EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

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Case Document No. 5

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

OBSERVATIONS BY THE INTERNATIONAL ORGANISATION OF EMPLOYERS (IOE)

Registered at the Secretariat on 14 September 2023

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Geneva, 14 September 2023

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

COMISIONES OBRERAS TRADE UNION (CC.OO.) v. Spain

Complaint No. 218/2022

The secretariat of the European Committee of Social Rights (ECSR) registered on 18 November 2022 the complaint lodged by Comisiones Obreras Trade Union (CC.OO.) against Spain under number 218/2022.

By decision of 4 July 2023, the ECSR declared the said complaint admissible and invited, inter alia, the international organisations of employers to submit observations before 15 September 2023.

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

Introduction

The IOE reiterates the importance it attaches to the application of the Charter at national level.

Employers are very attentive to the respect and implementation of the Charter's provisions within States.

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

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

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

1.- Preliminary point on the existence of a prior claim

Firstly, a complete referral should be made to the allegations submitted within the framework of the collective claim brought by the Unión General de Trabajadores (UGT) trade union, claim nº 207/2022, given that the subject-matter of that and the present claim are identical (questioning the adjustment of the Spanish law on compensation matters to the content of Article 24 of the European Social Charter) and their arguments are similar.

To this end, we ask for the allegations submitted within the framework of such claim to be taken as having been fully reproduced and to be considered for resolving the current claim.

2.- Regarding the mention of prior decisions of the European Committee of Social Rights

The claimant trade union cites various precedents of the Committee in the analysis of other regulatory frameworks in matters of compensation, specifically:

a) The decision relating to the complaint against Finland (nº 106/2014), in respect of which it should be emphasised that it analyses a different regulatory framework to the Spanish one since, in Finland, compensation for unfair dismissal cannot exceed 24 months' salary, without any possibility of reinstatement in the event of unfair dismissal.

However, Article 56 of the Workers' Statute ("WS") and the Eleventh Transitional Provision of the same regulation comprise a different model, a dual model in which, when a dismissal is declared to be unfair, it is possible to choose between reinstatement, with the payment of the salaries accrued between the date of termination and the date of the notification of the judgment, and the payment of compensation of 33 days' salary per year's service, up to a maximum of 24 monthly payments for contracts later than 12 February 2012, whereas if it is declared to be null and void, reinstatement is mandatory.

Regarding those employees with a length of service commencing prior to 12 February 2012, the transitional regime of the aforementioned Provision applies, which establishes that the compensation will be 45 days' salary per year's service for the period of the provision of services prior to such date, and 33 days' salary for the time worked as from that date, up to a maximum of 720 days, unless the calculation of the compensation for the period prior to 12 February 2012 results in a greater number of days, in which case this is applied as the maximum compensation amount, without being able to exceed 42 monthly payments.

In addition, the Finnish model cannot be compared to the Spanish model without taking into account absolutely key two circumstances of the latter, namely:

- The high number of cases in which the Spanish regulation imposes ANNULMENT as an automatic consequence of any dismissal not based on disciplinary or fair objective grounds, i.e. the obligatory reinstatement of the employee with the payment of any outstanding back pay.

  In fact, as regards the reasons cited on page 13 of the claim of CC.OO. as those that the European Social Charter considers to be invalid grounds for dismissal (membership of trade unions; being a workers' representative; having filed a claim or being involved in proceedings against the company; any ground such as race, colour, sex, civil status, responsibilities, pregnancy, religion, political opinion, national extraction or social origin; the enjoyment of maternity or paternity leave; or temporary absence from work

due to illness)[1], all of these under Spanish law are related to the ANNULMENT of the dismissal, i.e. to the necessary reinstatement of the employee to the same position and the payment of any outstanding back pay, with the court for these purposes having the option of adding the payment of compensation for damage.

- The relevant body of Case Law being built up by the Labour Courts in Spain regarding the possibility of increasing the statutory compensation for unfair dismissal (of 33/45 days' salary per year's service, up to a maximum of 42 monthly payments), ordering the employer to pay additional compensation.

Both of these questions will be analysed in detail later on, notwithstanding the fact that the foregoing shows that any simplistic comparison of the Finnish model to the Spanish model, and the automatic extrapolation of the considerations warranted by one and the other, in relation to their potential consistency with Article 24 of the European Social Charter, should be avoided.

b) The decision relating to the complaint against Italy (nº 158/2017). This states that the Italian regulatory framework establishes compensation ranging between 6, 12, 24 and 36 monthly payments, which also diverges from the Spanish model. Moreover, it mentions as the main reason for the Decision of the Committee the fact that the Italian Government *"has not provided any examples of cases in which compensation has been granted for unlawful dismissal on the basis of the rule on civil liability or under Article 1418 of the Civil Code"*. However, both the allegations against the claim already filed by UGT and these current ones cite numerous judgments of the Spanish Labour Courts ordering the employer to pay compensation for damage additional to that calculated by law, not only in cases of null and void dismissal, but also in cases of unfair dismissal.

c) The decision relating to the complaints against France (nº 160/2018, 171/2018 and 158/2017). This analyses a reform of the French model establishing a maximum limit of 20 months which only applies to employees with a length of service of 29 years or more, with

[1] Appendix to the revised European Social Charter, Part II, Article 24.3.

the scale being lower for employees with less length of service; a model, therefore, that cannot be compared to the Spanish model either.

Moreover, as regards the French cases, it is significant that the Committee should have considered it valid for a Judge to be able to propose reinstatement as a repair measure, which will be implemented unless either of the parties (employee or employer) refuses reinstatement, in which case the Judge will grant the employee compensation in accordance with the scale established to such end. This does not seem to be a more protective system than the Spanish one in which, as will be explained later on, all dismissals the real grounds for which are any of the invalid reasons listed in the Charter in relation to the application of Article 24, will be declared null and void, subject to mandatory reinstatement, the payment of any outstanding salaries and the potential payment of additional compensation for any damage suffered.

All the foregoing must necessarily lead to the conclusion that, whatever the content of these prior decisions, the claim against the Spanish regulatory system should be analysed independently, and not in view of the latter, by taking into account its specifics, which are dealt with at length in these allegations.

3.- Introduction to the Spanish regulatory framework on matters of dismissals and its development over time

3.1.- Spanish regulatory framework on matters of dismissal.

In Spanish law, dismissal is always causal, either based on the objective grounds established in Article 52 WS or on the disciplinary grounds established in Article 54 WS (and the applicable collective bargaining agreement), with the existence and sufficiency of such grounds being subject to judicial control by the Labour Courts and Tribunals.

Objective dismissal, with its different types (due to the employee's unexpected incompetence, due to the lack of adjustment to any technical modifications implemented in the post, or based on economic, production-related, organisational or technical grounds, following the removal of dismissal due to absenteeism), is in any case compensated because, if it is declared fair, the

minimum unalterable parameter applies of 20 days' salary per year's service, up to a maximum of 12 monthly payments (plus the legal minimum notice of 15 days' salary). Furthermore, this compensation must be made available to the employee on the same day as the delivery of the letter of dismissal, irrespective of whether or not the employee agrees with the terminating act and subsequent complaint, where applicable.

If the objective dismissal is declared unfair, the employer may opt between termination of contract, applying the same compensatory parameter established for unfair disciplinary dismissal (45/33 days' salary per year's service), and the reinstatement of the employee, in that case paying back pay. If it is null and void, the inevitable effect is the reinstatement of the employee, also with the payment of any outstanding back pay. In certain cases, the employee has the option to choose (for example, in the case of workers' representatives and the like).

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

Based on this, and on the fact that the articles the adjustment of which to the European Social Charter is questioned (Article 56 WS and Article 110 Law Regulating the Labour Courts) do not include the category of *"unjust"* dismissal, or dismissal due to *"a fraudulent action"*, the first unknown factor arises, relating to the actual request of the collective claim: is it questioning the compensation parameter for all events of unfair dismissal, or only for those dismissals that the claimants classify as unjust or fraudulent? Which of these categories would include a dismissal due to a real sufficient cause but based on time-barred facts? What about a dismissal without complying with the formal, legal or conventional prerequisites? Therefore, is the current parameter of days' salary for time worked considered valid for these cases and but for "unjust" or "fraudulent" dismissals, with everything that these terms imply or might hypothetically include?

In short, it seems that the request for the court to consider the possibility of assessing reinstatement as a suitable means of repair (sections 1 and 2 of the request made by CC.OO.)

and for the compensation to be sufficiently repairing and dissuasive is limited to individual "unjust" or "fraudulent" dismissals, concepts not considered in Spanish law.

Moreover, those "unjust" or "fraudulent" dismissals to which the claimants refer may, in all likelihood, commit a breach of fundamental rights, consequently resulting in annulment, or in a breach of other rights also triggering the annulment of the dismissal, rights that, as will be explained, are widely provided for under Spanish law. The truth is that unfair dismissal is not "unjust" or "fraudulent" *per se*; it is simply a dismissal in which the alleged cause has not been proven or in which the Judge deems that such cause is insufficient. It should be remembered, for example, that Spanish law does not simply consider the employee's incompetence or lack of performance to be grounds for dismissal. Such lack of performance must be qualified, very serious, voluntary and continual, which is interpreted in restrictive terms by the Courts.

