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EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

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Case Document No. 10

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

REPLY FROM THE GOVERNMENT TO CCOO'S RESPONSE ON THE MERITS

Registered at the Secretariat on 29 February 2024

MINISTERIO
DE LA PRESIDENCIA, JUSTICIA
Y RELACIONES CON LAS CORTES

ABOGACÍA GENERAL DEL ESTADO

SUBDIRECCIÓN GENERAL DE ASUNTOS
CONSTITUCIONALES Y DERECHOS HUMANOS

v

TO THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

THE KINGDOM OF SPAIN'S SUBMISSION

IN REPLY TO THE COMPLAINANT ORGANIZATION'S RESPONSE TO THE OBSERVATIONS ON THE MERITS

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COLLECTIVE COMPLAINT
No.218/2022

CONFEDERACIÓN SINDICAL DE COMISIONES OBRERAS

v.

SPAIN

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The Kingdom of Spain has been notified of the letter submitted by the trade union *CONFEDERACIÓN SINDICAL DE COMISIONES OBRERAS (CCOO)* in response to the observations on the merits of the present complaint made by the Government of Spain and submitted on 31 October 2023.

By means of the present observations, within the time-limit granted for this purpose, we submit to the Committee, to which we respectfully address, our reply with regard to the allegations made by the complainant trade union in relation to the written observations on the merits submitted by this party.

The complainant organisation's complaint is structured around six different grounds of complaint, all of them related to the protection that the Spanish system offers to the worker in case of "unfair" dismissal and its compatibility with the requirements deriving from Article 24 of the CSER. As explained in our observations, these six grounds, which are set out in points (1) to (6) of the "plea" of the complaint, are grouped into four aspects:

- Inability of the court to consider, as an appropriate form of redress, the reinstatement of the worker - grounds of complaint set out in points (1) and (2) of the plea.
- Removal of the company's obligation to pay the "wages for processing" accrued between the date of dismissal and the judicial decision declaring the dismissal to be unjustified - the ground of complaint raised in section (3) of the "plea".
- Fixing compensation in objective terms, based exclusively on seniority and salary, in the event of "dismissal without a valid reason", without allowing claims for additional damages resulting from the termination of the employment contract or without providing for a minimum amount - grounds for complaint raised in points (4) and (5) of the "plea".
- Alleged failure to remedy the harm suffered by temporary workers in cases of "repeated and systematic abuse of the use of fraudulent temporary recruitment" - a ground of complaint raised in point (6) of the "plea").

This party essentially refers to the explanations, comments and arguments contained in our written observations on the merits, in which we defend the full conformity of the Spanish system of protection of the dismissed worker with the standards of protection derived from Article 24 b) of the Revised European Social Charter.

Without prejudice to this, we will make some specific comments or clarifications on some of the allegations made by the complainant organisation in its reply to the State's observations on the merits.

We will address those claims dealing first with the criticism made by the relevant trade union with regard to the inability of the court to consider, as an appropriate form of redress, the reinstatement of the worker - grounds of complaint set out in points (1) and (2) of the "plea"); secondly, the criticism, following the 2012 Labour Reform, on the removal of the company's obligation to pay the "wages for processing" accrued - raised in section (3) of the "plea; thirdly, the criticism on the alleged failure to remedy the harm suffered by temporary workers in cases of "repeated and systematic abuse of the use of fraudulent temporary recruitment" - a ground of complaint raised in point (6) of the "plea); finally, we will address the trade union's reply to the alleged inadequacy of the Spanish compensation system in the event of "dismissal without a valid reason", raised in points (4) and (5) of the "plea".

Complaint concerning the granting to the employer in the Spanish system -except in some cases-, of the choice between reinstatement and compensation in the event of an unfair dismissal

This party refers in its entirety to the statement contained in sub-section 2.2 of our written observations with regard to the present complaint.

