event of unfair dismissal.

Specifically, Labour Court of Madrid No. 34, Judgment No. 71/2020 of 21 Feb. 2020, Rec. 843/2019, and 9 March 2020, Autos 302/2019, which was overturned by the Judgment of the High Court of Justice of Madrid, Labour, of 9 March 2020, Rec. 85/2021, on the grounds that the Revised European Social Charter, in its Article 24, was not applicable to Spain at the time of the facts, so that, according to that court, FJ *FOUR ... Therefore, the interpretation that may be made of this provision by the Committee of Social Rights of the Council of Europe is not relevant to this dispute, because the provision itself is not applicable. When the process of ratification of the revised Social Charter by Spain is completed and the new treaty is officially published, the binding nature of the "secondary legislation" resulting*

from the treaty, i.e. the resolutions of Council of Europe bodies such as the Committee of Social Rights, can be considered."

This is thus not an effective avenue, as it is not accepted by case law and does not give the workforce access to a system of protection against unfair dismissal in which the judicial authority can decide, under any circumstances, that reinstatement is the most appropriate form of protection for the person affected by the unfair dismissal.

SECOND: NON-COMPLIANCE WITH ARTICLE 24(B) OF THE REVISED EUROPEAN SOCIAL CHARTER IN THE ABSENCE OF AN ADEQUATE MEASURE OF PROTECTION AGAINST DISMISSAL RESULTING FROM THE EXERCISE OF THE RIGHTS SET OUT IN THE EUROPEAN SOCIAL CHARTER AND THE REVISED EUROPEAN SOCIAL CHARTER

The rights enshrined in the Revised European Social Charter, as in the original version and its Protocols, must be effectively protected, so that the judicial authority, in the event of a violation in the course of an employment relationship leading to the dismissal of the worker, where it is established that the dismissal is intended to prevent the worker from exercising the rights protected the Charter, must make it possible for it (the judicial authority) to consider, in deciding the dismissal dispute, the possibility that the most appropriate remedy must be the reinstatement of the unfairly dismissed worker.

The complaint alleges that the Spanish legal model is insufficient to prevent dismissal as a consequence of the exercise by workers of the rights recognised in the European Social Charter and in the Revised European Social Charter. Legislation and judicial practice limit the guarantee of compensation to the rights defined exclusively in the Spanish Constitution as fundamental rights, which do not include the set of rights derived from the employment relationship that are protected, among other international instruments, by the Revised European Social Charter, its original version, and its Protocols.

1. The case law criterion, which excludes the existence of "dismissal in fraudulent circumvention of the law" in Spanish law, when the company uses the dismissal without legitimate cause to preclude the exercise or enjoyment of other labour rights

In Spanish law, the regulation of fraudulent circumvention of the law in the execution of legal acts, businesses or contracts functions as rule inherent in the legal system, with, as a general basis, Article 6.4 of the Civil Code, which provides:

> *4. Acts carried out under the cover of the provisions of a rule which seek a result prohibited by, or contrary to, the legal system shall be considered to have been carried out by evasion of the law and shall not prevent the due application of the rule which it was sought to circumvent.*

However, concerning employment contracts, and more specifically, in relation to terminations decided by companies by means of dismissal without just cause, the case law of the Supreme Court, generally followed by the lower courts, has been to consider that a dismissal which does not comply with the form or the cause provided for by law must be characterised as unfair dismissal, and it is not necessary to examine whether the company has engaged in fraudulent behaviour, by which, through the termination, it has sought to prevent the worker from exercising his or her rights arising from the employment relationship.

Spanish law characterises the dismissal as unfair or invalid to identify the effects of the company's decision to terminate the employment, subject to the payment of statutory compensation, or to impose the obligation to reinstate on its own terms, with payment of back pay for the period between the termination of employment until reinstatement.

When the case law holds that fraudulent dismissal is to be characterised as unfair, this means that it is treated the same way as dismissal in which there are breaches of form, or a lack of evidence of the cause invoked, but there is no evidence that the company intends to prevent the exercise of the legally protected rights of workers.

As a summary, the Judgment of the Supreme Court, Labour, of 5 May 2015, Appeal No: 2659/2013, ECLI:ES:TS:2015:2469 states:

> *"And so it is, indeed. All of these decisions have invariably reached the conclusion that in those cases, such as the ones in question, in which the company has not alleged and proved the justified cause for objective dismissal set out in Article 52(d) of the Workers' Statute ("dismissal of an employee by reason of intermittent absences, even where justified," reaching or exceeding certain levels), the dismissal due to illness or medical leave deserves, in principle, to be characterised as unfair*

dismissal and not as invalid dismissal. In turn, this case law on the classification of dismissal due to illness expressly links (STS 29-2-2001) to a previous line of case law, according to which the business practice of invoking grounds for dismissal that do not correspond to the actual reason for the decision to terminate employment – so-called "fraudulent dismissal" – does not in itself justify the classification of invalidity.

3. According to this case law, based on the text of the Labour Procedure Act of 1990, not amended on this point in the amended text of 1995 or in the current LRJS, Article 108.2 of the latter provision "mentions in a restricted manner the cases in which the dismissal must be characterised as invalid," and this exhaustive list does not include termination by the employer whose true motive does not coincide with the formal cause stated in the notice of termination. This line of case law on the lack of "legal support or endorsement" for the invalidity of fraudulent dismissal begins with STS 2- 11-1993 (Rec. 3669/1992), to which the paragraphs in quotation marks correspond, and continues in STS 19-1-1994 (Rec. 3400/1992), STS 23-5-1996 (Rec. 2369/1995) and 30-12-1997 (Rec. 1649/1997). "Where there is no legal cause for termination of employment, and the actual cause is not among those specified for characterising a dismissal as invalid," concludes STS 29 February 2001 (cited), "the applicable characterisation [of the dismissal] is 'unfair'," not 'invalid'.

4. Thus, the issue in question, as mentioned above, has already been resolved by the Chamber, inter alia, in the judgments of 22 January 2008 (R. 3995/2006), 27 January 2009 (R. 602/2008) and 22 November 2007 (R. 3907/2006). This latter judgment, as well as the former, in addition to maintaining the previous case law on the characterisation of a dismissal as unfair due to "medical leave" of the worker, also provide answers to most of the specific arguments that appear in the present procedural debate."

This is case law, adopted and reiterated by judicial authorities, as for example, in the Judgment of the Labour Division of the Madrid High Court of Justice (Labour Division) of 21-05-2021, no. 486/2021, Rec. 159/2021, and 30-09-2021 no. 605/2021, Rec. 439/202.

The case of dismissal on grounds of illness, which is analysed in this case law, is particularly striking. Despite the fact that there is no breach by the employee, the company dismisses him or her on the grounds that he or she has exercised his or her right to sick leave to reduce the inherent costs arising from non-performance of work due to illness or accident.

2. The inadequacy of the consequences of dismissals arising precisely from the exercise of the rights recognised in the European Social Charter or in the Revised European Social Charter, and their extension to other rights of an employment nature

Case law therefore treats in the same way a case in which the employer lacks sufficient evidence, produced during the proceedings, of the non-compliance of the worker to attempt to justify the dismissal, with other situations in which it can be proved that the dismissal does not concern alleged non-compliance by the worker, but deprivation of employment due to an illegitimate purpose, such as preventing the worker from exercising his or her statutory labour rights.

Effective termination is thus granted upon invocation not only of causes with insufficient proof, but also of false, bogus causes, invoked as a mere pretext to achieve an end that the legislation itself considers illegitimate, despite the fact that the actual and effective reason, as established in the proceedings, for the termination, is to prevent the person from working, and despite the fact that he or she has an individual right that the company, by means of termination, intends to preclude him or her from exercising.

