EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

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Case Document No. 2

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

OBSERVATIONS OF THE GOVERNMENT ON ADMISSIBILITY
(English translation)

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ABOGACÍA GENERAL DEL ESTADO

SUBDIRECCIÓN GENERAL DE CONSTITUCIONAL Y DERECHOS HUMANOS

TO THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

OBSERVATIONS ON THE ADMISSIBILITY

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COLLECTIVE COMPLAINT
No. 218/2022

CONFEDERACIÓN SINDICAL DE COMISIONES OBRERAS (CCOO)
v. Spain

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On 13/01/2023 the Committee has communicated to this party the extension of the deadline previously set for submitting written observations on admissibility of the complaint, setting 20 February 2023 as the maximum time-limit for the said submission. Accordingly, on behalf of Spain, we hereby submit observations on the admissibility of the complaint.

I. DESCRIPTION OF THE COMPLAINT

1. The claimant organisation requests from the Committee to declare the infringement of Article 24 of the Revised European Social Charter ("the Charter") in six various aspects, listed in the respective six points set out in the *petitum* of the complaint (pages 75 to 77).

2. The six claims in which the complaint is organised - each of which is developed in a separate section of the complaint - a**re formulated autonomously and independently** of each other, so as to declare the existence of six different violations by the national legislation and/or practice, all of them of the same provision - Article 24 of the Charter. This is an important clarification in order to understand the scope of the grounds of inadmissibility set out below.

II. ON THE ADMISSIBILITY OF THE COMPLAINT

3. The Kingdom of Spain submits that the complaint, as per the particular points to be detailed hereinunder, does not satisfy the requirement set out in Article 4 of the Additional Protocol to the European Social Charter providing for a system of collective complaints -"*The complaint shall be lodged in writing, relate to a provision of the Charter accepted by the Contracting Party con cerned and indicate in what respect the latter has not ensured the satisfactory application of this provision*"-, which must be read together with Article 1of the Additional Protocol, that states that complaints can be made alleging *"unsatisfactory application of the Charter"*. Accordingly, a complaint must specify in what way a State has failed to ensure the satisfactory application of a provision of the Charter.

4. S*ensu contrario*, where non-compliance with obligations not stemming from the Charter is invoked, the complaint falls outside the competence *ratione materiae* of the Committee and should be declared inadmissible.

Thus, the complaint in *Syndicat national des Dermato-Vénérologues v. France*, no. 28/2008 the Committee had been invited by the French trade union SNDV to determine whether the difference in treatment between categories of specialist medical practitioners in private practice regarding the fees they can charge for items of service, and thus their remuneration, amounted to discrimination against one particular category of these practitioners. In paragraph 8 of the decision the Committee stated that the *"facts adduced are not of such a nature as to allow it to conclude that there has been a violation of the right"* as guaranteed in the Revised Charter.

5. In the present collective complaint some aspects mentioned by the complainant organisation as alleged violations of Article 24 of the Charter do not raise issues of satisfactory application of the Charter accdording to the legislation and/or practice in Spain, since it invokes obligations that are clearly not covered by the Charter, which renders the claims at issue manifestly illfounded.

6. In particular, in our view the claims raised in points (1), (2) and (6) of the *petitum* of the complaint should be declared inadmissible.

1. Inadmissibility of the claims raised in points (1) and (2) of the *petitum* of the complaint

The following is requested in paragraph (1) of the *petitum*:

> *1) Statement of non-conformity with Article 24 b) of the Charter, as it does not allow the court to assess reinstatement as an appropriate remedy for unfair dismissal* [despido improcedente], *regardless of the circumstances and demeanour of the parties.*

7. First, the broad assertion that Spanish law "does not allow the courts to assess reinstatement as an appropriate remedy for unfair dismissal, regardless of the circumstances and conduct of the parties" is not right: in cases of "null and void dismissal", which cover a large number of cases of "unfair" dismissal, Spanish legislation does oblige the employer to reinstate the worker who has been unfairly dismissed; moreover, in certain cases it allows the workers to choose between reinstatement or payment of compensation, at their convenience.

8. Second, and without prejudice to the fact that a more extensive explanation of the Spanish legislation in that regard and its application by the courts would be provided in the observations on the merits, the Spanish Government considers that **the claim contained in point (1) above and raised - as it is - in an autonomous manner, independently of the other claims contained in the complaint, is unfounded, since it does not raise a problem of compatibility with the Charter**.

9. The above is because:

- Neither Article 24 of the Revised European Social Charter nor any other international instrument on 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 court 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 Charter provides for "the right of workers whose employment is terminated without a 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**" - 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 worker by the company.