In addition, the claim mentions the circumstance regulated under Article 50 WS, when it is the employee that requests the termination of the employment contract due to a serious breach by the employer of their obligations, a situation that the Spanish regulation compares to unfair dismissal in terms of compensation, and the termination of *"fraudulent"* temporary contracts.

In relation to the first case, it is based on a fundamental mistake in the comparison made when mentioning that this case does not include the item of outstanding back pay either. The truth is that, under these circumstances, the employee files the complaint and it is not until the judgment (in the event this upholds the termination request) that the employment relationship ends. Until then, the employment relationship remains in place and, therefore, the employee continues to receive their professional salary as normal, and consequently there is no outstanding back pay subject to being compensated.

Moreover, the actual Law Regulating the Labour Courts (Law 36/2011) (*Ley Reguladora de la Jurisdicción Social*) ("LRJS") expressly contemplates the compatibility between the compensation calculated due to termination under the Workers' Statute, and the compensation for damage that the Court considers appropriate in accordance with the circumstances of the case analysed. This is deduced from the literal wording of Article 183 of the said regulation:

> *"1. When the judgment declares the existence of a breach, the Judge must pronounce on the amount of the compensation that, where applicable, corresponds to the claimant on having suffered discrimination or any other harm to their fundamental rights and public*

freedoms, depending on both the moral damage connected to the breach of the fundamental right as well as any resulting additional damage.

2. The court will pronounce on the amount of the damage, establishing it cautiously when proving its precise amount is too difficult or costly, in order to sufficiently compensate the victim and fully return the latter to their position prior to the harm, to the extent possible, and to contribute to the purpose of preventing the damage.

3. This compensation will be compatible, where applicable, with that which might correspond to the employee due to the amendment or termination of the employment contract or other circumstances established in the Workers' Statute and other employment regulations."

In relation to temporary contracts, it states that, in the case of a person who has been *"systematically subjected to fraudulent or abusive temporary hiring, with a threat of unjust dismissal"*, if they are dismissed, such circumstance should be taken into account when calculating *"the amount of the repair, as it corresponds to damage that must be compensated on the specific termination of the contract"*.

This reference to temporary hiring within the framework of the current regulatory framework following the latest reform enacted (Royal Decree-Law 32/2021, dated 28 December, on urgent measures for labour reform, the guarantee of job stability and the transformation of the job market) is surprising since it ignores the fact that it was the result of the social dialogue that ended up prioritising the objective of drastically reducing those cases in which a temporary contract can be signed and respecting the current compensation regime.

In fact, the preamble to this Royal Decree-Law emphasises that this reform resulted from the agreement reached between the Employers' Associations and the Trade Unions, UGT and CC.OO., specifically:

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

rise to the first labour reform of great importance in the Democracy, with the support of social dialogue."

Within the framework of this process of social dialogue, precisely held with the two claimant trade unions, the parties decided to prioritise the amendment of the hiring system, firmly committing to permanent contracts to reduce the levels of temporary hiring by removing the main type of temporary contract in force until then and restricting the rest. Thus, the agreement reached was the result of the balance of expectations and renouncements on both sides during the "*lengthy negotiation process*". Therefore, the fact that, through this claim, the intention is to change what was rejected (it was in fact agreed not to change it) in such social dialogue process is simply an interruption of the balance achieved.

In addition, the compensation regime of temporary contracts, when they are terminated in advance of their normal conclusion on disciplinary or objective grounds, is the same as that established for permanent contracts, taking into consideration for its calculation the accumulated length of service of all the temporary contracts if there have been several (even if they were not fraudulent but pursuant to law). The lack of definition of the requests made by CC.OO. becomes clear again, since the compensation regime is only questioned when there has been a *"repeated and systematic situation of abuse of fraudulent temporary hiring"* (*vid*. section 6) of the final request), which is totally indeterminate.

3.2.- Development over time.

The claim also ignores the fact that the current Workers' Statute, in relation to the matters in dispute, is the result of the social dialogue that gave rise to Royal Decree-Law 32/2021, and the fact that the immediate precedent of the compensation parameter of 33 days is to be found precisely in the Interconfederal Agreement for job stability signed in 1997 by the employers' associations (CEOE and CEPYME) and the UGT and CC.OO. trade unions. The feature of the contract to encourage permanent hiring which, in the case of unfair dismissal, entailed compensation of 33 days' salary per year's service, up to a maximum of 24 monthly payments, emerged from this Agreement. In other words, **the basis of the current compensation regime in dispute is precisely to be found in an Agreement signed by the employers' associations and the UGT and CC.OO. trade unions.**

Just as this agreed precedent is omitted from the current compensation regime, so is the fact that the development of the Spanish regulatory system on the subject has been as follows: based on a system in which the fixing of compensation depended on the total discretion of the Judge, with the subsequent burden of proof and lack of legal certainty for the employee, coinciding with the arrival of democracy, this shifted to an objective appraised system, releasing the employee from having to prove any evidence whatsoever of the damage caused, which is taken for granted and compensated by virtue of an automatic formula.

In fact, under Spanish law, traditionally, both at the corporate stages (Primo de Rivera dictatorship, Franco regime) and at the democratic stage (Second Republic), compensation in cases of unjustified dismissal was fixed either by the Judge or by the corporate bodies (which were maintained, under another name, in the Second Republic), at their free or prudent discretion. The law non-exhaustively established certain criteria to set the compensation along with a minimum and a maximum quantum thereof a as a general rule.

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

Moreover, this scale was established within the framework of the new democratic system precisely because it was considered, without disagreeing statements in this respect, that it constituted a safer, more objective and more beneficial route for employees to redress the damage caused by unlawful ("unfair", in our terminology) dismissal.

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

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

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

As observed, throughout the historic process, the establishment of the compensation was entrusted to the "prudent discretion", either of the Judge or of the acting corporate authority. A series of criteria were established (taking into account not only the employee's length of service and their salary, but also their family circumstances or the possibility of finding another job) along with minimums and maximums. These have evolved from 3 to 6 months and, finally, one year[2].

The democratic stage initiated by the 1978 Constitution and, in the legislative field, the 1980 Workers' Statute, for the first time revoked the judicial discretion for establishing compensation for unjustified (unfair) dismissal, and established a predetermined objective scale, quantifying the damage deriving from the termination of the employment contract, based on objective criteria (not subjective criteria, such as the employee's family circumstances, or the more or less foreseeable possibility of finding another job). This avoids judicial discretion, the lack of

[2] Only exceptionally, in 1977, was a maximum of 5 years established, strictly for political reasons because, in the rules during the transition, prior to the democratic Constitution, the regime that disappeared wanted to leave its "social conscience" embedded, in order to try and somehow realise its claims before the new democratic stage. It was a totally preposterous regulation, which had to be revoked rather quickly in order to avoid the damaging effects on employment that immediately began to emerge.

compensation for losing a job in cases in which it is not possible to identify or quantify damage (consider the employee who is dismissed having already reached the age of retirement, which they could benefit from with full rights, or the employee immediately employed elsewhere, if applicable, with better remuneration conditions), and the problems derived from the difficulty entailed in proving the existence of damage and the quantum thereof.

The truth is that, under Spanish tort law, compensation for damage requires a person seeking compensation to prove the existence of the damage, the quantum thereof and the fact that it was caused by the person allegedly liable. In order to avoid these problems, it is possible to reach an agreement, through a *penalty clause* (Article 1.152 of the Civil Code), for an early settlement of any damage, releasing the claimant from having to prove the existence and quantum thereof.

This is what democratic legislation does: establish through the law a type of penalty clause establishing an objective, automatic and predetermined settlement of any damage deriving from unjustified dismissal. The compensation for unjustified dismissal (justified objective dismissal is compensated with 20 days' salary per year's service up to a maximum of 12 monthly payments) becomes 45 days' salary per year's service up to a maximum of 42 months and this is a fully valid legislative option, which complies with the international mandates requiring adequate compensation in the case of unjustified dismissal.

At this stage, it suffices to note the paradox that the claim filed by CC.OO. (and previously by UGT) attempts to reverse the option of democratic legislation, to return to the guidelines established in the corporate system and in the Franco dictatorship. It would be no small paradox for a decision given by the European Committee of Social Rights, applying the European Social Charter, to introduce a change into the parameters regulating the Spanish system, reversing the option of democratic legislation to return to the regulating options in the dictatorship.

4.- Opposition to the sections and premises of the collective claim made by CC.OO.

4.1.- On the alleged breach in view of the impossibility of the court being able to agree the reinstatement and the absence of any appropriate protection measures (GROUNDS ONE and TWO of the claim, pages 35 to 46).

Sections 1) and 2) of the request of the claim filed by CC.OO. asks for a declaration of non-conformity in respect of Article 24.b) of the Charter of Spanish law, *"as it does not allow the court to assess reinstatement as a means of suitable repair for unjust dismissal, aside from the circumstances and actions of the parties"* and, in particular, "*on not allowing the court to assess reinstatement as appropriate repair for an unjust dismissal, when it is verified that the dismissal is a fraudulent action for ensuring the employee is removed from their employment activity, as a means for preventing the exercise of the rights that might correspond to them contained in the European Social Charter and the Revised European Social Charter or the Protocols therefore*".