Only in the case of a breach of a fundamental right can invalidity (nullity) be declared, or in the case of dismissal for reasons related to the company's operational requirements, if the dismissal has a collective dimension as determined by the number of persons affected, and no consultation period with the workers' representatives is held.

THIRD: NON-COMPLIANCE WITH ARTICLE 24(B) OF THE REVISED EUROPEAN SOCIAL CHARTER IN THE ABSENCE OF COMPENSATION FOR THE FINANCIAL LOSS CAUSED BY THE LOSS OF EMPLOYMENT FOR NO JUSTIFIED REASON DURING THE COURSE OF THE PROCEEDINGS: EXCLUSION OF THE PAYMENT OF POST-DISMISSAL REMUNERATION DURING PROCEEDINGS FOLLOWING THE LEGAL REFORM OF 2012

1. Denial of the right to receive back pay between the time of dismissal and delivery of the judgment

In 2012, Spanish law abolished the payment of post-dismissal remuneration during unfair dismissal proceedings where the employer opts for termination of employment.

RDL 3/2012 of 8 February 2012, subsequently passed as a bill that brought about Law 3/2012 of 6 July 2012, redrafted Article 56.2 of Royal Legislative Decree 1/1995 of 24 March 1995, approving the amended text of the Law on the Workers' Statute.

Article 56.2 LET, in the wording of RDL 3/2012 and Law 3/20212, only provides for the payment of post-dismissal remuneration during proceedings when the company opts for reinstatement, or when the workers' representative, affected by an unfair dismissal, opts for reinstatement. As the provision states, "[i]n the event that reinstatement is chosen, the employee is entitled to post-dismissal remuneration during proceedings."

With this new regulation, when a dismissal is characterised as unfair, the employer has the right to choose between reinstatement of the worker with back payment of post-dismissal remuneration during proceedings (wages not received from the date of dismissal until the date of notification of the judgment) or termination of employment with payment of the corresponding statutory compensation only.

The justification for eliminating post-dismissal remuneration during proceedings through Law 3/2012 (6 July), a departure from the previous legal model, whereby they were paid not only in the event of reinstatement but also in the event of termination of employment, is set out in the explanatory memorandum (penultimate paragraph of Section V): "*since the duration of the legal proceedings does not seem to be an adequate criterion to compensate for the damage caused by the loss of employment, especially bearing in mind that the worker is eligible for unemployment benefit from the very moment at which the decision to terminate the employment contract becomes effective*." Moreover, "*post-dismissal remuneration during proceedings sometimes acts as an incentive for procedural delaying tactics, to which is added the fact that they end up becoming a partially socialised cost, given the provision that the employer may claim from the State the portion of these wages that exceeds 60 days*."

2. The absence of compensation for access to unemployment benefits

The fact that a person may qualify for unemployment benefits, if he or she has sufficient contributions, does not prevent prejudice in the form of loss of income.

The right to unemployment benefits does not arise in connection with unfair dismissal, but stems from having paid contributions over a period of time, and being in a certain situation, basically, loss of employment not attributable to the person concerned. (Article 262 of Royal Legislative Decree No. 8/2015 (30 October) approving the amended text of the General Law on Social Security).

This allows access to the benefit if one meets the requirements of having a minimum contribution period (12 months), in accordance with Article 266.b) of the General Law on Social Security, which has not been considered to previously recognise another benefit entitlement, so that the periods of contribution are used up each time a new entitlement is granted. Therefore, access to unemployment benefits is not strictly speaking an individual right that compensates for the loss of unfair dismissal.

Moreover, these benefits are not the same amount as wages, and are often significantly less. The amount of the benefit is, for the first six months, 70% of the assessment base set according to the average salary of the worker's last 180 days, and after those six months it is reduced to 50% of that average salary. In addition, ceilings are applied that may result in further reductions in the amount of salary that was being received. In general, the maximum amount of unemployment benefits is 175% of the IPREM ('public indicator of multiple-effect income') increased by one-sixth, which for 2022 represents 1 182.16 euros per month, which increases with one child to 1 351.04 euros per month, and, with two or more children, to 1 519.92 euros per month in 2022.

Moreover, the period from the dismissal to the judgment reduces the duration of the benefit, which is fixed according to the years of contribution in the last six years, basically at the rate of 120 days of benefit for each year of contribution, which generates a maximum of 720 days of benefit (Article 269.1 of the General Law on Social Security). Use of the benefit reduces the period of enjoyment, and these contributions cannot be taken into account to give rise to a new right (Article 269.2 of the General Law on Social Security). A person unlawfully dismissed therefore has his or her right to social protection for unemployment reduced while the dismissal proceedings are under way; during this period, instead of new contributions being generated, his or her previous contributions are used up.

More importantly, access to unemployment benefits has no dissuasive effect on the company's unlawful conduct, but rather the opposite, when a significant part of the damage caused by its unlawful conduct is borne by public resources and, in particular, by the right

to unemployment protection that the person concerned may be entitled to and which he or she has to use while the dismissal proceedings are in progress.

3. Denial of the right to default interest for late payment of compensation after the effective date of the termination of employment

It is clear that default interest does not provide adequate compensation for the financial loss of income generated by an unfair dismissal. Therefore, we are not of the view that recognising default interest can adequately compensate for this loss of income.

It at least implies, however, that the financial amount of the compensation intended to compensate for termination of employment is not devalued by the time elapsed between termination of employment and the court decision declaring the right to receive it.

However, neither national legislation nor national judicial practice recognises the right to such compensation of default interest.

The absence in Spanish legislation of any kind of compensation for the financial harm incurred by loss of employment during unfair dismissal proceedings even adversely affects the recognition of the payment of interest for the delay in the payment of compensation, for the period from the moment of the termination decided by the company until the moment in which, in the judicial decision declaring the dismissal unfair, the amount to be received by the worker is set.

In fact, there is no judicial practice of this type of compensation due to the lack of legal basis and precedents, and in cases where it has been expressly claimed, it has been rejected, as in the case of the judgment **STSJ Catalonia, Labour, Plenary, of 31 March 2021**, Rec. 3825/2020).

The employee claimed the payment of interest by arguing that since the statutory severance payment is a debt that is configured and arises in law at the same time as the dismissal, the delay that could potentially occur between the dismissal and the time when the severance payment is effectively and materially received must be compensated with the late payment credit. However, the Court rejected this compensation (FJ 6):

> "...*Statutory severance pay is not a debt that is liquidated, due and payable from the moment of dismissal*. *In order for the right to arise legally, as in the case in question,*

a final judicial decision must declare the dismissal to be unjustified, and the employer must exercise the option for termination in due time and form. Only at this point is the compensation paid."

4. The absence of incentives for the company to avoid litigation or to pay compensation more quickly, and the legal incentives for the worker to waive part of the statutory compensation

With the Spanish legal model, the company has no incentive to avoid litigation, or even to pay compensation, even months or years after dismissing the person affected by the unfair dismissal.

- The court has no means of imposing reinstatement; rather, it is treated as a company right.

- Compensation is only payable after the final judgment declaring the dismissal invalid, despite the fact that the law recognises the termination of employment the moment the company notifies the person concerned of the dismissal.

  The amount of severance pay is determined by considering length of service, exclusively, up to the date of dismissal, as interpreted by the Supreme Court (STS 21 October 2004, Rec. 4966/2002). In law, Article 56.1 of the Workers' Statute establishes that "Opting for compensation shall trigger the termination of employment contract, which shall be deemed to have occurred on the date of the effective termination of employment," thus giving the date of unlawful dismissal as the final moment for calculating the services rendered.

- The period between the dismissal and the judicial ruling of the existence of an unfair dismissal does not generate default interest either, even though there is a delay in the payment of compensation for the damage sustained by the dismissal, which is calculated at the time of the company's decision.