  This point is even clearer from the wording of Article 10 of ILO Convention No. 158, which is precisely cited by the complainant organisation in its written submission, when states that:: "***If*** *the bodies referred to in Article 8 of this Convention* [the courts] *find that* ***termination is unjustified and if they are not empowered or do not find it practicable, in accordance with national law and practice, to declare the termination invalid and/or order or propose reinstatement of the worker, they shall be empowered to order payment of adequate compensation or such other relief as may be deemed appropriate.***"

  As can be seen, the provision envisages the possibility that the law or practice of a State does not confer on courts the possibility of ordering the reinstatement of an unfairly dismissed worker, and for such a case in particular the system should provide for adequate compensation or other appropriate redress to be awarded to the worker concerned.

- The Committee itself has repeatedly held that a national system must be considered to be in conformity with the Charter when it meets a number of conditions[1] including the following:

  - The system provides for the possibility of reinstatement of the worker; and/**or**

  - The system provides compensation that is regarded as "proportionate to the loss suffered by the victim and sufficiently dissuasive to employers."

  The States are therefore given the possibility of devising a satisfactory system of compensation as an alternative to the possibility of reinstatement of the dismissed worker.

10. This means that the Charter does not result in an obligation of the States - as the complainant organisation claims - to necessarily provide for compulsory reinstatement of the worker in the event of "unfair" dismissal (either by choice of the worker or because the judge is allowed to agree to it), but the obligation assumed by the signatory States is to articulate a system that **either** provides for adequate compensation, **or** provides for other means of relief (such as, we insist, reinstatement).

11. Thus, a system which provides for adequate compensation to a worker who is unfairly dismissed is not contrary to Article 24 of the Charter merely because it does not provide for the possibility of reinstatement of the worker, since it is within the margin of appreciation granted to the States to decide whether their system provides for adequate compensation to be granted to the worker in all cases, or readmission -or other restorative measures-, or whether, as in the case of Spain, it provides for a mixed solution, insofar as in some cases the worker may opt for readmission, or even compulsory readmission of the worker, whereas in other cases the choice between readmission and compensation rests with the employer.

12. In so far as the complainant organisation submits this first claim independently, and without linking it to the fourth claim - in which the adequacy of the compensation provided for in the Spanish system in the event of unfair dismissal is challenged - it must be declared inadmissible, since there is no incompatibility with the Charter for

[1] Thus, the most recent decision on the merits in the case *Syndicat CFDT de la métallurgie de la Meuse v. France* (No. 175/2019).

a State system wich does not provide for the possibility of reinstatement of the worker in cases of "unfair" dismissal.

The following is requested in point (2) of the *petitum* of the complaint:

> *2) In particular, a statement of non-conformity on the grounds that the court does not consider reinstatement as an appropriate means of redress for unfair dismissal, where it is established that the dismissal is a fraudulent act aimed at expelling 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 or the Protocols thereto.*

13. The above is equally applicable to the claim set out in point (2) of the complaint. Indeed, this is a particular application of the same aspect - the failure to confer on the court the power to order the compulsory reinstatement of the dismissed worker: when the dismissal is used for the purpose of preventing the legitimate exercise of his or her rights - and therefore the same arguments as those set out above are applicable, and **the mere fact that national legislation or practice does not provide for the compulsory reinstatement of the dismissed worker does not *per se* imply that a State is in breach of Article 24 of the Charter.**

14. The claim is, if possible, even more clearly unfounded in this second case, since if a dismissal is used for the purpose of preventing workers from legitimately exercising their rights, or to punish them for having exercised their rights, in the Spanish system it must be classified as "null and void dismissal" by the court, and in this case reinstatement - and payment of the lost wages - is mandatory, without the company being allowed to replace the worker's reinstatement with a compensation[2].

15. In particular, the following are **cases of null and void dismissals** provided for in Article 55.5 of the WS:

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

[2] As provided for by Article 55.6 of the Workers' Statute: "Null and void dismissal shall produce the immediate reinstatement of the worker, along with the payment of those wages that s/he stopped receiving". If the cause of nullity is the violation of fundamental rights or public freedoms, the regulations also provide for the court to establish, in the judgment, compensation for the damages suffered by the worker, both pecuniary and non-pecuniary (Article 183 of the Law Regulating Social Jurisdiction).