In particular, we must insist on the following items, which are not adequately refuted by the complainant trade union organisation[1] in its written allegations:

i) Neither Article 24 of the Revised Charter, nor any other international instrument regulating the protection of workers in the event of "unfair" dismissal, recognises in absolute terms the right of the worker to be reinstated in the event of "unfair" dismissal, or the right of the courts to assess the appropriateness, in the specific case, of reinstatement as an alternative to compensation or other relief, and to impose it on the employer.

In this regard, Article 24 of the Revised Charter refers to the "right of workers whose employment is terminated without valid reason to adequate compensation or other appropriate relief". This implies that a system complies with Article 24 if it provides for **either** compensation that is considered "adequate" - of an amount sufficient to compensate for the damage resulting from the loss of employment - **or** other measures of relief, which may include the reinstatement of the dismissed

[1] On this point, in its written statements, the complainant trade union provides an extensive description of certain cases in which it considers that the termination of the contract is abusive or fraudulent, deviating from the subject matter of the complaint raised at this stage.

worker by the company. This is an aspect in which States have a certain margin of appreciation, which must be respected.

ii) Therefore, in no case is the mere fact that the Spanish system does not provide, in certain cases, for the employer to be required to reinstate the worker in the job *per se* contrary to the Charter, given that the system of the Revised Charter provides the States with the possibility of devising a satisfactory system of compensation as an *alternative* to the possibility of reinstatement of the dismissed worker.

iii) In so far as the complainant organisation formulates its first claim (complaint described in point (1) of the 'plea') autonomously, and without linking it to the fourth claim - in which it questions the adequacy of the compensation provided for in the Spanish system in the event of unfair dismissal - its complaint cannot be upheld, since it is clear that the mere fact that a State system does not provide for the possibility of reinstatement of the worker in certain cases of 'unfair' dismissal is not incompatible with the Charter.

Special attention should be paid to the particular case of dismissal when this constitutes "*a fraudulent action to achieve the expulsion of the workers from their employment, as a means of preventing the exercise of the rights to which they may be entitled under the European Social Charter and the Revised European Social Charter and its Protocols"*, to which the complainant trade union devoted a specific section in the Complaint.

It should be noted that no reference is made in the reply to the extensive response that we gave in the written observations on this complaint, §§ 159 to 164, where we noted the inexplicable nature of this complaint, given that precisely in the case described, in the Spanish system the dismissal is necessarily classified as null and void, with the consequent obligatory reinstatement of the worker in the company.

The lack of substance of the complaint is so clear and manifest, as we pointed out, that it has not even deserved a comment from the complainant organisation.

Complaint concerning the removal of the obligation to pay "accrued wages" in accordance with the 2012 Labour Reform

As set out in our observations on the merits, this party considers that it does not follow *per se* from Article 24 of the Revised charter that it is necessary to impose, in any national system of protection against dismissal, an obligation on the employer to pay the dismissed worker, where the dismissal is declared unfair, the "accrued wages" between the date of dismissal and the judicial declaration of unfair dismissal.

In particular, with regard to the alleged violation of Article 24 of the Revised Charter due to the fact that the 2012 Reform abolished the employer's obligation to pay the worker "accrued wages" in the event of unfair dismissal, we refer in particular to what is set out in sub-section 2.3, §165 to 177, of our observations.

In that section, we explained how the International Labour Organisation assessed, at the time, an identical question to the one now raised, doing so precisely at the request of the now complainant trade union before the European Committee of Social Rights, together with the trade union organisation UGT.

The International Labour Organisation, after a thorough examination of the evolution of the Spanish system of dismissal protection, in particular after the 2012 Reform, reached the conclusion that the abolition of the accrued wages operated by that reform was not incompatible with the requirement of "adequate compensation" or "adequate reparation" derived from Article 10 of ILO Convention No. 158.

This conclusion, and the reasoning behind it, can be fully applied to the present case, concerning the conformity of the same provision (the abolition of the obligation to pay "accrued wages" in certain cases following the 2012 Reform) with Article 24 of the Revised Charter, a provision which, as we have said, is directly inspired by ILO Convention No. 158.