Therefore, pre-trial attempts at conciliation, of which our legal system requires two – one in the preliminary stage, and another before the start of the trial – are solely a forum for the person to renounce a part of the compensation he or she may be entitled to in exchange for the illegitimate offer that the company will pay it immediately. This is instead of following the procedural steps that only ensure payment after a sometimes lengthy

process, which, if the company chooses to file an appeal, is sure to exceed twelve months, and can take up to two or three years, depending on the workload of the respective bodies hearing the appeals, i.e. the Labour Division of the High Courts of Justice or, on appeal, the Labour Division of the Supreme Court.

5. The judicial criterion finding non-compliance with the Revised European Social Charter in the denial of entitlement to outstanding wages until the date of service of the judgment

This means that there are no precedents or cases in which the right to compensation for such losses is recognised.

However, the case law has, exceptionally, noted the need to review the exclusion of the payment of post-dismissal remuneration during proceedings upon termination in unfair dismissal cases, which is evidence that Spanish legislation is not aligned with international legislation, in particular, ILO Convention 158 and, in the present case, Article 24 of the Revised European Social Charter.

The **Judgment of the Labour Court of Reus No. 1 of 16 July 2021 (case no. 650/2020)** recognises that the amount of severance pay must include back pay for the period between the time of dismissal and the termination, with a review of compatibility in the case of Spanish legislation, for which Article 10 of ILO Convention 158 is decisive, and as a guiding criterion, Article 24 of the RESC.

The judgment states that compensation resulting from the application of Article 56.1 of the TRLET (Amended Text of the Workers' Statute Act), "*is neither minimally dissuasive for the company nor adequate to remedy the situation of the worker, who is deprived of the support provided by the salary she had been receiving for her work, without sufficient contributions even to access contributory unemployment benefit, a situation aggravated by the fact that the dismissal took place in the midst of the health crisis caused by the COVID-19 pandemic, the effects of which on the labour market are well known, which is why the rule contained in Article 56.2 of the Workers' Statute should undergo a review of compatibility with Convention number 158 of the International Labour Organisation, dated 22 June 1982, and with Article 24 of the European Social Charter (revised), ratified by Spain on 17 May 2021, with effect from 1 July 2021.*"

This ruling highlights the enormous lack of protection for those affected by unfair dismissal, whose contracts are terminated and who have no right to compensation for the financial losses stemming from the wages lost from the time of dismissal until the judgment declaring it to be unfair.

This is not, on the other hand, proof that current Spanish legislation makes it viable to claim financial damages for the period following dismissal, as it is an exceptional ruling, which, moreover, was overturned by the judgment STSJ, Labour, Catalonia, of 30 May 2022, Rec. 538/2022.

FOURTH: NON-COMPLIANCE WITH ARTICLE 24(B) OF THE REVISED EUROPEAN SOCIAL CHARTER, IN VIEW OF THE LEGAL IMPOSSIBILITY OF CLAIMING ADDITIONAL COMPENSATION OVER AND ABOVE THAT FOR WHICH COMPENSATION IS PAYABLE UNDER THE LEGALLY ESTABLISHED COMPENSATION FOR UNFAIR DISMISSAL

1. The ECSRC case law on the scope of Article 24.b of the RESC concerning the requirement of adequate compensation for unfair dismissal

Collective Complaint No. 106/2014 brought by *Finnish Society of Social Rights* v. Finland. The country redrafted the Employment Contracts Act 55/2001, giving rise to Act 398/2013. The Finnish Society for Social Rights argued that the situation in Finland was contrary to Article 24 of the Charter for two reasons.

- First, the law governing employment contracts provided that the amount of compensation that could be awarded by the courts in unfair dismissal cases could not exceed the equivalent of 24 months' salary.
- Secondly, the law did not provide for any possibility of reinstatement in the event of unfair dismissal.

The ECSR ruled in its Decision on Admissibility and the Merits, adopted on 8 September 2016, that it was not in conformity with the requirements of Article 24 RESC.

In its decision, the Committee set out the following considerations: (Paragraphs 45 et seq.):

45. The Committee recalls that under the Charter, employees dismissed without valid reason must be granted adequate compensation or other appropriate relief.

Compensation systems are considered appropriate, if they include the following:

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

- possibility of reinstatement and/or

- compensation at a level high enough to dissuade the employer and make good the damage suffered by the employee (Conclusions 2012, Turkey).

46. Any upper limit on compensation that may preclude damages from being commensurate with the loss suffered and sufficiently dissuasive is in principle, contrary to the Charter. However, if there is such a ceiling on compensation for pecuniary damage, the victim must be able to seek compensation for non-pecuniary damage through other legal avenues (e.g. anti-discrimination legislation) (Conclusions 2012, Slovenia).

(i) Adequate compensation

48. The Government states that employees may in addition to the Employment Contracts Act seek compensation for unlawful dismissal under the Non-Discrimination Act and the Act on Equality between Women and Men. However, the Committee notes that only persons who were dismissed on discriminatory grounds may seek compensation under these pieces of legislation. In a case of unfair dismissal, not having a discriminatory element, it is not possible to claim compensation under them.

49. The Committee considers that in some cases of unfair dismissal an award of compensation of 24 months as provided for under the Employment Contracts Act may not be sufficient to make good the loss and damage suffered.

51. [...]The Committee notes that the Tort Liability Act does not apply in all situations of unlawful dismissal, and may only be applicable in restricted situations. It points out, in particular, that the law relating to civil liability does not apply, unless otherwise provided, to contractual liability or to liability governed by a different law.

52. The Committee finds that the Tort Liability Act does not provide a fully-fledged alternative legal avenue for the victims of unlawful dismissal not linked to discrimination.

53. The Committee considers that the upper limit to compensation provided for by the Employment Contracts Act may result in situations where compensation awarded is not commensurate with the loss suffered. In addition, it cannot conclude that adequate alternative other legal avenues are available to provide a remedy in such cases.

54. Therefore the Committee holds that there is a violation of Article 24 of the Charter.

Decision on the Merits of 11 September 2019, Complaint No. 158/2017, (CGIL v. Italy), examines the adequacy of compensation for unlawful dismissal in the private sector following Legislative Decree No. 23/2015 *Disposizioni in materia di contratto di lavoro a tempo indeterminato a tutele crescenti (plafond progressivo*) ['Provisions on permanent contracts of employment offering a level of protection that increases with length of service'].This was amended after the complaint. Constitutional Court Judgment No. 194/2018 enabled courts to consider not only length of service but also other factors (number of workers, company size, and conduct and situation of the parties).

With regard to other types of dismissal without valid reason, the Committee noted that not only did the contested measures not allow for reinstatement, but they also provided for compensation which did not cover the reimbursement of financial losses actually incurred, as its **amount was subject to an upper limit of 6, 12, 24 or 36 times the reference monthly remuneration, as the case may be**.

The Committee noted that the Government had not provided any examples of cases in which compensation had been granted for unlawful dismissal on the basis of the rule on civil liability or under Article 1418 of the Civil Code.

In the **Decision on the Merits of 23 March 2022, Complaints 160/2018 (CGT-FO v. France) and 171/2018 158/2017 (CGT v. France)**, the Committee unanimously concluded that there was a violation of Article 24.b of the Charter.

This stemmed from the collective complaint lodged by the French trade union organisations, CGT-FO and CGT, in which they alleged that the reforms in the regulations on dismissals carried out by Order No. 2017-1387 of 22 September 2017 to Article L 1235-3 of the Labour Code, violated Article 24 of the Charter and, more specifically, the right of workers whose employment was terminated without a valid reason to adequate compensation or other appropriate relief.

The previous legal framework relating to the termination of the employment contract and the provisions concerning dismissal without real or serious cause did not provide for an upper limit on compensation, but for minimum sums, which could not be less than 6 months' salary (until the Order of 22 September 2017).