The basic question for the purposes of replying to this first section of the claim filed involves returning to the source, which is none other than Article 24 of the European Social Charter. As admitted in the claim itself on transcribing the literal wording, and even the decision adopted in relation to the complaint against Finland, Article 24 does not expressly contemplate a return to work or reinstatement as a measure that must necessarily be included within the national regulatory framework.

In fact, Article 24 mentions the right of those employees dismissed without a valid reason *"to adequate compensation or other appropriate relief"*, without even mentioning reinstatement by way of example as a potential alternative measure to compensation. The Article reads as follows: *"the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief"*.

In other words, Article 24 of the Charter is formed on the basis of a disjunctive conjunction (*"or"*) which in Spanish, according to the Real Academia de la Lengua Española, implies *"difference, separation or alternative between two or more persons, things or ideas"*. Put another way, **any regulatory framework contemplating adequate compensation would be valid, even if it did not contemplate any case of reinstatement, or any other appropriate repair other than**

reinstatement. Or, what amounts to the same, a regulatory framework cannot be contrary to Article 24 of the Social Charter due to the fact of not contemplating reinstatement as a measure available to the employee, and certainly not because it does not consider the right of the Judge to impose one measure or another, at their discretion.

The copulative conjunction *"and"* does indeed imply the sum of elements, whereas the disjunctive conjunction *"or"* does not, which allows national legislation to construct its model based on one option of the alternative or another, but not necessarily contemplating the accumulation of several measures.

Moreover, and what is also relevant for the purposes of this allegation, **Article 24 of the Charter must necessarily be interpreted in line with the Appendix of the actual Charter, Part II of which provides criteria for interpreting certain Articles, including Article 24**. As the claim of CC.OO. in fact states, the Charter clarifies that, for the purposes of this Article *"no valid reasons for the dismissal will be considered, in particular"* the following:

"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."

In other words, even accepting the argument of CC.OO. in its claim, merely for the sale of argument, the Social Charter would require the repairs of section b) of Article 24, as the trade union interprets it, for cases of dismissal without a valid reason (*"the right of workers whose employment is terminated <u>without a valid reason</u> to adequate compensation or other appropriate relief"*).

As stated in the Charter itself, those grounds considered not valid for the purposes of Article 24 are those listed in the Appendix and transcribed above. Thus, Article 24 of the Charter must necessarily be interpreted consistently with the clarifications of the Appendix which also form part of the Charter, in the sense that what is required under section b) of Article 24 is not aimed in the abstract at abusive or fraudulent dismissals, etc., but at those dismissals based on the specific particular invalid reasons of the Appendix.

Extrapolating all the foregoing to the Spanish regulatory model, we see how, on the one hand, that not only does it not coincide with the Finnish model, as there are numerous circumstances in which the annulment of the dismissal and, therefore, the reinstatement of the employee, is obligatory, but also that, in cases of unfair dismissal, reinstatement in some cases; and, finally, **all the grounds that the Charter itself lists as invalid reasons do not lead to a declaration of inadmissibility, with the possibility of the employer choosing between compensating or reinstating, but lead inevitably to a declaration of annulment and, therefore, they oblige the employer to readmit the employee and pay them any outstanding back pay and, where applicable, to compensation them with an amount for repairing the damage suffered by the business decision, pursuant to Article 183 of the LRJS**.

We must insist that it should be understood that the Spanish regulatory model on matters of dismissals is causal (the termination must be based on disciplinary or objective grounds, all calculated legally or contractually) and establishes three potential legal classifications of the dismissal: fair, unfair and null and void, with the subsequent effects (if it is fair, no compensation whatsoever is paid, unless the dismissal is due to objective grounds, in which case a minimum of 20 days' salary per year's service is guaranteed, up to a maximum of 12 monthly payments, which must be made available to the employee in the same act as the delivery of the letter of dismissal; if it is unfair, the employer chooses between reinstating or compensating for the amounts described, except in special cases in which it is the employee that chooses; and if it is null and void, only reinstatement is possible).

Furthermore, those cases in which dismissals should be classified under Spanish law as null and void are not only numerous, in no way limited to those cases in which a fundamental right is breached, but also contemplate or encompass each and every one of the invalid reasons listed by the Charter in the part of the Appendix clarifying the scope of Article 24.

In other words, Spanish legislation has opted for a totally protective system, even more than that deduced from Article 24 of the European Social Charter, which has also progressed since the 1980 Workers' Statute, in which the only case for annulment arose from a breach of the formal requirements, to the current Workers' Statute in which, particularly in recent years, has constantly included new specially protected cases to which legislation has related automatic annulment in the event of termination and, therefore, the unavoidable reinstatement of the employee.

Therefore, as regards all those cases in which dismissals are shown to be related to the reasons of the Appendix, legislation already has a provision, and not a provision of inadmissibility with the option of the Judge to assess whether there should be a reinstatement or compensation, at their free discretion, but a provision that must be complied with by the Judge and the parties, because in all those specially protected cases, the annulment is automatic and unavoidable, and therefore so is the reinstatement, the payment of any outstanding back pay and potential additional compensation for damage *ex* Article 183.3 LRIS.

In fact, those cases warranting special protection have not stopped increasing under Spanish law. This is so to the extent that, even from the filing of the claim of CC.OO. to the date of these allegations, Article 55 WS transcribed by the opposing party has already become outdated, due to the addition by Royal Decree-Law 5/2023, dated 28 June, transposing the European Union Directive on work-life balance for parents and carers, of new cases of the annulment of the dismissal.

Indeed, the current wording of Article 55.5 WS[3] transcribed on page 25 of the CC.OO. claim has been replaced by the following (the new points introduced by the said Royal Decree-Law are emphasised in bold):

> *"5. The dismissal, the motive of which is any of the grounds for discrimination prohibited by the Constitution or by law, or which occurs in breach of the employee's fundamental rights and public freedoms, will be null and void.*
>
> *<u>The dismissal will also be null and void in the following cases</u>:*

[3] In the same terms as for disciplinary dismissal (Article 55.5 WS), Article 53.4 WS has been amended regarding objective dismissal.

a) the dismissal of employees during periods of suspension of the employment contract due to birth, adoption, guardianship for the purposes of adoption, fostering, risk during pregnancy or risk during breastfeeding referred to in Article 45.1.d) and e), ***the enjoyment of the parental leave referred to in Article 48 bis****, or for illnesses caused by pregnancy, labour or breastfeeding, or when notice of the decision is served on a date in such a way that the notice period granted ends in such periods;*

b) the dismissal of pregnant employees, as of the date of commencement of the pregnancy up to the commencement of the suspension period referred to in letter a); the dismissal of employees who have requested one of the ***periods of leave referred to in sections 3.b), 4, 5 and 6 of Article 37****, or are enjoying them, or have requested or are enjoying the* ***adjustments to the working day established under Article 34.8*** *or the leave provided for in Article 46.3; and the dismissal of employees who are victims of domestic violence for exercising their right to effective legal protection or the rights recognised in this Law in order to render effective their protection or their right to integral social care;*

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

The provisions established under the foregoing letters will apply unless, in those cases, the admissibility of the dismissal is declared based on grounds not related to pregnancy or the exercise of the right to leave and absence mentioned."

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

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

Finally, letters a) and b) have been amended once again under Royal Decree-Law 5/2023, which is not limited to extending remunerated leave and adjustments to the working day, but connects

the effect of the automatic annulment to the dismissals of employees who are enjoying such measures at the time of the termination; specifically, the following are included as grounds for annulment: (i) the enjoyment of parental leave[4]; (ii) the request for leave under Article 37.3.b) of the WS (due to a serious illness or accident, hospitalisation or surgical intervention without hospitalisation involving rest at home for the spouse, *de facto* partner or relatives up to the second degree of consanguinity or affinity, including blood relatives of a *de facto* partner, as well as any person other than the foregoing who lives with the employee at the same address and who requires their effective care); (iii) and regards the reduction of the working day of Article 37.6 WS and leave to take care of relatives under Article 46.3 WS, these are extended to those needing to take care of their spouse or *de facto* partner, or relatives up to the second degree of consanguinity or affinity, now including any blood relative of the *de facto* partner who, for reasons of age, accident or illness, cannot take care of themselves, and who does not perform any remunerated activity; (iv) those cases in which the employee has requested or is enjoying an adjustment to their working day *ex* Article 34.8 WS[5].

This same regulation has also amended Article 4.2 c) WS, expressly including the right of the employee not to be subject to discrimination based on sex, including unfair treatment given to men or women due to exercising rights to work-life balance or joint responsibility therefor:

> *"Not to be directly or indirectly discriminated against for employment or, when employed, for reasons of civil status, age within the limits set by this law, racial or ethnic origin, social condition, religion or convictions, political ideas, sexual orientation, sexual identity, gender expression, sexual characteristics, membership or not of a union, on grounds of language within the Spanish State, disability, or based on reasons of sex, including unfavourable treatment given to men or women due to exercising the rights to a work-life balance or the joint responsibility therefor."*

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[4] A new Article 48 *bis* WS is introduced, establishing that employees, in order to take care of a child or foster child taken in for a period of more than one year, until the child turns 8, will be entitled to parental leave of a maximum of 8 weeks, whether or not continual, which may be enjoyed full time or on a part-time working day basis.