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

- Dismissal of a pregnant woman, from the date of onset of pregnancy until the date of suspension of the contract due to childbirth[3];

- Dismissal of a worker during the suspension of the contract on grounds of childbirth, adoption, guardianship for the purpose of adoption, foster care, risk during pregnancy or risk during breastfeeding, or sickness caused by pregnancy, confinement or breastfeeding, or notified on a date such that the period of notice granted ends within those periods[4];

- Dismissal of a worker who has applied for or is enjoying any of the permits referred to in Article 37, Sections 4 (in cases of birth, adoption, foster care or adoption), 5 (in the event of the premature birth of a son or daughter, or who, for any reason, must remain hospitalised following childbirth.) and 6 (for the worker who, for reasons of legal custody, is charged with the direct care of a child less than twelve years of age or a person with a disability who does not perform any paid activity) of the WS;

- Dismissal of the worker who has applied for or is enjoying the leave provided for in Article 46.3 of the WS for taking care of children or relatives who cannot fend for themselves;

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

- Dismissal of workers following their incorporation at work after enjoying the suspension of the contract due to Ley 39/1999, de 5 de noviembre,

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

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

> para promover la conciliación de la vida familiar y laboral de las personas trabajadoras childbirth, adoption, guardianship for the purpose of adoption, foster care, provided that this period has not elapsed.

16. Thus, for instance, if the dismissal occurs as a consequence of a worker's trade union action, the Spanish system considers it null and void for violation of the right to freedom of association (recognised in Article 28 of the Spanish Constitution, and in Article 5 of the Charter); or if the dismissal is a consequence of certain statements that the worker may have made against the company or its managers, provided that such statements have been made within the limits protected by the right to freedom of expression, the dismissal is null and void for violation of the right to freedom of expression (Article 20 of the Spanish Constitution).

    Particularly interesting is when the dismissal is **a reprisal for the workers having gone to court to assert certain labour claims, or a means to prevent them from doing so**: in these cases, the **dismissal** would be declared **null and void** for violation of the right to effective legal protection in its aspect of "indemnity bond" of the workers (Article 24 of the Spanish Constitution), an area in which case-law has been giving a broad interpretation, applying the case not only to cases in which the dismissal is a response to actions of the worker consisting of the presentation of judicial claims, or preparatory acts of legal claims provided for in applicable rules, but also to actions regarding "voluntary" out-of-court complaints - i.e. not imposed by the labour law – lodged by the workers, provided that from the context it can be deduced that is directly aimed at subsequent access to the courts, the filing of a complaint with the Labour and Social Security Inspectorate, if it can be regarded as connected to the purpose of preparing or avoiding a court process, or the filing not of an individual claim by the worker (or counsel), but of a collective claim filed by the trade union.

17. In short, the dismissal in the case described by the complainant organisation when lodging the second claim - dismissal as a means of preventing the legitimate exercise by the workers of their rights, in particular those recognised in the European Social Charter or in the Revised European Social Charter - in the Spanish system would generally be classified as null and void dismissal, and in this case compulsory reinstatement is provided for.

18. As a result of the foregoing, it can be seen that the claims set out in points (1) and (2) in the *petitum* of the complaint invoke an obligation that does not result from the

Charter, and therefore fall outside the competence *ratione materiae* of the Committee.

2. Inadmissibility of the claim set out in point (6) of the *petitum* of the complaint.

The following is requested in point 6) of the *petitum* of the complaint:

> *6) Statement of non-conformity in view of the lack of redress for the damage suffered as a result of the repeated and systematic abuse of fraudulent temporary contracts, which has a particularly serious effect on workers subjected to abusive temporary contracts in public administrations, who are awarded compensation lower than that established for unfair dismissal.*

19. In addressing the last claim of theur submission - concerning the situation of irregularly recruited temporary staff – the complainant organisation starts from an **erroneous assumption.**

20. Contrary to what is claimed, **Spanish legislation adequately protects those who find themselves in this situation**, with Article 15.4 of the Workers' Statute declaring the conversion of the temporary relationship into a permanent one in these cases -specifically in the case of workers in the public sector-, either by having denounced the situation in a declaratory process brought by the worker during the term of the employment relationship, or when the termination of the employment relationship is agreed:

i. In the first case, the workers shall continue to provide services with the status of permanent employee in their company, and shall enjoy the same rights and conditions as if they had had that status from the beginning of the employment relationship.

ii. In the second case, the termination of the employment relationship due to the alleged expiry of the term of the allegedly temporary contract will, in any event, be considered unfair or null and void (depending on the circumstances), with the consequences generally provided for in the applicable legislation. It is also possible for an irregularly temporary worker to be subject to objective - or, as the case may be, disciplinary - dismissal, with the same regime as that applicable to permanent workers. It is therefore not clear to what extent their standard of protection is affected, with regard to Article 24 of the Charter.