According to Article L.1235-3 (and its paragraphs) of the Labour Code as amended by Article 2 of Ordinance No. 2017-1387 and Article 11 of Law No. 2018-217:

> "If an employee is dismissed for a reason that is not real and serious, the court may propose that he or she be reinstated, with the retention of all of his/her accrued benefits.
>
> If either of the parties objects to such reinstatement, the court shall award the employee compensation, to be covered by the employer, and whose amounts shall lie between the lower and upper limits set in the table below:
> ..
>
> In the event of a dismissal from a company ordinarily employing fewer than eleven employees, the minimum amounts below shall be applicable, by derogation from those set above:"

This was a scale which set the maximum limit at 20 months and which only applied after 29 years of service. The scale was lower for employees with a shorter length of service and for those working in companies employing fewer than eleven employees.

This regulation provided for another system of compensation for cases of dismissals that were rendered invalid because they were discriminatory, contrary to fundamental freedoms, or in retaliation for legal proceedings relating to gender equality, or which affected persons in need of special protection:

> Article L.1235-3-1

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

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

1. the breach of a fundamental freedom;
2. psychological or sexual harassment in the circumstances described in Articles L.1152-3 and L.1153-4;
3. discriminatory dismissal of the type described in Articles L.1132-4 and L.1134-4;
4. dismissal following the initiation of legal proceedings in relation to gender equality at work in the circumstances described in Article L.1144-3, or following the denunciation of crimes or offences;
5. dismissal of a protected employee, as described in Articles L.2411-1 and L.2412-1, as a result of the exercise of his or her office;
6. dismissal of an employee in breach of the protections referred to in Articles L.1225-71 and L.1226-13.
Compensation shall be payable without prejudice to the payment of the salary which would have been received during the period of invalidity, where it is owed pursuant to the provisions of Article L. 1225-71 and to the protected status granted to certain employees pursuant to Chapter I of Part I of Book IV of the second part of the Labour Code, and without prejudice to any compensation provided for by statute, collective agreement or contract."

On the scope of the safeguard of reinstatement, it was stated that insofar as reinstatement was a possible remedy in the case of unfair dismissal, the situation was in conformity with Article 24 of the Charter (156). The Committee referred to the criterion laid down in its decision in Complaint No. 106/2014.

156. In this connection, the Committee refers to its decision in Finnish Society of Social Rights v. Finland, Complaint No. 106/2014, op. cit., §55: "…while Article 24 does not explicitly refer to reinstatement, it refers to compensation or other appropriate relief. The Committee considers that other appropriate relief should include reinstatement as one of the remedies available to national courts or tribunals. […] Whether reinstatement is appropriate in a particular case is a matter

for the domestic courts to decide." The Committee also recalled that "it has consistently held that reinstatement should be available as a remedy under many other provisions of the Charter as interpreted by the Committee, for example under Article 8§2 and 27§3." The Committee therefore considers that as long as reinstatement is available as a possible remedy in cases of unlawful dismissal, the situation is in conformity with Article 24 of the Charter.

With regard to the adequacy of the compensation, the Committee stated that there was indeed a violation of Article 24 RESC:

158. The Committee recalls that in Finnish Society of Social Rights v. Finland, Complaint No. 106/2014, op. cit., a ceiling of 24 months provided for by Finnish legislation was considered insufficient by the Committee, as it did not allow for adequate compensation within the meaning of Article 24 of the Charter.

159. The Committee notes that in French legislation the maximum ceiling does not exceed 20 months and only applies for 29 years of seniority. The scale is lower for workers with low seniority and working for companies with fewer than 11 workers. For these workers both minimum and maximum amounts of compensation that they can claim are low and sometimes close together, which means the compensation range is not wide enough.

160. The Committee considers that, contrary to what the Government asserts – the aim of the system introducing compensation ceilings was to provide greater legal certainty for the parties and thus greater predictability of the costs of legal proceedings – the ***'predictability' resulting from the scale might rather serve as an incentive for the employer to unlawfully dismiss workers****. Indeed, the established compensation ceilings could prompt employers to make a pragmatic estimation of the financial burden of an unjustified dismissal on the basis of cost-benefit analysis.* ***In some situations, this could encourage unlawful dismissals.***

161. Moreover, the Committee notes that the upper limit of the compensation scale ***does not allow the award of higher compensation on the basis of the personal and individual situation of the worker****, as the courts can only order compensation for unjustified dismissal within the lower and upper limits of the scale, unless the application of Article L. 1235-3 of the Labour Code is excluded.*

168. The Committee considers that the ceilings set by Article L.1235-3 of the Labour Code are not sufficiently high to make good the damage suffered by the victim and be dissuasive for the employer.

Moreover, the courts have a narrow margin of manoeuvre in deciding the case on its merits by considering individual circumstances of unjustified dismissals. For this reason, the real damage suffered by the worker in question linked to the individual characteristics of the case may be neglected and therefore, not be made good. In addition, other legal avenues are limited to certain cases. The Committee considers therefore in light of all of the above elements, that the right to adequate compensation or other appropriate relief within the meaning of Article 24.b of the Charter is not guaranteed.

Therefore, there is a violation of Article 24.b of the Charter.

2. Determination of the rate of compensation for unfair dismissal in Spanish legislation and judicial practice. Impossibility of basing such a complaint on general contractual liability law, or on any other legitimate legal ground

Article 56 of the Workers' Statute sets the amount of compensation for unfair dismissal at "the equivalent of thirty-three days' salary per year of service, with periods of less than one year being calculated pro rata on a monthly basis, up to a maximum of twenty-four monthly payments*."*

Thus, compensation for termination of contract is determined based on salary and years of service at the rate of 33 days' salary per year of service. However, a maximum limit is set at 24 monthly payments in all cases.

This amount is the result of the reform carried out in 2012, which, in addition to excluding the payment of post-dismissal remuneration during unfair dismissal proceedings, reduced statutory compensation in two ways:

- By reducing the number of days' salary paid per year of service from the 45 days' salary previously provided for in labour legislation to 33 days' salary.

- By lowering the upper limit of the amount of the resulting compensation, which went from 48 months' salary to the current limit of 24 months' salary, in all cases.

Spanish law sets the amount of compensation for termination of contract in the event of unfair dismissal characterised as unlawful. It is not calculated on the basis of the parameters for quantifying actual damage, loss of income and non-pecuniary damage caused; rather, the amount is set by law (Articles 50, 53 and 56 Workers' Statute).

This is stated in Judgment of the Supreme Court STS UD 31/05/2006 (RECUD 5310/2004): *"according to this line of case law, of which the judgments of 23 October 1990 (Rec.527/1990) and 3 April 1997 (Rec. 3455/1996) are examples, among many others*, "*the labour legislation, in its regulation of dismissals... departs from the provisions of Articles 1106 et seq. of the Civil Code, and establishes a specific system of compensation, "consisting of setting the scope of compensation 'in an objective and statutory manner,'" "without the judge being able to assess the damage caused in any other* way" (STS 29-10-90, cited).

According to the same judgment, which cites numerous precedents in the case law of previous years, this system *"can sometimes benefit and sometimes harm the worker, who, on the one hand, is freed from having to prove the damage suffered, since their existence is protected by an irrebuttable presumption, and on the other hand is prevented from being able to prove that the damage suffered is of greater economic impact than what is determined on the basis of the precise valuation rules established in the law*." To continue: *"The same thesis is maintained in the other judgment cited as an example of the traditional case law (STS 3-4-1997). It starts from the premise that "when there is a specific compensation provision in the labour law, it is not feasible to resort to provisions of the same nature in ordinary law," to reach the conclusion that a breach by the employer (the case in question pertained to the application of Article 50 Workers' Statute) "cannot generate dual compensation, one in the sphere of civil law and the other in the particular and special sphere of labour law*."