[5] The right to request the adjustment of the working day is extended to employees with care needs as regards children over the age of 12, their spouse or *de facto* partner, relatives up to the second degree of consanguinity or affinity or any other dependants when, in this latter case, they live at the same address and, due to reasons of age, accident or illness, they cannot take care of themselves. Until this Royal Decree-Law came into force, this adjustment was only established regarding employees with children below the age of 12.

Continuing with the reasons that the Charter considers to be invalid for triggering a dismissal, section f) of Article 24 (of the Appendix) establishes the temporary absence from work due to illness or injury. To be precise, Law 15/2022, dated 12 July, essential for equal treatment and non-discrimination, has supported numerous legal pronouncements since it came into force, declaring the dismissal of employees in a situation of temporary disability to be null and void. This is based on the provisions of Articles 2, sections 1, and 3, 9.1 and 26 of the regulation:

> Article 2.1: *"The right of any person to equal treatment and non-discrimination is hereby recognised, regardless of their nationality, whether or not they are adults or minors or whether or not they are legal residents. Nobody may be discriminated against due to reasons of birth, racial or ethnical origin, sex, religion, convictions or opinions, age, disability, sexual identity or orientation, gender expression, illness or health condition, serological status and/or a genetic predisposition to suffer pathologies and conditions, language, socio-economic situation or any other personal or social condition or circumstance."*
>
> Article 2.3: *"Illness cannot cover differences in treatment other than those deriving from the actual treatment process thereof, the objective limitations this imposes for the performance of certain activities or those required due to reasons of public health."*
>
> Article 9.1: *"No limitations, segregations or exclusions may be established based on the grounds established in this law for gaining access to employment, whether public or private, including selection criteria, training for employment, professional promotion, remuneration, the working day and other work conditions, or on suspension, dismissal or other grounds for termination of the employment contract."*
>
> Article 26: *"Any provisions, acts or clauses of legal transactions constituting or causing discrimination based on any of the grounds established in section one of Article 2 of this law are fully null and void."*

The entry into force of this Law has meant that the Labour Courts and Tribunals have abandoned the case law opinion whereby the dismissal of an employee on leave due to a temporary disability, in general, was not null and void but unfair, with the sole exception until this Law of those cases in which the temporary disability or illness could be compared to a situation of disability in the terms previously delimited by the European Union Court (under the Judgment

of the Court of Justice of the European Union ("CJEU") dated 1 December 2016, which declared that a long-term illness, albeit temporary, could be considered equal to a situation of disability, determining that the termination of contract that was analysed was based on clearly discriminating grounds and should be considered null and void).

Examples of this are the Judgment of the High Court of Justice of the Canary Islands (Las Palmas) dated 21 December 2022, which analyses the case of a lifeguard dismissed when on leave of absence due to an illness immediately at the start of such situation, and the Judgment of Cartagena Labour Court nº 1 dated 18 January 2023, which also analyses the case of an employee dismissed on the same day as the commencement of their situation of a leave of absence due to a temporary disability, by sending a certified fax to their home at 10 p.m., with no reference to any significant grounds for dismissal beyond a general mention of some delays in the previous days. Both obliged the employer to reinstate the employee and, in addition, established as compensation for moral damage an amount coinciding with the minimum tranche of a very serious penalty under the Law on Infringements and Penalties in the Labour Courts.

In view of the foregoing, **the example used in the CC.OO. claim** to show that dismissals exist which, on the basis of *"mendacious, false and simulated"* grounds, remove the ill employee from the job market, with no recourse other than the payment of compensation for unfair dismissal (pages 39, 43, 44 and 45 of the CC.OO. claim) **is totally obsolete and, therefore, unrelated to the reality of the judicial and regulatory framework in Spain**.

In fact, it is of note that precisely this example should be used to support the idea that, in Spanish law, there are supposedly cases of abusive dismissals, committed in abuse of the law, which do not find a suitable repair measure, when precisely in view of the current regulation (Law 15/2022) and the judicial decisions already applying it in practice (of which those cited here are mere examples), any dismissals of employees in a situation of temporary disability, and/or limited by illness are no longer consider to be unfair but null and void, with the subsequent right to reinstatement, the payment of any outstanding back pay and, furthermore, additional compensation for any effective damage suffered, i.e. the accumulation of all the reparatory measures possible.

Also of note is the fact that section 3 of the first application (page 39) does not cite any other example of supposed fraudulent dismissals with insufficient repair in Spanish law. Nor does section 1 of the second application (pages 43 to 45).

In other words, in order to substantiate what represents the backbone of the first part of its claim (that abusive and fraudulent dismissals should receive the protection of a system in which the Judge can choose between reinstatement and compensation), only one case is cited (that of dismissals due to a health condition or illness), which precisely under Spanish law since 2022 has been subject to such strong protection for the employee that it obliges the employer to reinstate them, reimburse them for any salary not received and compensate them for any physical or moral damage suffered, in the event the Judge should conclude that the true reason for the dismissal was such health condition or illness.

The use of this example or case specifically and, above all, the absence of any other examples, is a determining factor in assessing to what extent the claim of inadequacy made by the opposing party against the Spanish regulatory framework does not stand up to scrutiny. In fact, it is surprising that page 44 should cite a Judgment of the Supreme Court dated 5 May 2015, the arguments of which have been broadly superseded by Law 15/2022 (and even earlier by the adjustment of the position of the Supreme Court to the pronouncements of the CJEU).

Up to here, the cases listed as invalid reasons for dismissing in all the situations of sections a), d), e) and f) of Article 24 of the European Social Charter (*vid*. Appendix) would be covered by a guarantee of direct automatic reinstatement.

As regards the grounds of section b) of Article 24 of the Charter (seeking office as, acting or having acted in the capacity of a workers' representative), these are cases that, if it is proven that they are the true cause of the dismissal, also imply annulment, in accordance with consolidated legal opinion and the provisions regarding the guarantees of representatives contained in both the Workers' Statute and the Organic Law on the Right to Union Membership (*Ley Orgánica de Libertad Sindical*) ("LOLS") (Article 68 WS and Article 12 of the LOLS[6]).

[6] Any regulatory articles, clauses of collective bargaining agreements, individual covenants and unilateral decisions of the employer containing or involving any type of discrimination in employment or in work conditions, whether favourable or adverse, due to joining or not joining in with a union, their agreements or the general exercise of union activities will be null and void and will not render any effects.

Moreover, in any case, if the dismissal of a representative is not declared to be null and void but unfair, the choice between reinstatement and compensation always corresponds to the former. In addition, although not mentioned in the CC.OO. claim brief, the same guarantees are extended to candidates in current election proceedings, which is additional to the protection of representatives during the year following the expiry of their position (Article 68.c) WS[7]).

The only missing reference would therefore be to the ground of section c) of Article 24 of the Charter (*"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"*). All these cases and more are covered by the so-called **guarantee of the right to protection** which is understood as a fundamental right and, therefore, if it discovered to be the true cause of the act of termination, this also results in a declaration of annulment and obligatory reinstatement, in accordance with consolidated legal opinion. One clear example of this is the Supreme Court Judgment dated 20 April 2022, which declared a dismissal due to a breach of the guarantee of the right to protection to be null and void as it was evidenced that the act of termination was a reaction to a prior legal action brought by the employee and when the latter was also in a situation of a leave of absence due to a temporary disability, with the company being ordered to reinstate the employee, pay any outstanding back pay and, in addition, pay compensation for damage amounting to 60,000 euros, quantified based on the following premises:

> *"Aspects such as the length of service of the employee with the company, the continuance in time of the breach of the fundamental right, the severity of the infringement of the right, the consequences caused to the personal or social situation of the employee or person holding the infringed right, the possible recurrence of the infringing actions, the multiple offences of the harm, the context within which the action might have taken place or an attitude aimed at preventing the defence and protection of the breached right, among others that might be assessed bearing in mind the circumstances of each case, should comprise elements to be taken into consideration for the quantification of the compensation."*

[7] According to this article, among other guarantees, representatives have the right not to be dismissed or penalised while performing their duties or within the year following the expiry of their position.

Aside from the invalid reasons in respect of which Article 24 of the European Social Charter must be interpreted, many other cases could be cited in which Spanish law opts for annulment and obligatory reinstatement as a repair measures in favour of the employee.

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

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

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

There are also multiple examples in legal opinion of dismissals classified as unreasonable when the company taking charge of the assets of the previous holder of the labour relations, and continuing its activity, does not honour the rights of the regime of company succession established in Article 44 WS and Directive 2001/23/EC of the Council, of 12 March 2001, on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

The annulment should also be recalled of individual objective dismissals made surpassing the thresholds of Article 51 WS (collective dismissals), an article which regulates annulment in the following case: *"When, in successive periods of 90 days and in order to avoid the provisions contained in this Article, the company terminates contracts, pursuant to the provisions of Article 52 c), in a number lower than the stipulated thresholds, and without any new causes existing to justify such action"*.