The complainant, in the section devoted to commenting on the response given by the State to the complaint relating to the abolition of accrued wages, does not give any reasoning as to what different elements are present in its current complaint, with respect to the one it raised at the time before the ILO, that would support a different response.

In their reply - §24 – they refer to a "lack of hierarchical linkage" between the two international supervisory bodies - ILO and the ECSR -, to the application by the two bodies of different normative instruments - ILO Convention No. 158 and the Revised Charter, respectively - and to the fact that they are "complaints with different grounds and arguments".

However, what is certain is that, despite what has been stated, in the complaint lodged by the CCOO organisation with the European Committee, regarding the abolition of the obligation to pay accrued wages under the Labour Reform, the issue it raises is identical to that raised at the time before the ILO Committee, without - beyond stating this - indicating what these alleged "grounds and arguments" would be different from those raised now, or what the difference would be, for these purposes, between the protection afforded by Article 158 of ILO Convention No. 158 and Article 24 of the Revised

Charter. In short, no plausible explanation is offered as to why it considers that the ILO Committee's approach is not correct when it comes to the application of Article 24 of the Revised Charter.

Complaint concerning the system of protection against dismissal for workers who have been irregularly recruited on temporary contracts, with particular reference to workers in the public administrations

The complainant organisation does not devote any specific section of its submission to replying to this party's argument with regard to the complaint set out in point (6) of the "plea" - alleged failure to remedy the harm suffered by temporary workers in cases of "repeated and systematic abuse of the use of fraudulent temporary recruitment."

As explained in our observations - subsection 2.4 of Section III "Merits of the case" - the system of protection in the Spanish legal system for workers who are subject to irregular temporary contracts, with special reference to the specific situation of staff subject to irregular contracts in the sphere of the Public Administrations, reaching the conclusion that in no case can it be stated - contrary to what the complainant claims - that persons who have been subject to irregular temporary contracts are subject to less protection than that which the system recognises in general for any worker.

In contrast to the detailed explanations provided by this party, the complainant merely refers, in § 51, to the collective complaint submitted and to the reply to the IOE's observations - which is striking, since the latter observations did not make any reference to this issue, beyond referring to the complaint - without devoting, as we have pointed out, a specific section to provide answers to our arguments.

The failure to reply on this point to the defence put forward by the Kingdom of Spain proves precisely that the introduction of this claim in the collective complaint is manifestly ill-founded, it being clear that: (i) on the one hand, in the Spanish system the standard of protection against dismissal of workers who have been subject to irregular temporary employment is identical to that of any other worker, without it being particularly apparent in such a case that those workers, in the event of unfair dismissal given that they have been hired on an irregular temporary basis instead of having been hired as permanent staff, the decision to dismiss them would cause them more serious harm[2]; (ii) on the other hand, the response adopted by the Spanish system as regards the

[2] In our written observations, §183, we stated that "It is therefore not obvious to what extent the standard of protection of workers in the aforementioned situation, in relation to Article 24 of the Revised Charter, is affected, nor is it particularly apparent what damage is generally caused to a worker initially hired as a temporary worker - subsequently converted into a permanent worker by application of Article 15.4 of the WS - which is greater than that caused to a worker hired as a permanent worker from the beginning, by the

protection of temporary staff of public administrations subject to abusive practices in the use of temporary contracts is adequate, in particular as per the protection of this group at the time of the termination of their relationship with the public administration.

Complaint concerning the adequate compensation provided for in the Spanish system in the event of unfair dismissal

This party refers in its entirety to the State's allegations contained in sub-section 2.1, §§ 76 to 137 of our observations on the merits - whose arguments, articulated around five ideas - to which sections A, B, C, D and E are devoted respectively - are not undermined by the comments and allegations made by the complainant trade union in its response.

In the light of the reply given by the trade union in its written statement, some particular aspects should be highlighted:

i) On previous occasions, the Committee has ruled on the conformity or non-conformity of the regulations of different States with the requirements of Article 24 (b) of the Revised Charter, declaring the incompatibility of certain systems with these requirements.