From the perspective of this complaint, the Spanish legislation's incompatibility with the Charter regarding compensation for unfair dismissal relates to its maximum upper limit, with no possibility of claiming additional damages, whether material or non-pecuniary, regardless of the personal and family situation of the worker and the conduct of the company.

The complaint further alleges that such quantification criteria should be applied to cases in which the individual is the one who initiates the termination of employment in the face of

serious breaches by the employer, and that in Spanish law such cases are treated in the same manner as unfair dismissals, since they essentially amount to unfair indirect dismissals prompted by the non-payment of wages, or the violation of the basic rights of the worker, justifying termination of contract due to serious misconduct on the part of the company.

3. Inadequacy of the compensation model for invalid dismissal on grounds of discrimination or infringement of fundamental rights to guarantee the right to adequate compensation for unfair dismissal

There is only one exception to the general rule against claiming additional compensation for loss of employment: when a dismissal decision is made on discriminatory grounds or in violation of fundamental rights and other civil liberties.

However, one cannot interpret this as being an effective means of compensating for the damage resulting from unfair dismissal.

As stated in the ECSR decision in Collective Complaint No. 106/2014 brought by *Finnish Society of Social Rights* against Finland, in relation to the requirement of sufficient compensation:

(i) Adequate compensation

> *48. The Government states that employees may in addition to the Employment Contracts Act seek compensation for unlawful dismissal under the Non-Discrimination Act and the Act on Equality between Women and Men. However, the Committee notes that only persons who were dismissed on discriminatory grounds may seek compensation under these pieces of legislation. In a case of unfair dismissal, not having a discriminatory element, it is not possible to claim compensation under them.*

Similarly, in the Decision on the Merits of 23 March 2022, Complaints 160/2018 (CGT-FO v. France) and 171/2018 158/2017 (CGT v. France), the Committee found that a model which allowed for additional compensation to be claimed, covering all the damage sustained, but reserved for cases of dismissal ruled to be invalid for being discriminatory, violating a fundamental freedom, or in retaliation for the initiation of legal proceedings in relation to gender equality at work, or affecting persons in need of special protection, did not offer sufficient protection for the full range of cases of unfair dismissal. As paragraph 168 stated, "For this reason, the real damage suffered by the worker in question linked to the individual

characteristics of the case may be neglected and therefore, not be made good." In addition, other legal avenues were limited to certain cases. The Committee considered therefore in light of all of the above elements, that the right to adequate compensation or other appropriate relief within the meaning of Article 24.b of the Charter was not guaranteed.

4. Judicial rulings that have found the amount of compensation for unfair dismissal to be insufficient to ensure adequate redress under the terms of the Revised European Social Charter

In the judicial practice in labour matters, various rulings have confirmed the non-compliance of Spanish labour legislation with international regulations, principally with Article 24 of the Revised European Social Charter and Article 10 of ILO Convention 158.

- The Judgment of the Labour Court no. 26 Barcelona of 28 July 2020 (Rec. 848/2019), on the dismissal of a person who had provided services under a so-called *fijo-discontinuo* contract [permanent seasonal contract], recognised additional compensation of €3 162 (9 months' salary), unless the worker is reinstated.

  It considered that in a disciplinary dismissal where unfairness was recognised under ILO C158 (interpreted in accordance with the 1996 CSE), the statutory severance pay was not sufficiently dissuasive and, therefore declared that (FJ 7): "SEVEN. - *Solution to the specific case. From what has been reasoned so far, it is easy to conclude that the strict application of Article 56 of the Workers' Statute, with an almost symbolic compensation of 95.45 euros, is contrary to ILO Convention no. 158, as it does not have a dissuasive effect for the company, citing a naturalisation card as grounds for termination of the employment, at the mere will of the employer (withdrawal)."*

- The Judgment of the Labour Court of Barcelona **No. 26 of 31 July 2020** (no. 170/2020), set the amount of compensation at the equivalent of 9 months' salary, which in the plaintiff's case amounted to 60 000 euros. **SJS No. 26 Barcelona 31 July 2020** (no. 174/2020) also reached the same conclusion, imposing the payment of 9 months' salary by way of compensation.

- The **STSJ Catalonia of 23 April 2021** (Rec. 5233/2020), overturned JS decision No. Barcelona of 31 July 2020, but on the premise that Spanish legislation did not guarantee the payment of adequate compensation in the event of termination of

contract due to unfair dismissal, and therefore considered the possibility that in exceptional cases in which damage greater than that included in the statutory compensation was proved, an increase in compensation of 15 days' salary per year of service could be paid, with a maximum of 12 months, by analogy with what was provided for cases of termination when the company failed to comply with its obligation to reinstate after voluntarily opting to do so – Article 281. 2.b) of the Law governing employment courts (Ley Reguladora de la Jurisdicción Social). To this end, it required the worker to allege and prove additional damage, giving as an example "*the need to travel, the employee's expenses, rental payments, the actual damage due to the loss of a previous job or the non-pecuniary damage of abandoning a consolidated family and social environment*.

"..., it would be advisable for the legislature to conduct an in-depth revision of our method of dismissal and termination of contracts insofar as the current legal framework creates obvious dysfunctions... In practice, this means that, in our system, it is possible for a company to withdraw (even if this is not formally stated), which is in flagrant contradiction of the commitments agreed upon by Spain with the signing of ILO Convention 158 (BOE 29 June 1985), which in Article 4 requires the existence of a justifiable cause. This is not the case with Article 24 of the European Social Charter (revised) of 1996, which requires "valid reasons," insofar as the latter has not yet been signed by the Spanish state (it is currently under consideration by parliament), and the previous version – if ratified – of 1961 does not provide for similar protection.
..."

- This criterion was reiterated by the **Judgment of the High Court of Justice (STSJ) of Catalonia of 20 May 2021** (Rec. 5234/2020) and **14 July 2021** (Rec. 1811/2021), acknowledging the insufficiency of the legal model in force in Spain and the failure to satisfy the review of compliance with international conventions, but denying the right to compensation on the grounds that the complaint did not comply with the proof of the damage that the Chamber considered necessary to recognise additional compensation.

- This was reiterated in **STSJ Galicia 27 May 2022** (Rec. 1631/2022), which stated that it accepted the reasoning of the judgment **STSJ Catalonia 23 April 2021** (Rec. 5233/2020, and **STSJ Catalonia 30 May 2022** (Rec. 538/2022), adopted the case law of the aforementioned **STSJ Catalonia 23 April 2021** (Rec. 5233/2020), but rejected the compensation in the case, considering that the post-dismissal

remuneration during proceedings was not protected (based on wages lost between the date of dismissal and the date of the trial – Article 56.2 of the Workers' Statute). Only if additional damage were to be proven could the compensation of 15 days' salary per year of service be recognised, in application, by analogy, of Article 281.2.b) of the LRJS.

In any case, this line of judicial interpretation does not constitute case law, which in practice has not recognised effective compensation in the cases it has decided, since the rulings have been overturned.

There is another example of opposing case law that denies the possibility of higher compensation than the statutory sum in the case of unfair dismissal. The judgments of the High Courts of Justice of Castilla y León (Valladolid) of 1 March 2021, Appeal 103/2021, and Madrid, in judgments of 1 and 18 March 2021, Appeal 596/2020 and 136/2021, rejected the payment of additional compensation. The same criterion was applied in judgment **STSJ Asturias 21 December 2021** (Rec. 2295/2021), and in judgment **Castilla-La Mancha of 1 December 2021** (Rec. 1807/2020).

5. The need for labour regulation to incorporate elements to establish the bases for calculating compensation to be set in a feasible manner, ensuring the adequacy of redress and the dissuasion of unfair dismissal practices by employers

According to the Appendix to the Charter, with reference to Article 24, point 4, stating that:

> *4. It is understood that compensation or other appropriate relief in the case of termination of employment without valid reasons shall be* ***determined by national laws or regulations, collective agreements*** *or other* ***means appropriate to national conditions****.*

The requirement that the determination of compensation be specified by a regulatory instrument derives from the Charter itself. This requires that the compensation not be determined solely by criteria of judicial quantification, taking into account any alleged and proved damage caused, but that elements be offered to serve as a basis, at least in their minimum amount, for the setting of compensation, using one of the instruments listed in the Appendix, and which can be complemented with additional compensation to cover the material or non-pecuniary damage actually suffered by the dismissed worker.