In order to conclude this response to sections ONE and TWO of the CC.OO. claim (pages 35 to 46), we cannot fail to mention certain blatant inaccuracies contained in the brief, specifically the following:

a) Page 38 mentions that when the dismissal is unfair, the only procedural burden of the employer is to *"express its intention, within a period of five days as from notice of the judgment being served, but it does not have to assume, pay or even secure the payment of any statutory compensation that might correspond to the unlawful dismissal".* This is not true, given that Article 230 LRJS establishes that *"when the judgment opposed has ordered a party to pay an amount, it will be essential for the appellant not using free legal aid, when announcing the appeal for reversal or preparing the appeal for cassation, to prove it has deposited the amount ordered with the appropriate credit entity in the deposit account held in the name of the court, being able to replace a cash deposit with security through a fixed-term joint and several guarantee due on first demand issued by a credit entity"*. This article applies to any proceedings ordering the payment of an amount and, therefore, if the dismissal is unfair, and the employer opts for compensation, it will have to pay this immediately or, if it decides to appeal, deposit the amount of the compensation into the account of the Court. This article is also complemented by Article 290 LRJS which regulates the possibility of the employee requesting provisional enforcement from the court charged against the amounts deposited. All this is without forgetting that, in the case of an objective dismissal, the employer has the obligation to pay in advance the minimum statutory compensation of 20 days' salary per year's service at the time of the delivery of the letter of dismissal; therefore, when the employee brings an action based on unfair or null and void dismissal, they already have this part of the compensation in their possession.

b) In addition, the way in which the claimant refers to the incident of irregular reinstatement of Article 281 LRJS (page 40) is inaccurate, as the additional compensation that the law establishes (apart from statutory compensation and back pay) is compensation that not only comprises 15 days' salary per year's service, but that is calculated by taking as the length of service the time elapsed up to the date of the ruling. Moreover, it is inadmissible to start from the premise that when the employer opts for reinstatement, it does so *"in the expectation that, if the person does not accept, it is released from any compensation obligation, as this implies a voluntary renouncement of the employment position"*. This statement is totally subjective, excessive and baseless.

In conclusion, a request is made for the Spanish regulatory framework to be declared contrary to Article 24 of the European Social Charter on the basis that the Judge is not able to decide on the appropriate repair measure between reinstatement and compensation in cases of abusive and fraudulent dismissals, ignoring the fact that Article 24 b) applies to cases of dismissals for invalid reasons, and that these are those identified in the list contained in the Appendix. As we have explained, these are reasons in respect of which Spanish law establishes annulment, not unfairness, as the effect, with mandatory reinstatement, the payment of any outstanding back pay and the possibility of the Judge, under Article 183 LRJS, adding compensation for any damage suffered by the employee in the specific case at hand.

4.2.- On the alleged breach of Article 24 b) due to the removal of back pay as a way of offsetting the financial damage caused by the loss of employment (GROUND THREE of the claim, pages 46 to 51).

Section 3) of the request of the claim filed by CC.OO. asks for it to be declared contrary to Article 24 b) of the Charter for there to be no guarantee of *"reimbursement of the financial losses suffered between the date of the dismissal and the decision of the court declaring the dismissal unjust, including any costs deriving from Social Security contributions (back pay)"*.

It should first be mentioned that, following the 2012 reform, the obligation was removed to pay back pay in those cases of unfair dismissal in which compensation is chosen, limiting this to cases of null and void dismissal and unfair dismissal with reinstatement.

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

In any case, even though this is based once again on mistaken premises, the truth is that it is hard to understand the relationship between the literal wording of Article 24 b) of the European Social Charter and the question relating to the (partial) elimination of back pay as a legitimate option of national legislators. Article 24 b) of the Charter does not result in any instruction stating that any type of repair should exist in addition to that which already exists in Spanish law for the period elapsing between the dismissal and the judgment.

The truth is that the removal of back pay is a subject that really has no bearing on the judgment of the appropriateness of the compensation parameter in Spanish law, which is the specific subject-matter of the collective claim. The removal of back pay in cases in which, subsequent to the dismissal, the termination of the employment contract is maintained, with payment of compensation, corresponds to the criteria of opportunity that will be mentioned below, and also to a strictly legal criterion, i.e. precisely the extinctive nature of the act of dismissal in Spanish law. The termination of the employment relationship does not derive from the judgment declaring the dismissal fair, but rather from the act of dismissal itself. Only in cases of annulment, or reinstatement of the employment relationship subsequent to the unfairness of the dismissal, has the termination not taken effect or have the effects thereof been reverted and, therefore, back pay is due up to the date of the effective reinstatement of the employment relationship.

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

> *"Together with the deletion of "express dismissal", other amendments are introduced into the rules referring to back pay, maintaining the company's obligation to pay it only in*

those cases of the employee's reinstatement, either because the employer has opted for this in view of a dismissal declared unfair, or as a result of the classification of annulment thereof. In the event of unfair dismissal, in which the employer opts for compensation, the non-payment of back pay is justified by the fact that the duration of the legal proceedings does not appear to be an adequate criterion to compensate for damage involved in the loss of employment and, furthermore, the employee can access unemployment benefit as of the date on which the decision to terminate becomes effective. Moreover, back pay occasionally acts as an incentive for procedural delaying strategies, in addition to the fact that it ends up becoming a partially-socialised cost, given that the employer can claim from the State the part of such back pay that exceeds 60 days."

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

"When the judgment declaring the unfairness of the dismissal is delivered more than ninety business days after the date on which the complaint was filed, the employer may claim from the State the payment of the economic amount referred to in section 2, corresponding to the time exceeding the said period of ninety business days."

Not only the legislators but also the Labour Courts precisely refer to this relationship between the greater or lesser delay in settling the legal proceedings and the figure of back pay, upon validating the removal thereof, beginning with the Ruling given by the Constitutional Court on 12 February 2014, followed by consolidated Case Law along the same lines; by way of example, the Judgment delivered by Madrid High Court of Justice on 3 November 2020 which, based on the following line of reasoning, also ruled out the removal of back pay being a way to make compensation prevail over reinstatement:

"With regard to the recognition of back pay in the option for reinstatement and the omission thereof in the option for compensation, in the opinion of the Constitutional Court,

this does not imply a disproportionate or unreasonable difference in treatment, but rather constitutes an opinion that ordinary legislators can legitimately adopt without breaching the requirements of the principle of equality, as a result of having an effect on clearly different situations from the perspective of the purpose contemplated.

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

Nor do we in any way agree with the statement that the procedural interest does not involve additional compensation for the financial loss of income caused by an unjust dismissal, when Article 576 of the Spanish Civil Procedure Law, applicable in Labour Courts under Article 251 LRLJ, states that this accrues *"as of the date on which any judgment or decision ordering the payment of a cash amount was delivered in the first instance"* in accordance with the *"legal interest of money, plus two points"*.

Moreover, the mention of the non-application of Article 1.108 of the Civil Code to compensation for unfair dismissal (default interest) is also biased, because this is an issue in respect of which a judicial debate still exists, especially when the situation is that of compensation already recognised.

All this is without mentioning the fact that the case of objective dismissal is again ignored, in which the minimum statutory compensation of 20 days is made available to the employee in the same act as the delivery of the letter of dismissal based on legal imperative.

In relation to the reference to the amount of the unemployment benefit contained on page 48, this is completely mistaken and has become out of date because, based on the reform enacted by Law 31/2022, dated 23 December, this was increased.

Nowadays, since 1 January 2023, the amount of the unemployment benefit is determined by applying the following percentages to the regulatory base: 70% during the first 180 days, and 60% as from day 181.

In addition, the maximum amount of the unemployment benefit will be 175% of the public income multiplier effect index (*Indicador Público de Rentas de Efectos Múltiples*) (IPREM), except when the employee is responsible for one or more children, in which case the amount will respectively be 200% or 225% of such index (Article 270, sections 2 and 3, of the General Social Security Law).

The CC.OO. brief sticks to the wording given to Article 270 of the General Social Security Law by Royal Decree-Law 20/2012, of 13 July, on competitive measures to guarantee budget stability and encourage competitiveness, as regards unemployment benefit, which dropped from 70% of the regulatory base during the first 180 days and 60% as of day 181, to 50% in this second tranche (remaining unchanged in the first).

Moreover, the fact is ignored that, in this same regulation, there was an extension of those items that should be included in the contribution base and, therefore, in the regulatory base, in order to eliminate the differences that persisted between the tax rules and regulations and Social Security rules and regulations, in such a way that those items which were considered to be income under the tax rules and regulations and, as such, were already taxed, were also included in the contribution base, an issue that has not been amended.

Firstly, the set of products in kind voluntarily granted by companies was deleted from the list of items excluded from the contribution base. In 2013 (Royal Decree-Law 16/2013, of 20 December, on measures favouring stable hiring and improving the employability of employees), there was a second reduction of the items excluded from the contribution base, i.e. an extension of the contributable and computable items and, therefore, included in the regulatory base (with regard to expense allowances and travelling expenses, and also with regard to the improvements in Social Security benefits, limiting the exclusion to the improvements in the benefit for temporary disability).

All this is without mentioning the fact that the CC.OO. brief is misleading in relation to the question regarding contributions, failing to mention that while the employee is receiving unemployment benefit, the payment of contributions to the Social Security is made by the Spanish Public Employment Service (*Servicio Público de Empleo Estatal*), which assumes the employer contribution and discounts the corresponding payment from the amount of the employee' benefit.