The complainant trade union considers that the fact that the systems examined by the Committee have similarities with the Spanish system, essentially by determining the amount of compensation in the case of "unfair" dismissal on the basis of automatic factors, such as seniority and salary, must necessarily lead to the complaint being upheld in the case of Spain.

However, in our written observations we pointed out the existence of essential differences which mean that, in the case of Spain, despite the fact that the Workers' Statute (WS) establishes a system of predetermined compensation in the event of unfair dismissal based on automatic factors (salary and seniority), the Committee's criteria cannot be applied to those other cases examined by the said Committee.

ii) One of these differences is the existence, in the Spanish system, of a way that allows the worker who has suffered damages as a consequence of an unfair dismissal agreed by the employer, to claim a higher amount than the one resulting from the strict application of the Workers' Statute.

dismissal decision adopted by the employer". This finding is apparently acknowledged by the complainant organisation, as no explanationis provided on these issues.

We devote a specific section to this aspect in our observations, namely §§ 114 to 137.

The introduction of the channel explained, allowing the ordinary courts to directly apply Article 24 (b) of the Revised Charter through the technique of the "conventionality control " -allowing them in this way to set an additional compensation to that resulting from the Workers' Statute-, is certainly recent: in fact, as we explained in detail, the doctrine of the "conventionality control " has been definitively enshrined since the Constitutional Court's judgment no. 140/2018, and has been expressly assumed by the Social Division of the Supreme Court for the first time in its judgment of 29/03/2022, in a criterion subsequently reiterated in later decisions.

It is striking that the complainant trade union, on this issue, merely points out that the court decisions are "absolutely exceptional", and tries to imply that the majority of the High Courts of Justice have rejected the application of this doctrine, something that clashes with reality.

An analysis of the case-law leads to precisely the opposite conclusion: despite the short period of time that has elapsed since the Constitutional Court formulated the doctrine of "conventionality control" in it judgment no. 140/2018, there has been a swift and growing incorporation of this doctrine in the High Courts of Justice, especially with regard to the possibility of directly applying Article 24 (b) of the Revised Charter, endorsing the possibility of establishing additional compensation to that established in Article 56 of the WS.

In §129 of our observations, a number of judgments were listed from different Supreme Courts in which the **possibility of the judicial body hearing the dismissal proceedings to set additional compensation, when there are exceptional circumstances duly accredited by the worker that make the compensation derived from Article 56 WS manifestly inadequate in their case, is expressly and unequivocally recognised.**

The trade union in the present case tries to show that the rulings are "exceptional" ("*a small handful of rulings referring to very specific and exceptional cases*") by stating that "*they only correspond to a total of 5 Social Chambers of the Supreme Courts of Justice out of a total of 19 Social Chambers*". However, the reality is that **in almost all the cases in which the counsel of a worker has invoked the application of the doctrine of conventionality control before a High Court of Justice to support the direct application of Article 24 (b) of the Revised Charter, despite the very recent incorporation of this doctrine into our**

system, it has been expressly recognised, as we fully explained in our observations.

The trade union could easily have refuted this assertion, had it not been true, by citing judgments of other High Courts of Justice expressly rejecting the application of this doctrine, and thus the possibility of requesting additional compensation to that provided for in the WS based on such text. According to the complainant organisation's speech, the vast majority of the High Courts of Justice would allegedly reject this doctrine, and its acceptance would be "absolutely exceptional". However, the complainant organisation has not been able to cite these rulings, the majority apparently, for the simple reason that **if there are no more decisions of High Courts of Justice that accept the doctrine of conventionality control, it is, in general, because the application of this doctrine has not been explicitly raised before these courts until now.**

As already explained in our observations, the convenience of expressly transposing this route, where appropriate, into the regulations could be assessed. In this regard, certain authoritative voices have been raised suggesting that it would be convenient that this should be the case.

However, this is still an assessment of opportunity or convenience which, in the opinion of the Spanish Government, falls within the State's margin of appreciation.