A system based exclusively on invoking and proving the specific items of actual damage and loss of earnings in a manner similar to the reparation of civil or non-contractual damage may present objective difficulties of accessibility to compensation.

This party considers that it is a requirement of the Charter that the system for determining compensation must be regulated in such a way that the amount of compensation can be set according to criteria of effective accessibility for workers, so that compensation is not a controversial aspect that is very difficult to determine and quantify.

It is difficult to quantify damages incurred by loss of employment because it entails projections of the impact on a professional career, necessitating judgments based on forecasts, which are not always compatible with the judicial criteria for effective proof of damage.

In addition, the unfair loss of employment has an impact on the finances and material belongings of the affected person and their family, which sometimes makes it necessary to consider very diverse factors that are difficult to specify and project in monetary terms.

Therefore, to fulfil its restorative and dissuasive function, compensation for damages must be feasible in terms of its accessibility, which requires the establishment of a base with elements set out in the law, without prejudice to the possible establishment of minimum amounts, which may include requirements for proof of additional qualified damage.

This would ensure that compensation has a reference basis which guarantees a minimum amount to victims of unfair dismissal, which is remedial of the damage that can arise from the unlawful loss of employment, which facilitates use of the scheme and which is not limiting and does not preclude claims of additional qualified damage.

As the Committee has found, a model that allows the company to know the cost of compensation in detail has no deterrent effect and can be an incentive to unfair dismissal practices. In the Decision in Complaints nos. 160 and 171/2018, the Committee stated that *"the 'predictability' resulting from the scale might rather serve as an incentive for the employer to unlawfully dismiss workers. Indeed, the established compensation ceilings could prompt employers to make a pragmatic estimation of the financial burden of an unjustified dismissal on the basis of cost-benefit analysis. In some situations, this could encourage unlawful dismissals."*

However, a model featuring the possibility of claiming, in addition to the minimum legal damages, additional damages depending on the damage proven, does not have this risk of allowing the financial burden to be calculated.

In this sense, Spanish legislation is not faulted for the fact that it takes into consideration length of service and salary to set severance pay. The problem lies in the fact that this legislation and national practice do not provide for the possibility of claiming additional damages, and that statutory severance pay is inadequate and does not even include reimbursement of back pay for the period between dismissal and the sentence. Furthermore, it also does not provide for any system for updating the amount of compensation from the time of dismissal until the judgment declaring the dismissal unfair.

However, it is legitimate for the basis for calculating minimum compensation to take into account the parameters of length of service and salary, which are actually the qualifying conditions for any termination of employment referred to in Article 12 of ILO Convention 158, as a measure of protection against loss of employment, and these can, naturally, form part of relief for unfair dismissal.

Therefore, we are of the view that it is compatible with the Charter to establish minimum compensation, which can be based on the parameters of length of service and salary, in line with the provisions of Article 12 of ILO Convention 158. However, it must be of a minimum amount sufficient to make good the damage that can generally arise from the unlawful loss of employment; offer the possibility of claiming a higher amount; and be updated from what it was at the time of dismissal once the judgment settling the dispute is issued.

This legal quantification of the basis of minimum compensation helps give legal certainty to workers, as it makes it possible to prove the damage caused by unfair dismissal without having to submit to criteria of allegation and proof of items that can be compensated, based on loss of earnings and actual damage, which are difficult to specify in a situation of dismissal, difficult to prove, as loss of employment leads to having to make predictions as to when new employment will be found, and difficult to quantify in a specific monetary amount.

Therefore, we are of the view that the minimum statutory compensation can be an adequate redress mechanism, provided its minimum amount is truly dissuasive, and that proving specific and additional damage is allowed, depending on the circumstances of the case, and that compensation for unfair dismissal does not take the form of maximum statutory compensation.

We do not consider that this minimum statutory compensation creates incentives to unlawful dismissal for being foreseeable to the company, given that the individual must be allowed to claim additional damages and, not least, the judicial authority must be given the power to assess whether reinstatement is the most appropriate form of reparation for victims of unfair dismissal. This precludes the use of financial calculations of the costs of unfair dismissal that would encourage its use.

The minimum legal severance pay model does not create arbitrary differences between groups of workers, as length of service and salary are the basis for the impact of occupation on career and income foregone.

Therefore, we cannot agree with the view that a statutory compensation model based on salary and length of service, while statutory compensation is set as a minimum amount, and the judicial authority can agree to reinstatement, creates any form whatsoever of arbitrary duality in the protection of workers. A higher salary inevitably means that a dismissal causes a greater loss of income, and greater length of service involves a more consequential break in a professional career, with a greater impact personally and professionally, as well as in terms of material belongings.

It does not result in any arbitrary regional differences, beyond the average wage differences that may exist between the different professional levels, or the agreements that regulate the value of work.

FIFTH. - NON-COMPLIANCE WITH ARTICLE 24.B OF THE CHARTER, GIVEN THE ABSENCE IN SPANISH LEGISLATION OF MINIMUM COMPENSATION WITH AN AMOUNT THAT HAS A DISSUASIVE OR RESTORATIVE FUNCTION FOR PERSONS WITH SHORT LENGTH OF SERVICE OR LOW SALARY LEVELS

The Committee has stated that the requirements which severance pay must meet include not only compensation for damage, but also that it should act as a deterrent to unfair dismissal practices.

Specifically in relation to the determination of compensation, the Committee has set out the following considerations:

- Compensation in the case of unfair dismissal should be **commensurate with the prejudice** suffered by the victim and **sufficiently dissuasive** for the employer (see Conclusions of 2016, North Macedonia, Article 24).

In Decision no. 106/2014 (*Finnish Society for Social Rights v.* Finland) the Committee noted:

> *45. ..., under the Charter, employees dismissed without valid reason must be granted adequate compensation or other appropriate relief.*
>
> *Compensation systems are considered appropriate, if they include the following:*
>
> *- reimbursement of financial losses incurred between the date of dismissal and the decision of the appeal body;*
>
> *- possibility of reinstatement and/or*
>
> *- compensation at a level high enough to dissuade the employer and make good the damage suffered by the employee (Conclusions 2012, Turkey).*
>
> *46. Any upper limit on compensation that may preclude damages from being commensurate with the loss suffered and sufficiently dissuasive is in principle, contrary to the Charter.*

When compensation is based on length of service and salary, there remains a large part of the workforce for which the amount of compensation would not, in itself, create a deterrent to unlawful dismissal practices. This is not only an incentive to engage in unlawful conduct contrary to the Charter, but also a limit to the exercise of claims against termination, even if unfair, given the lack of financial impact that the complaint would have.

Even in a system which permits proof of specific additional damage, the difficulties of specifying and proving damage that this entails mean that in many cases, because no minimum amount is guaranteed, there is also no deterrent effect on illegal practices.

On the contrary, a minimum amount, based on no less than three months' salary, makes it possible to set a financial cost for any unfair decision, which in turn gives economic weight to damages claims and, above all, discourages companies from unlawfully dismissing people who do not have significant length of service in the company.

In Spain, neither labour legislation prior to 2012 nor subsequent legislation, nor judicial practice, has provided for a minimum limit to statutory compensation for cases in which, due to the person's limited length of service in the company, and/or their low salary level, the assessed statutory compensation would not represent a minimally sufficient amount to cover damage for loss of employment, or represent a minimally relevant amount to dissuade the company from carrying out an unfair dismissal.