In any case, once again we are dealing with a subject which has nothing whatsoever to do with the legal dispute as to whether or not the compensation parameter in Spanish law constitutes an appropriate formula with regard to Article 24 of the European Social Charter. In fact, based on this, we agree with the statement that unemployment benefit does not have a dissuasive effect, and nor should it, given that the nature and objective of the contributory benefit, which is generated from the joint payments of employers and employees, is simply to protect any employee who has temporarily lost their job.

To conclude, regarding the subjective opinions put forth in section 4) of this ground, regarding the fact that there are no incentives in Spain to avoid lawsuits for dismissal, these totally contradict the reality of two mandatory procedures the purpose of which is precisely for the parties to reach an agreement with no need for a lawsuit in order to resolve all the effects of the act of termination (firstly, administrative conciliation proceedings, then judicial conciliation proceedings before the Court Clerk).

It is actually a lack of respect towards the civil servants performing these conciliation duties to mention that these prior conciliation stages are aimed at the employee *"renouncing part of the compensation that might correspond to them in exchange for the unlawful offer of the company making its payment immediately, instead of following the procedural steps which only ensure payment after a process"*. This statement is as ridiculous as stating that this twofold conciliation procedure always obliges companies to offer compensation that would never be owed in the event the lawsuit were held and a judgment delivered. The former would the same as assuming that all dismissals made in Spain are unfair, and the latter just the opposite, when it is neither one thing nor the other.

And, of course, the statement that *"compensation is only enforceable following a final judgment"* is once again false, taking into account the provisional enforcement options regulated under Article 290 LRJS.

As regards the Judgment of Reus Labour Court nº 1 cited in section 5) of this third ground, this does not even warrant being analysed because, as is admitted, it has been revoked.

This concludes the response to the third ground and we will move on to the response to the fourth and fifth grounds, which are actually the only ones related to the opinion on the adjustment of the compensation regulated under Article 56 WS in respect of Article 24 of the European Social Charter.

4.3.- On the alleged breach of Article 24 b) by the theoretical impossibility of the Labour Courts to add further compensation to the statutory compensation assessed under Article 56 WS (GROUND FOUR of the claim, pages 52 to 66).

This ground is based on a false premise, namely, the statement that within the Spanish judicial and regulatory framework, compensation for unfair dismissal is assessed "*without the possibility of claiming for further damage, whether financial or moral, aside from the personal and family situation of the employee, and the conduct of the company*".

For this, apart from starting by recalling the content of decisions related to complaints brought against other countries (Finland, Italy and France), something in respect of which the relevant allegations have been made at the start of the brief, a summary of the Spanish compensation system is provided, which is once again biased and erroneous.

Thus, page 58 mentions that the compensation for unfair dismissal is 33 days' salary per year's service, up to a limit of 24 monthly payments, which is not completely true, because the 2012 reform has a transitional regime that increase this limit up to a maximum of 42 monthly payments as explained previously, for those employees with a length of service from prior to February 2012.

Moreover, page 58 mentions that the format of days of work was lowered (from 45 to 33) and that the maximum limit was lowered from 48 to 24 monthly payments, which is not true, as the limit before the reform (and still transitionally) was 42 monthly payments, and not 48.

To end, a Supreme Court Judgment from the year 2006 is cited, i.e. a Judgment from 17 years ago, which in no way reflects current trends or the body of legal opinion arising in 2022 and 2023 regarding the possibility of requesting compensation for damage in addition to that assessed statutorily, also in cases of unfair dismissal.

In fact, to date there are a multitude of Judgments refuting the statement of CC.OO. in the sense that, in Spain, it is not possible to compensate for the damage actually sustained by the employee outside the applicable scale (except in cases of compensation for moral damage as a result of the violation of fundamental rights *strictu sensu*).

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

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

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

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

b) Judgment delivered by the High Court of Justice of Catalonia on 4 July 2022, also referring to other earlier Judgments delivered by the same Court, which rules out this being a one-off pronouncement:

"In short: we accept that, based on the regulatory substratum described, which our legislation itself has already cracked open and admits extensions to, it will be possible, in exceptional circumstances such as those described (which incidentally is the one at hand), in which legal and assessed compensation is notoriously insufficient, to set higher compensation, compensating for all of the damage (consequential damage, loss of profit, moral damage, and so on) that the unlawful act of dismissal may have caused, in order to thus eliminate the total harmful effects thereof from the legal world.

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

We should also state that this Court has applied the aforementioned case law in later Judgments, such as, for example, the Judgments dated 14.7.2021 (appeal 1811/2021) and 13.05.2022 (appeal 500/2022)."

Other Judgments delivered by the same Court ruling along the same lines are the Judgments dated 23 April 2021 and 16 September 2022 as well as the more recent one dated 30 January 2023, which show that the trend is consolidated, dealing with the case of an employee dismissed just a few days before the company commenced proceedings for the collective suspension of employment contracts on grounds of *force majeure*, in which she could have been included but chose to dismiss her instead, due to the low cost of her compensation. The Court ordered the company to pay additional compensation equivalent to the amount of the unemployment benefit the employee would have received if she had been included in the suspension proceedings on grounds of *force majeure*, a fair higher amount than the statutory compensation calculated for unfair dismissal. This was on the basis of the following premises:

"In the case at hand, the statutory compensation calculated, which does not even come to 1,000 euros, is clearly insignificant, does not compensate for the damage caused by the loss of the job and does not have a dissuasive effect on the company. The termination decision was definitely not acausal, as it was based on financial and production-related grounds, albeit of a purely temporary nature, as was stated, but this in any case shows an excessive exercise of the right to dismiss, as it involved excluding the claimant from the Temporary Redundancy Plan that had commenced a few days earlier which, if this had not been the case, would have allowed her not only to keep her job but apply to the extraordinary measures for unemployment contemplated in art. 25 of RD 8/2020."

This particular Judgment was precisely echoed by the claimant trade unions, both UGT and CC.OO. Thus, in the comments of its Studies Service (*Servicio de Estudios*) nº 91, from March 2023, UGT concludes that there is already a significant number of judgments confirming that compensation in addition to statutory compensation is indeed possible in cases of unfair dismissal, which contradicts its arguments (as well as those of CC.OO.) in the claims filed with the Committee. Specifically, and literally, it assesses the Judgment in the following terms:

"In general, within the scope of the employment contract, compensation is assessed and calculated depending on certain objective criteria such as the salary or years of provision of services, and is subject to certain maximum limits, without taking into account other parameters such as consequential damage, lost profit or moral damage caused. However, we have recently been seeing how an increasing number of judgments have been admitting the possibility of recognising for employees compensation higher than that established statutorily based on the provisions of Convention nº 158 of the International Labour Organization and Article 24 of the European Social Charter."

As regards CC.OO., this trade union includes on its webpage a recent Judgment handed down by a Barcelona Labour Court in the following terms:

"Barcelona Labour Court 26 has ordered a company to pay additional compensation of 60 thousand euros. The CC.OO. legal department has obtained a significant judgment regarding dismissals during the state of emergency. <u>The judgment applies compensation</u>

far higher than the established for unfair dismissal, as a dissuasive measure in application of Convention nº 158 of the International Labour Organization."

c) The High Court of Justice of Galicia, in its Judgment dated 27 May 2022, also agreed with the line of reasoning laid down by the High Court of Justice of Catalonia:

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

d) Even in those cases that end up dismissing a request for additional compensation, the reasoning of the Courts and Tribunals lean towards the possibility of requesting and granting it when the necessary requirements exist (to start, this must be requested in the complaint, the damage must be proven and the circumstances justifying it must exist). Thus, for example, the Judgment of Barcelona Labour Court nº 10 dated 14 March 2023 that did not upheld the request in the specific case at hand but recognised that it is feasible when circumstances exist that lead to evaluating that additional compensation is admissible, for example: the loss of another job on having accepted a job offer terminated unfairly and with minimal compensation; access or not to the job market following the dismissal; travel expenses assumed personally and/or by relatives; possible psychological damage; the right or not to unemployment benefit, among others.

Some pronouncements, as a valid criterion for setting additional compensation, have even used that established in Article 281 LRLJ which, for cases of unfairness and irregular reinstatement, establishes the possibility of the Judge agreeing to the termination of the employment relationship, with the payment of compensation for unfair dismissal and back pay, plus additional compensation of 15 days' salary per year's service up to a maximum of 12 monthly payments.

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

"It is also worth recalling here, in this sense, that cassational legal opinion in cases of termination under Article 50 WS, revising its earlier interpretation, has been finding that the estimated statutory compensation would be insufficient in these cases to redress the damage caused (by way of example: Supreme Court Judgments UD 07/02/2007 Appeal 1867/2004, 20/09/2007 Appeal 3326/2006, etc.)."

In conclusion, all of the foregoing invalidates the statement of CC.OO. in the sense that, in Spain, compensation is not possible for the damage caused to the employee as a result of their dismissal (except in the case of unreasonable dismissal on the grounds of a breach of fundamental rights).

Based on this premise, proven with the pronouncements analysed, the claim filed must automatically be dismissed because its very *raison d'être* collapses since, if it is clear that compensation may be claimed in addition to statutory compensation in cases of unfair dismissal, it is also clear that there is no basis for this to succeed.