What is beyond doubt is that, with the introduction of this route, it cannot be accepted that the Spanish system, as a whole - i.e. not taking Article 56 of the Workers' Statute in isolation, but also Article 31 of the Law on Treaties and the doctrine coined by the Constitutional Court in its application, in judgment no. 140/2018 - fails to comply with the requirements of Article 24 (e) of the Revised Charter, since the system itself provides the instruments for the dismissed employee to claim additional compensation in addition to that provided for in the WS in the event of unfair dismissal.

It should also be pointed out that the Spanish system for establishing compensation in the event of unfair dismissal on the basis of pre-established objective criteria and with a maximum limit on the amount, unlike other systems assessed by the Committee, is a system which was, at the time, peacefully accepted by the social partners, and this peaceful acceptance of the system, based on its objective advantages, particularly for the worker, was accepted both at the time it was introduced and subsequently throughout the time it has remained in force, as we explained in section B.2.1, §§ 86 to 99, of our written observations.

The trade union in the present case implicitly recognises, by not denying it, the peaceful acceptance – as well as the other most representative trade unions in Spain - of the system followed in Spain since its initial implementation and over the years, and merely points out that the Revised Charter came into force on 1 July 2021. It is nevertheless clear that this circumstance has not prevented it from having advocated at any previous time for the regulation of a system other than the one it now describes as inappropriate and unjust for workers.

iii) Finally, we reiterate all the remaining arguments expressed in our observations, in particular those contained in sections C, D and E of sub-section 2.1, in which we emphasised:

- Firstly, the set of measures that have been adopted by the public authorities in recent years to set up a regulatory framework for the labour market that provides the greatest possible guarantees of employment stability, avoiding the use of dismissal and promoting other internal flexibility formulas, and encouraging permanent contracts to the detriment of temporary contracts;

- Secondly, we advocated the need to assess the whole of the public action that is developed in a State for the protection of the worker who has lost his job when assessing the "adequacy" of the relief required by Article 24 of the Revised Charter, instead of looking strictly at the setting of the severance pay: the result of this assessment, in the case of Spain, contrary to what the trade union claims, leads to the conclusion that the system provides a sufficient degree of protection to the worker who has lost his job;

- Thirdly, a number of considerations on the deterrent nature of compensation were then made and now reiterated.

To conclude, in view of the persistent references in the trade union's observations to the delimitation of the concepts of "unfair dismissal" and "null and void dismissal" in our system, which, due to their inaccuracy, may lead the Committee to confusion, we make a specific reference to the determination of the scope of each of these categories of dismissal in our written observations, where we made a detailed analysis of the numerous grounds for nullity in our system, and explained, with objective data, how, although the number of grounds for nullity is limited or closed, the fact is that such number has been progressively increasing in recent years, and how the case-law has in many cases given a broad interpretation of these grounds, in order to guarantee greater protection for the worker.

We therefore insist that, as we explained in our observations, a significant part of the situations that are included in what the complainant organisation in its submission describes as "unfair", "abusive", "fraudulent" or "arbitrary" dismissal, referring to the most serious cases of the employer's conduct in unilaterally terminating the relationship with the worker, in the Spanish system can in practice be included in the category of "null and void dismissal". Not because in our system "abusive" or "fraudulent" dismissal *per se* is considered null and void, but because in many cases a dismissal that is "abusive" or "fraudulent" is so precisely because is due to reasons which precisely amount to grounds of nullity (for example, dismissal carried out to retaliate against a worker who has sued the company, dismissal of a pregnant worker, dismissal due to discriminatory reasons, etc).

Furthermore, as we also explained, "unfair dismissal" in the Spanish system includes cases in which, although the dismissal decision has not strictly complied with the legal requirements, it cannot be said to be a "dismissal without valid reason", since even if such reason exists and its existence is accredited, incurring in formal irregularities can lead to the dismissal being declared unfair.

In the light of the above, this party respectfully REQUESTS from the Committee:

- To consider the present observations as submitted in reply to the complainant organisation’s response to our submissions on the merits.

Madrid for Strasbourg, 29 February 2024

The Co-Agent of Spain

Heide-Elena Nicolás Martínez