The absence of the minimum amount of compensation for unfair or unlawful termination of an employment contract means that such compensation fails to meet the two requirements of Article 24 of the Revised European Social Charter:

- It does not have the function of remedying the damage caused. Since it is based on length of service and salary, it is based on the unavoidable but unfounded premise that when the worker has little length of service in the company, the damage resulting from unfair dismissal is limited or irrelevant, and does not involve a significant financial sum.
  One month of length of service in the company generates 2.7 days' salary as the amount of compensation (which is the proportional application of 33 days of salary for each year of service in the company). Therefore, in Spain, it is necessary to have almost one year of service for the severance payment to attain one month's salary (33 days' salary per year of service). It is clear that the harm suffered by the individual is not, in many cases, remedied by compensation of this amount.

  It should be noted that the loss of income due to termination of employment is not compensated, from the dismissal until the judgment, when the company opts for termination, so that these 2.7 days of wages per month worked include the damage sustained due to the loss of income during the proceedings, and until the actual payment of the compensation.

- Nor does it have any dissuasive function, limiting or determining the company's decision to carry out an unfair, abusive or fraudulent dismissal, especially in cases of people with little length of service in the company, where the compensation amounts to a few days' salary, which is easily calculated by the company, and which therefore not only does not dissuade abusive termination, but also gives legal certainty to a company violating the law and dismissing staff without just cause.

This affects, in a very qualified manner, two groups of workers.

Firstly, persons subject to a fraudulent temporary contract that the company terminates for the sake of convenience, even if it is to replace the person with another of its choice. In such cases, given that length of service is low and compensation is set exclusively at the rate of 2.7 days' salary per month worked, a real incentive is created for fraudulent and abusive temporary contracts, which has characterised the model of labour relations in Spain to the point of it being the country with the highest rates of temporary employment, and of 'added' temporary employment, in the European Union as a whole.

Secondly, those working under a part-time contract – women, for the most part in Spain. By setting compensation according to level of salary, without a minimum limit, it generates an amount, in many cases, of little monetary relevance for the company, which easily anticipates a cost-benefit equation of non-compliance with the law.

This situation indicates not only an effective absence of disincentives to unfair dismissal, but also directly encourages the use of temporary contracts legally centred on dismissal, and part-time contracts, as contractual frameworks in which non-compliance with the law is widespread, not only in terms of dismissal, but also in terms of other working conditions.

The absence of any disincentive effect in respect of unfair dismissal, in the absence of minimum compensation, empowers the company to resolve any labour conflict with accessible recourse to unlawful dismissal, as an across-the-board personnel management technique to implement abusive working conditions. This has led business management in many production sectors and in a wide range of companies to devise a recruitment model based on preventing the accumulation of length of service by means of massive and across-the-board staff rotation to cover the company's permanent labour needs. This is based on the consideration that during periods of low length of service in the company, the company faces no disincentive to terminate the employment relationship unfairly or arbitrarily; consequently, it amounts to a constraint on the exercise by workers of their labour rights as recognised by national and international law, or collective bargaining.

SIXTH. NON-COMPLIANCE WITH ARTICLE 24.B OF THE CHARTER, IN THE ABSENCE OF REDRESS FOR THE DAMAGE SUFFERED AS A RESULT OF THE REPEATED AND SYSTEMATIC ABUSE OF THE USE OF FRAUDULENT TEMPORARY CONTRACTS. IN PARTICULAR, THE SITUATION OF STAFF SUBJECT TO ABUSIVE TEMPORARY CONTRACTS IN PUBLIC ADMINISTRATIONS AND PUBLIC BODIES

1. The need for redress for persons who have been dismissed and who have been subjected to prolonged and systematic fraud due to temporary hiring, arbitrarily denying their right to employment stability

The amount of compensation set in Spanish labour law is intended to cover all the damage suffered by the person because of unfair dismissal, but we have already shown it to be insufficient.

In the specific case of temporary staff who are victims of fraudulent hiring, and who by law have the status of permanent staff, when they are dismissed due to the alleged application of a statutory period of termination that is unlawful, they are clearly subject to unfair dismissal, which they should be protected against by Article 24 of the Charter.

Failure to recognise the status of a permanent employee and the threat of termination of employment for unlawful reasons, where this situation is prolonged throughout the employment relationship, is, in our opinion, a compensation concept that must be included in the compensation for the damage caused by unfair dismissal.

The presence of specific and additional damage due merely to illegitimate loss of employment, in light of the disregard of the right to employment stability during the employment relationship, places workers in a situation of particular vulnerability when it comes to exercising their labour rights. They are faced with the threat of termination upon contract expiry, and of financial vulnerability, as there is no provision governing the duration of the employment relationship under the terms recognised by law. They find themselves in a situation of unpredictable income and consequent difficulty in accessing the basic necessities for living personal and family life in dignified conditions.

Since statutory compensation for wrongful termination of employment is set, this component is not taken into account in the determination of the compensation, so that neither the law nor the judicial practice recognises this compensation item. Not only are there no rules for redress of such specific damage, there also is no precedent for fraudulent circumvention of the law to be the subject of redress in addition to statutory compensation, which shows that it is not an accessible or realistic safeguard available to workers.

2. In particular, the situation of staff hired in fraudulent circumvention of the law in Public Administrations and Entities, when their employment is terminated

Case law has dealt with the case of termination of employment of Public Administrations and Public Entities staff who are subject to abusive temporary hiring practices. When the contracts are terminated, despite the fact that by law they are abusive contracts and their limited duration should have no legal effect, the case law has recognised compensation equivalent to that which occurs in the case of justified dismissal for reasons linked to a company's operational requirements (objective dismissal), which in Spain is quantified at 20 days' salary per year of service, with a maximum of one year's salary. However, it has refused to recognise compensation for the time the staff have been unduly subjected to fraudulent temporary hiring, leading to prolonged job instability, for months, years or decades in some cases.

As an exception to the general scheme for fraudulent hiring, the case law applies a special scheme to fraudulent temporary contracts signed by Public Administrations and Entities. Instead of granting them the same rights as permanent staff in any company, they are characterised as "*indefinite non-permanent"* staff, which means, in practice, that an additional cause for termination is applied to them, such as the filling of the post by a selective procedure – both for entry-level recruits and for internal mobility – which results in reduced compensation.

In such cases, termination of employment is not subject to compensation for unfair dismissal, but to a lower compensation of 20 days' salary per year of service, with a maximum of one year's salary.

As stated in the Judgment of the Supreme Court, Labour, Plenary, of 28 June 2021, Rec. 3263/2019: "*The fact that the worker, at the time of the termination of her contract, was considered to be an indefinite non-permanent employee, leads to the application of our case law (expressed in the* ***STS-plenary of 28 March 2017, Rcud. 1664/2015 et seq., inter alia, by the SSTS of 9 May 2017, Rcud. 1806/2015 of 12 May 2017, Rcud. 1717/2015 and of 19 July 2017, Rcud. 4041/2015)****, according to which termination of employment of the indefinite non-permanent employee due to the statutory coverage of the post she occupied entails the recognition in her favour of a severance payment of twenty days per year of service with a maximum of twelve monthly payments, as stated in the judgment under appeal.*

Dismissal of public sector temporary staff as a whole who are fraudulently hired, because they do not meet the requirements for temporary employment, gives rise to a form of termination that has lower severance pay than unfair dismissal.

The seventeenth Additional Provision of the amended text of the Public Service Regulations Act, approved by Royal Legislative Decree 5/2015, of 30 October, as amended by Law 20/2021, of 28 December, on urgent measures to reduce temporary employment in the public sector, provides for specific compensation in the event that temporary staff provide services in breach of the maximum periods of employment. It gives rise to compensation consisting of the difference between the maximum of twenty days of the fixed salary per year of service, with a maximum of twelve monthly payments, and the compensation that would have been owed for termination of contract.