21. The situation is similar when it comes to personnel hired by the Public Administrations under temporary contracts used in an irregular manner -without there being a real cause of temporary employment that would cover the use of such temporary contract, or there being such a real cause of temporary employment, but the maximum periods laid down have been exceeded.

22. In these cases - in which, when the situation is reported to the labour courts, the employment relationship is considered *indefinido no fijo* [indefinite non-permanent term][5]- if the employment relationship is subsequently terminated by the contracting entity, the dismissal may be classified as fair - for validly agreed disciplinary dismissal, or validly agreed dismissal for objective reasons - as unfair, or as null and void.

23. As per the last two cases -unfair or null and void dismissal- the consequences are identical to those that apply in the case of dismissal of a worker who has been hired as a permanent worker from the start: in the case of unfair dismissal, the employer may choose between reinstatement of the worker, or payment of the compensation provided for in Article 56 of the WS (33 or 45 days per year of service, depending on the period worked), while in the case of null and void dismissal, reinstatement and payment of lost wages is mandatory.

24. When dealing with a fair disciplinary dismissal, termination shall take place without severance pay, as in the case of dismissal of a worker hired on a permanent basis

[5] The category of " indefinite non-permanent worker" is a jurisprudential construction that is applied in the public sector to those workers who, hired through temporary contracts -also applied in other situations of irregular contracting-, report the irregular situation in the use of temporary contracts, and the judge verifies that their temporary contracting has indeed been irregular. Given the impossibility for the judge to recognise them as permanent employees in these cases, as the Constitution and legal regulations require that access to public employment must take place after passing a selection process governed by the principles of equality, merit and ability, the Supreme Court, from the mid-1990s, introduced the concept of the "indefinite non-permanent worker" for these situations: in accordance with this doctrine, in when the judge detects that the temporary contracting of workers is irregular, they are recognised as "non-fixed permanent" workers, and may continue to occupy their job, without being subject to the time-limit derived from the formal temporary contract type, until such time as the position occupied is filled through a selective process based on principles of equality, merit and ability.

The regime and scope of this category, which can be assimilated to the employment relationship of "temporary worker due to vacancy", has given rise to numerous doubts over the years, and case-law has evolved on the subject, and in particular on the effects of the termination of the relationship when the post is definitively filled and the worker has not been awarded such post in the selection process conducted to that effect.

Further details on the explanation of the regime for this type of employment will be provided, where appropriate, in the observations on the merits of the case.

from the beginning of the relationship, or of a worker validly hired on a temporary basis.

25. Finally, in the case of dismissal for objective reasons, when the decision is fair, and there is legal cause for objective dismissal, the worker is paid a compensation of 20 days' salary per year of service in the same way as a worker hired on a permanent-term basis from the beginning.

26. Hence, it is wrong to claim that this group of workers is subject to lesser protection and that the compensation granted to non-regular permanent workers in the event of dismissal is "lowered" - as the complainant organisation insistently claims[6].

27. This is without prejudice to the fact that, in the case of *indefinidos no fijos* [indefinite non-permanent] workers employed by the Administration, there is a specific cause for which the temporary employment relationship may be validly terminated – namely, filling the post by the statutory procedure. In these cases, due to the very nature of the position, there is an objective cause that justifies the termination of the relationship, given that the post is then filled by a worker who has passed the selection process established for this purpose - which is undoubtedly covered by Article 24 a) of the Charter or by Article 4 of ILO Convention No. 158.

From the foregoing, the Spanish Goverment REQUESTS from the Committee:

That the claims set out in points 1, 2 and 6 of the *petitum* in the framework of the complaint be declared inadmissible, on the ground that no appearance of a breach of the Revised European Social Charter exists that would justify an examination of the merits by the Committee.

Madrid for Strasbourg, 20 February 2023

The Agent of Spain — The Co-Agent of Spain

[6] Indeed, the evolution of the notion of the *indefinidos no fijos* [indefinite non- permanent] worker, of jurisprudential origin (it is in fact a notion whose regime continues to be defined to a large extent by case-law) has been advancing in the interests of greater protection of the worker affected by this situation, whose working conditions have been fully assimilated to those of permanent workers, despite the fact that they have not passed - like the latter - a competitive selection process with the requirements for access to the status of permanent worker in the Administration, and they have been recognised as having the right to maintain their employment relationship until the post is filled on a permanent basis - in addition to a series of important stabilisation processes to allow them to consolidate their relationship.

Alfonso Brezmes Martínez de Villareal Heide-Elena Nicolás Martínez