4.4.- On the alleged breach of Article 24 b) due to the theoretical lack of any repairing and dissuading function of compensation in the case of unfair dismissal (GROUND FIVE of the claim, pages 66 to 69).

Bearing in mind the conclusion of the response to the previous ground, this must also be dismissed, as the compensation cannot be considered to be insufficient in its repairing and dissuading function if, within the current Spanish judicial and regulatory framework, it is a reality that the Courts can indeed establish (and are in fact establishing) compensation in addition to that calculated statutorily when the circumstances of the case thus justify, when it is mentioned in the complaint and the damage is proven.

In any case, on entering into the merits of the issue, it is defended that the Spanish compensation system is not in line with Article 24 of the Charter because a formula evaluated based on just two parameters, such as the length of service and salary of the employee, is not *"dissuasive of unlawful dismissal practices"*. It is added that, even in a system in which the proof of specific additional damage is allowed, the difficulties of specifying and proving involved in this means that, on many occasions, *"as no minimum amount is ensured"*, there is also no *"dissuasive effect for unlawful practices"*. It is of note that this should be argued when the intention is to replace objective assessed compensation with another system in which it is the discretion of the

Judge that decides the compensation quantum, with the difficulties in respect of proof and the burden thereof that this involves.

Once again, CC.OO. is committing an error from the outset, namely, that no minimum amount exists. Given that the formula is that of compensation calculated on the basis of the salary and the length of service of the employee (33 days' salary per year's service), there is indeed a minimum (which is the amount resulting from the application of this formula) and a maximum (24 monthly payments), so that no employee whose dismissal is declared unfair could receive a lower amount than that resulting from this formula.

It is then stated that establishing a minimum of three months' salary would make it possible to *"establish a financial cost for any unjust decision"*, giving a *"financial meaning to reparatory action and, above all, dissuading the company from carrying out unlawful dismissal actions on persons with no consolidated length of service in the company"*.

This argument is very surprising, as the opposing party considers that Spanish law would indeed be in line with Article 24 of the Charter if a minimum of three months' salary were established, regardless of what results from the formula of days for years worked. It is surprising when the basis of the claim made is that the Spanish compensation model does not take into account the true damage caused to the employee and does not prevent clearly unlawful dismissal practices.

Just as surprising is the lack of consistency between this argument and the request for a minimum of three months contained in this ground and section 5) of the final request of CC.OO. (page 76), which asks for *"the inclusion of a minimum amount in order to ensure repair and dissuade from practices of unjust dismissal, for which the figure of six months is an acceptable reference"*.

Moreover, the way in which the request is made is erroneous, because the trade union may ask for the formula of Article 56 WS to be considered to be not in line with Article 24 of the Social Charter, but without intending for specific formulas to be adopted, which is only for national legislators to implement, formulas which, in any case, are not contained in the literal wording of this article either.

In view of all this, the truth is that the Spanish model in accordance with the reality that has been described in the previous ground, with mandatory reinstatement in those cases in which

the decision for the termination is one of the reasons that Article 24 of the Charter lists as invalid reasons for dismissal (among many others), along with the possibility that, in the event of unfair dismissal, the Judge might order additional compensation to be paid), is complete, protective in all its facets and, therefore, respectful of the literal wording of Article 24 of the Charter.

It is clearly a different model from all those analysed in the previous decisions of the Committee mentioned by the opposing party.

It is a model that cannot be shown by emphasising the reforms that favour the arguments of CC.OO., silencing those that do not, and certainly not by concealing the reality of the Labour Courts and Tribunals which, like the legislators, have shown a consistent protectionist tendency in respect of the rights of the employee under the *pro operario* principle.

Apart from the basic tendency to recognise compensation in addition to the statutory compensation calculated, which has been sufficiently illustrated, other relevant subjects are omitted, such as the Labour Courts' continual tendency to increase the list of salary items, which, as such, are included in calculations for the purposes of compensation. One of the most paradigmatic examples is the Judgment delivered by the Supreme Court on 3 May 2017, amending the legal doctrine existing up to that date of considering the contributions paid into life and accident insurance, health insurance, as well as contributions to social welfare plans as voluntary improvements of Social Security contributions and, therefore, not subject to being included as salary for the purposes of compensation, in the following sense:

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

Moreover, in any case, it should be recalled that the only thing that the European Social Charter establishes is that the compensation must be "appropriate", without linking this adjective to the need for compensation dependent on any real damages caused to each employee, in each specific case and in view of their personal circumstances.

Furthermore, if we refer to Article 12 of Convention nº 158 of the International Labour Organization (ILO) on the termination of employment at the initiative of the employer, adopted in Geneva on 22 June 1982, the instrument of ratification by Spain of which was published in the Official State Gazette of 29 June 1985, it precisely establishes that, in accordance with national law and practice, every employee whose employment has been terminated will be entitled to compensation "*the amount of which shall be based inter alia on length of service and the level of wages*". In other words, the parameter that Spanish law adopts is precisely the one mentioned by the ILO itself for illustration purposes, and not exclusive of others, which may be considered by each national legislator.

This makes us reflect once more on what the risks might be in a model in which there was no evaluated calculation formula for compensation, but rather it depended on the discretion of each of the Labour Court Judges to establish greater or lesser compensation depending on the personal circumstances of the employee, not to mention the evidentiary effort this would involve for them, compared to a model in which the compensation is objective and automatic, which needs no proof of quantification beyond the details of length of service and salary.

Paradoxical situations could even arise, because what would be the risk of the Judge finding such damage cancelled out in the case of an elderly employee who could directly access retirement after the 24-month unemployment benefit has been exhausted?

In terms of comparative law, the Spanish compensation scale is above the one in force in the majority of our neighbouring countries' systems.

In addition, as regards the alleged encouragement that this evaluation compensation formula gives to fraudulent temporary hiring, we must insist once more that this is a totally unacceptable accusation when, within the framework of the social dialogue table and the consensus reached between the employer organisations and the trade unions, a model for hiring has been designed in Spain that prioritises that of the permanent contract over any other hiring formulas, with the possibilities of agreeing a temporary contract being absolutely minimal following the removal of contracts for specific services or work.

The contract to replace an absent employee continues to exist, while keeping their jobs (for example, due to sick leave), and contracts for covering production circumstances, lasting six months or ninety days a year depending on the type of circumstances covered. Moreover, in

any case, Article 15 WS establishes that consecutive temporary contracts will cause them to be turned into permanent contracts as from a certain moment, specifically:

> *"Notwithstanding the foregoing, those employees who, within a period of twenty-four months, have been hired for a period of more than eighteen months, whether or not continually, in the same or different job for the same company or group of companies, through two or more contracts due to production circumstances, whether directly or through being made available by temporary employment agencies, will be classified as permanent employees.*
>
> *(…)*
>
> *Furthermore, any person holding a position that has been held, continually or not, for more than eighteen months within a period of twenty-four months through contracts due to production circumstances, including contracts making the person available through temporary employment agencies, will be classified as a permanent employee."*

In short, within the framework of a hiring model that only allows replacement contracts during the time in which the employee holding the position is absent but keeps their job, and contracts due to production circumstances lasting a maximum of six months, with a limit of giving consecutive contracts of eighteen months, not only when it is the same employee that holds the position, the argument that the alleged pernicious effects of our compensation system are aggravated in relation to temporary contracts is totally inadmissible and out of date. Moreover, it should be recalled that the use of temporary contracts in abuse of the law not only rises to responsibilities on the part of the employee, but is also subject to an administrative penalty for an amount of up to 10,000 euros per employee, in accordance with the Law on Labour Court Infringements and Penalties (*Ley de Infracciones y Sanciones en el Orden Social*) (Article 40.1 c) *bis* LISOS).

In fact, as it is only logical, the claimant trade union itself has published studies, analyses and opinions on the impact of the latest labour reform on the increase in permanent hiring. For example, on 4 April 2023, it published these words on its webpage:

> *"In relation to the unemployment figures published today, the secretary of Acción Sindical y Empleo of CC.OO. (…), has confirmed that these are very positive figures, as job creation*

has been accelerated, with 206,410 more people being employed, the best figure for the month of March since figures began.

Moreover, 615,674 permanent contracts have been signed, representing 46.8% of all contracts signed. (…) it was recalled that, one year ago, before the entry into force of the labour reform, this percentage did not even come to 10%. This change of hiring model has also reduced temporary contracts from 30% to 14%, reaching a historic minimum."

In relation to the mention of the compensation formula of our model penalising the collective of employees with part-time contracts, particularly affecting women in Spain, once more ignores the fact that the latest reform has also reinforced the protection mechanisms of this form of hiring. In addition, many of the cases in which the working day is reduced for the collective of working women are due to taking care of children and relatives, the truth being that, in these cases, if a dismissal takes place due to these circumstances, it is automatically null and void and, in the case of an objective fair dismissal, the compensation of 20 days per year of service is calculated on the full salary, without taking into account the reduction of the working day.