This does not cover all cases of fraudulent hiring, nor does it prevent the payment of compensation for unfair dismissal, but it is deducted from the amount of the latter, so it is not an additional amount.

It is questionable whether this system of reduced severance pay, when dismissing these workers, is compliant with the Revised European Social Charter, Article 24, a) and b).

Article 24(a) of the Charter requires that the employment be terminated *"for **valid reasons** for such termination connected with their **capacity or conduct** or based on the **operational requirements of the undertaking**, establishment or service."*

Indeed, States' legislation must have a margin of discretion as regards the causes that may justify the termination of employment, but they must be linked, as the Charter states, in similar terms, to ILO Convention 158, Article 4 of which states that "The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service."

This allows the Committee to assess whether this termination arising from the filling of the post is a valid reason for exclusion from the system of guarantees against termination without a valid reason, which includes the right to adequate compensation or other appropriate relief.

Firstly, such termination cannot be considered as a justified cause for reasons relating to the operational requirements of the undertaking, in the terms used by the Charter. In practice, when public administrations and public bodies use temporary contracts, they commit numerous cases of fraudulent circumvention of the law, which affects hundreds of

thousands of people, to the point that public administrations in Spain have totally disproportionate rates of temporary employment.

In these cases, the specific features of the Public Administrations regarding current staff selection practices are being used, in practice, as an argument to reduce the compensation for termination of employment.

Based on the argument that they are obliged to guarantee the principles of equality, merit, capacity and publicity in staff selection, the case law, without an express regulatory basis, allows that it is legitimate to terminate contracts by filling positions through selective procedures.

Termination does not even require the selective procedures to be for the recruitment of new staff, it being allowed that the posts occupied by the persons affected may be filled through internal mobility or career advancement systems.

If this were a lawful cause for termination of employment, fraud in temporary hiring in Public Administrations and Public Entities as a whole would have no tangible effect, whether in terms of the existence of dissuasive costs of such practices, or in terms of reparation of the damage caused to the victims of abusive hiring.

It should be noted that the compensation of 20 days per year of service, with a maximum of 12 months, is the same as that provided for in the case of termination of employment for justified objective grounds, linked to the operational requirements of undertakings, including cases of permanent contracts where there has been no abuse or fraud in the contracting process.

The Administration or public entity uses a more favourable form of termination than the one it must carry out when, in fact, there are reasons linked to the operational requirements of the undertaking, in the terminology of the Charter, such as the objective grounds regulated in Articles 51 and 52 of the Workers' Statute.

By applying the case law regarding grounds for termination based on the statutory filling of the posts to cases of abuses in temporary hiring, the employing public entity does not have to proceed with a dismissal that results in guarantees for the persons affected, including informing trade union representatives, as in the case of objective dismissal, or even a consultation period when it exceeds the thresholds of collective dismissal.

Of interest here is the fact that, despite the occurrence of unlawful temporary hiring, which by law has the status of permanent employment, termination of employment can be used as a basis for not compensating for the damage suffered by the person concerned as a result of the loss of employment. In fact, the compensation awarded is set at a much lower amount than that stipulated for unfair dismissal, so that our arguments regarding its insufficiency can, in an aggravated form, be applied to this case.

This prevents the person from being able to prove the damage he or she has suffered because of the irregular recruitment, contrary to the law, which has led to the termination of his or her employment contract. In such cases, the compensation does not even fulfil the remedial function, much less the dissuasive function, for loss of employment, insofar as it represents a privilege for the Public Administrations which, by simply resorting to internal mobility, terminate the employment of the abusively hired employees, assuming the same cost as in the case of valid reasons linked to a company's operational requirements, and without the need to submit to the forms and guarantees of the rights of information and consultation of the workers' representatives.

In relation to staff subject to the statutory civil service scheme, although justifying reasons are also required for the selection of staff with fixed-term or interim appointments, the legislation does not expressly provide for the treatment of cases of abuse or non-compliance with these requirements. In case law, termination due to a post being filled, or its elimination, has also been allowed.

In these cases of civil servants, case law has allowed behaviour on the part of the Administration that results in prejudice caused by termination of employment, but without having objectively established the amount of the compensation, either for unfair dismissal or for the termination of the employment of indefinite non-permanent staff. It allows quantification based on proof of actual damage, invoked and proved in the proceedings. However, as there are no minimum limits, nor thresholds based on length of service and salary, nor even elements for establishing what can be compensated, in practice, such terminations are not covered by effective protection, either, given the impossibility of proving damage that is based on the assessment of expectations, which are difficult to specify and quantify.

In practice, this leads to a lack of recognition of effective compensation, given the difficulties that this entails, especially when the Administration has neither regulatory nor jurisprudential criteria for its quantification, and it requires the systematic examination by

the courts of any complaints for compensation for dismissal of civil servants subject to abusive hiring practices.

This makes it clear that compensation based exclusively on proof of actual damage caused, but without means of determining a minimum amount, based at least on length of service and salary, does not meet the requirement of what can be regarded as adequate compensation. There is a risk of compensation becoming unenforceable, or completely ineffective, with possible legal uncertainty in the determination of economic rights arising from unfair dismissal.

CLAIM OF THE CCOO

For all the above reasons,

THE COMMITTEE IS ASKED, once the complaint has been allowed and the appropriate procedures have been followed, to issue a decision on the merits, establishing infringement by Spain of Article 24 of the European Social Charter (revised) in these matters:

1) Declaration of non-conformity with Article 24.b of the Charter, for not allowing the judiciary to assess **reinstatement as an adequate form of compensation** for unfair dismissal, regardless of the circumstances and conduct of the parties.

2) In particular, a declaration of non-conformity for not allowing the judicial authority to assess reinstatement as an adequate form of redress for unfair dismissal, where it is established that the dismissal is a **fraudulent act** intended to achieve the dismissal of the worker, as a means of **preventing the exercise of the rights to which he or she may be entitled under the European Social Charter and the Revised European Social Charter or the Protocols thereto**.

3) Declaration of non-conformity for not guaranteeing, in unfair dismissals with the option of termination, the reimbursement of **financial losses incurred between the date of dismissal and the decision of the judicial authority** declaring the dismissal to be unfair, including the costs arising from Social Security contributions **(post-dismissal remuneration during proceedings)**.

4) Declaration of non-conformity due to the insufficient amount of compensation to redress the damage suffered due to unfair dismissal, given the impossibility of claiming **additional compensation linked to damnum emergens (actual damage and loss of earnings, as well as non-pecuniary damage), which must also be applied to** cases where the worker is the one who initiates termination of employment due to serious breaches by the employer, for non-payment of wages, or the violation of the basic rights of the worker that justify **termination of employment due to serious misconduct on the part of the company**.

5) Declaration of non-conformity for the lack of recognition, in all cases of unfair dismissal, including the dismissal of civil servants subject to abusive temporary appointments, of **minimum, accessible and effective compensation**, which can be quantified on the basis of the salary and length of service of the worker, and without prejudice to proving additional damages, and which includes a **minimum amount** to achieve redress and discourage unfair dismissal practices, with six months' salary serving as an acceptable benchmark.

6) Declaration of non-conformity in view of the lack of redress for damage suffered because of the **repeated and systematic abuse of the use of fraudulent temporary contracts**, which, in particular, seriously affects staff subjected to abusive temporary contracts in public administrations and bodies, who are awarded compensation lower than that established for unfair dismissal.

Documentation annexed to this complaint:

1. - Statutes of the Trade Union Confederation of Workers.
2. - Certificate of Representativeness (*Certificado de representatividad*) of the Trade Union Confederation of Workers at the national level.
3. - Power of attorney of Mr Unai Sordo Calvo.

At Madrid, 17 November 2022.

Unai Sordo Calvo
Secretary General of the Trade Union Confederation of Workers