CC.OO. has also commented on the implications of the latest labour reform in relation to part-time permanent hiring, for example, in the article it published on its webpage on 2 June 2023, with a far more positive and realistic view than what was precisely sought by the labour reform agreed, eradicating temporary contracts and proposing other flexible formulas more favourable for job creation (such as encouraging permanent seasonal contracts):

"44.3% of the employment contracts signed in May were permanent, and of these, 40% were full time, 22% part time and 37% permanent seasonal contracts. The trade union responsible emphasises that, after a year of the labour reform rendering full effects, the high percentage of permanent contracts remains, improving the quality and composition of hires. Companies have replaced temporary contracts with part-time permanent contracts as a flexible formula."

In addition, the image conveyed of the corporate world, said with all due respect, is totally perverse, as if most companies built their strategy on the basis of a constant rotation of staff to avoid the accrual of any significant length of services and therefore greater compensation. It is not admissible to speak of *"contractual frameworks generalising the lack of fulfilment of the law, not only in matters of dismissal, but other work conditions",* or to say that the model has caused

"business management, in numerous production sectors and in a wide range of companies, to be aimed at designing a model for hiring staff based on preventing the consolidation of a greater mayor length of service through the mass general rotating of staff in order to cover the permanent labour needs of the company".

It is unfair to treat the corporate world in this way, and this certainly does not correspond in any way to the reality of the situation.

Basically, claims such as the one analysed should be based on a serious study of rules, legal opinion and even data, but objective data (as provided by CC.OO. regarding the progress of permanent contracts compared to temporary contracts following the reform), but not propaganda statements void of any resemblance of reality, said with all due respect.

4.5.- On the alleged breach of Article 24 b) due to the theoretical lack of any repairing and dissuading function of compensation in the case of unfair dismissal in the specific area of temporary hiring (GROUND SIX of the claim, pages 70 to 75).

This last ground focuses almost in its entirety on the use by the Public Authorities of the various formulas of temporary hiring, which bears NO relation to the wording of Articles 56 WS and 110 LRJS in respect of which a declaration of the lack of adjustment to Article 24 of the European Social Charter is sought.

Therefore, we believe that this latter request should not be considered or assessed within the framework of the claim filed by CC.OO. What is submitted for consideration by the Committee is not the practice that may be followed by the Spanish Administration with respect to labour contracting, but rather the regulatory framework in force in this regard. It is manifestly inappropriate to seek to include in the claim the prosecution of administrative practices.

In any case, all the allegations contained in the foregoing grounds would be fully applicable to the specific case of dismissals of temporary staff at the services of the Public Authorities which is also subject to the Workers' Statute.

We therefore refer in full to the allegations made in relation to the foregoing grounds.

In **CONCLUSION**, and in view of all the foregoing, we hereby provide an executive summary of all the issues dealt with in these written allegations:

a) In all those cases in which Article 24 b) establishes the need for the repair of the dismissal for an invalid reason to be sufficient, Spanish law establishes annulment, i.e. mandatory reinstatement, the payment of any outstanding back pay and even the possibility of the Judge including additional compensation for damage, pursuant to Article 183 LRJS.

   This is so in all cases of protection deriving from maternity and paternity, the enjoyment of all the leave and measures related to work-life balance, in those cases in which the employee is a workers' representative or candidate, when there is a breach of the guarantee of the right to protection, when the reason for the dismissal is a health condition or situation of illness and, of course, when any fundamental rights and public freedoms of the employee are compromised.

   In other words, when a dismissal takes place under Spanish law actually caused by one of the invalid reasons listed in Article 24.3 of the European Social Charter (according to the list of the Appendix), the measure that the Judge must necessarily implement is that of annulment with its related effects (reinstatement, payment of outstanding back pay and compensation including, where applicable, compensation for damage).

   It is not true that reinstatement is a totally exceptional measure limited to cases of a breach of fundamental rights in the strict sense. Many more cases have been mentioned in which the annulment of the dismissal is imposed and, with it, reinstatement, apart from the case cited in the claim itself, in which the option between reinstatement and compensation corresponds to the employee as a result of them being a representative. **In all cases in which the Annex to the Social Charter considers that there is no just cause for the termination of the contract, Spanish law requires the reinstatement of the dismissed employee**.

b) Secondly, the claim is built around the basis of a false premise, namely, the statement that, within the Spanish judicial and regulatory framework applicable to unfair dismissal, it is not possible to claim for additional compensation for damage in addition to the assessed compensation of 33/45 days, up to a maximum of 24 monthly payments (or up to 42 if exceeding the maximum of 24 for the tranche prior to 12 February 2012). The number of Judgments upholding these types of pronouncements cited, along with the actual reflections that the largest trade unions in Spain (led by UGT and CC.OO.) have

published on the importance of this new body of legal opinion, necessarily lead to the claim being dismissed.

Consequently, additional compensation can indeed be claimed, as the allegation that the compensation of Article 56 WS might be insufficient is not admissible since, in those cases where this is so, it is possible to request additional compensation, and this has been recognised by the Courts.

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

This is because, under Article 56 WS, if the judgment declaring the unfairness of the dismissal is delivered when more than 90 business days have elapsed as from the filing of the complaint, the employer is entitled to claim from the State the payment of back pay for the time exceeding such 90-day period.

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

It is also a fallacy to allege that the situation is aggravated when the company decides to appeal to the High Court of Justice given that, in that case, the LRLJ establishes the obligatory deposit of the compensation (replaceable with a bank guarantee), the accrual of procedural interest and, naturally, formulas including provisional enforcement.

In short, the model is that of an (objective) dismissal warranting immediate compensation protection (in addition to unemployment benefit), and another (disciplinary) in which, in most the cases, companies recognise the unfairness during administrative conciliation (before the conciliation, mediation and arbitration authorities, which summon the parties in a short period of time) or during judicial conciliation, if they are in any doubt whatsoever about the competence of their defence.

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

d) The line of reasoning that assessed compensation leads companies to make habitual adjustments to the workforce is, to say the least, simplistic.

It is also simplistic to accuse companies of resorting to compensated dismissal, with the automatic expense thereof, as a normal and habitual way to adjust the workforce because, in cases of the adjustment of workforce, it is habitual for the thresholds established in Article 51 WS (10 employees in companies with fewer than 100, 10% in companies with 100 to 300 employees, and 30 employees in companies with a workforce in excess of 300, limits that also apply to work centres with at least 20 employees) to be reached or exceeded, which renders it necessary to honour the procedure for collective dismissals and the appropriate consultation period with the workers' representatives. Moreover, in this scenario of collective dismissals, added to the compensation regime are other financial charges and non-compensation improvements (such as paying contributions to the Treasury and the financing of the special agreement with the Social Security for employees aged 55 or over).

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

e) The insufficiency of the Spanish compensation scale is also based on the high rate of temporary contracts, which has precisely been the main objective dealt with in the latest

agreement between the employers' associations and the trade unions, the basis of the December 2021 reform, through the elimination of the most common temporary contract format (for specific services and work), the limitation of the cases in which the contract due to production circumstances can be used and the increase in administrative penalties for fraudulent temporary hiring (of up to 10,000 euros per contract executed in abuse of the law).

Therefore, the problem of the excessive temporary nature in our model of hiring labour having been dealt with and resolved from different perspectives and applying several measures in the latest reform, what is not acceptable is for this same argument to still be used misleadingly in order to justify the alleged insufficiency and inadequacy of the compensation scale that the parties (employers' associations and trade unions) agreed not to discuss (in other words, to maintain) in this latest reform.

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

In addition, it presents unquestionable advantages over uncertain compensation based on the circumstances of each case depending on the damage actually caused, submitted to the principle of obligatory proof and the discretional evaluation by the competent court (which would be conducive to a scenario of dispersed criteria given the existence of High Courts of Justice in each Autonomous Community).

All of this is within the framework of all the circumstances that Article 24.3 of the Charter considers to be invalid for justifying the dismissal being protected by annulment.

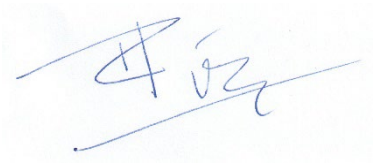
Under these conditions, it is incomprehensible how it can be reasonably considered that the Spanish rules and regulations do not comply with the requirements established in Article 24 of the European Social Charter.

We must insist that international commitments, expressed through general principles, should be understood as reasonably fulfilled through the national laws that establish a mechanism to that end, which may be considered sufficient as well as reasonable. In addition, the national laws must be assessed as a whole and not through the separate consideration of some of their articles.

Naturally, such international commitments should not serve to impose certain legislative options on national laws (for example, that regarding reinstatement compared to compensation, that regarding a system of free judicial discretion compared to a specific and objective formula, or that regarding even the refund of back pay, as the claim appears to suggest).

Furthermore, in addition to the legal allegations already raised, we must point out the unfair action in breach of good faith of the claimants who, following the signing of an important corporate agreement in which, in exchange for other points (mainly, the restriction of the possibility of temporary hiring), it was decided not to modify the rules in force on dismissal, are using this channel to try and obtain claims not met in the social dialogue. The aim of this complaint is to use the European Committee of Social Rights as an instrument to obtain advantages outside the social dialogue process and the corresponding agreements. It would be a disservice to social dialogue and consensus, and therefore to the good governance of employment relationship in Spain, if the Committee were to lend itself to such use.

By virtue of the foregoing, the collective claim filed by the CC.OO. trade union should be dismissed in its entirety.



Roberto Suarez Santos

IOE Secretary General

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