EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

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Case Document No. 7

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

SUBMISSIONS OF THE GOVERNMENT ON THE MERITS

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SUBDIRECCIÓN GENERAL DE ASUNTOS
CONSTITUCIONALES Y DERECHOS HUMANOS

TO THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

OBSERVATIONS ON THE MERITS

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COLLECTIVE COMPLAINT
No. 218/2022

CONFEDERACIÓN SINDICAL DE COMISIONES OBRERAS (CCOO)

v. the Kingdom of Spain

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On 20/07/2023 the Kingdom of Spain was notified the Committee's decision on the admissibility dated 4/07/2023 of the present collective complaint, requesting the Spanish Government to submit written observations on the merits by 15/09/2023.

Subsequently, the Government of Spain requested the extension of this deadline until 30/10/2023.

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

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

1. The complainant organisation has requested to the European Committee on Social Rights (hereinafter, "the Committee" or "ECSR") to declare that the Spanish national legislation breaches Article 24 of the Revised European Social Charter in six respects which are listed in the correlative six points set out in the 'plea' of the complaint (pages 75 to 77).

2. The six aspects listed above form the basis of six correlative claims, which are formulated in the complaint autonomously and independently of each other - so that a declaration of six different violations by the Kingdom of Spain is sought - even though they all revolve around the protection which the Spanish system offers to the worker in the event of "unfair" dismissal and its compatibility with the requirements of Article 24 of the Revised Charter.

   Thus, it is stated that the Spanish legislation is incompatible "*with the guarantees granted by Article 24(b) of the Revised European Social Charter, in the repeated,*

consistent and explicit interpretation given by the Committee, from these points of view:

…

- Inability of the court to consider, as an appropriate form of redress, the reinstatement of the worker - grounds of complaint set out in points (1) and (2) of the plea.

- Removal of the company's obligation to pay the "accrued wages" accrued between the date of dismissal and the judicial decision declaring the dismissal to be unjustified - the ground of complaint raised in section (3) of the "plea".

- Fixing compensation in objective terms, based exclusively on seniority and salary, in the event of "dismissal without a valid reason", without allowing claims for additional damages resulting from the termination of the employment contract or without providing for a minimum amount - grounds for complaint raised in points (4) and (5) of the "plea".

- Alleged failure to remedy the harm suffered by temporary workers in cases of "repeated and systematic abuse of the use of fraudulent temporary recruitment" - a ground of complaint raised in point (6) of the "plea".

1. On the relationship of the present complaint with the complaint submitted by the trade union UGT (complaint no. 207/2022)

3. As the complainant organisation expressly notes in its written complaint, it is closely related to the collective complaint filed by the trade union *UNIÓN GENERAL DE TRABAJADORES (UGT),* which has given rise to procedure no. 207/2023 before the Committee.

In this regard, as stated by the author of the present complaint, namely *CONFEDERACIÓN SINDICAL DE COMISIONES OBRERAS (CCOO),* many of the issues addressed in the UGT complaint "may coincide with those raised in the present complaint", although CCOO raises grounds of violation of Article 24 of the Charter that go beyond the complaint of a legally predetermined system of

calculation of compensation in the case of unfair dismissal, which does not allow for the modulation of the compensation assessed to reflect the reality of the damage suffered

4. This party observes that, although it is true that the claim raised by CCOO includes additional arguments to those put forward by UGT in Collective Complaint no. 207/2022, it is also true that these additional arguments – which we shall see are manifestly ill-founded - do not prevent, in any event, the main issue at stake from being the conformity with Article 24.b) of the Revised European Social Charter of the protection that the Spanish legal system affords to a worker dismissed "unfairly" or "without valid reason", according to the aforementioned provision.

5. The State suggests that, by application of a sort of "prejudiciality" established by the earlier submission of the complaint filed by UGT, that complaint be decided first, after which the Committee may examine those further arguments raised by CCOO in the present complaint and confirm that they are manifestly ill-founded.

6. Without prejudice to the fact that, as has been pointed out, concerning the conformity with the Revised Charter of the rules regarding the system for calculating the compensation provided for in Articles 56 of the Workers' Statute (WS) and 110 of the Law Regulating the Labour Jurisdiction in the event of "unjust" dismissal - more precisely, unfair dismissal[1] -, the issue has essentially been answered in the observations submitted by the Spanish State in Collective Complaint no. 207/2022. Therefore, we will essentially reiterate in the present submission the content of those observations, without prejudice to the inclusion of certain additional aspects in view of the specific content of the present complaint. It should also be noted that between the date of submissiuon of the State's observations in Collective Complaint No. 207/2022 and the present time, some events have taken place which indeed support the position held in the said observations and to which we well refer in the present submission.

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

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

2. Introductory remarks on the terminology used in the complaint

8. Throughout the text of the complaint, different terminology is used to refer to the dismissal situation which triggers the protection of Article 24 of the Revised Charter, and inmany cases it is difficult to discern whether the complainant is referring exclusively to “unfair dismissal” [*despido improcedente*] under Spanish law - and, where appropriate, to all cases of "unfair dismissal", or only to cases of "unfair dismissal" in which there are circumstances that make the employer's behaviour particularly reprehensible - or in general to all cases of "unjust dismissal" [*despido injusto*], an expression used constantly throughout the complaint, although it does not clearly define what, in the complainant's opinion, is the meaning and scope of the category "unfair dismissal", and in particular its correspondence with the categories used in the Spanish system

   The Government of Spain therefore points out that the complainant organisation should define precisely what it understands by "unfair dismissal", and other expressions that it uses throughout its submission (fraudulent dismissal, arbitrary dismissal, dismissal without a valid reason, etc).

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

   i. In the Spanish system there are two categories of dismissal, which are perfectly defined by the regulations: "unfair dismissal", and "null and void dismissal", the latter category covering a broad group of cases of termination of the contractual relationship based on a legally established cause of dismissal, which are considered "aggravated" by the concurrent circumstances.

      The complaint raised by the complainant in fact questions the compatibility of the Spanish regime with Article 24 of the Charter in relation to the treatment of compensation in case of unfair dismissal, recognising the perfect alignment of the Spanish system with the Charter in relation to the treatment of null and void dismissal.

   ii. Many of the situations included in the description made by the complainant as "abusive" dismissal, "fraudulent" dismissal, "arbitrary" dismissal, in reference to the most serious cases of the employer's conduct when

unilaterally breaking the employment relationship with the worker, could in practice be included in the category of "null and void dismissal" in the Spanish system.

Moreover, it should be borne in mind that "unfair dismissal" [*despido improcedente*] in the Spanish system encompasses cases in which the court considers that the dismissal decision has not strictly complied with the provisions of the regulations, it does not consider the existence of a particularly reprehensible conduct on the part of the employer (abusive, fraudulent, arbitrary...), and it may be, for example, mere formal irregularities in agreeing the dismissal that determine that it is declared unfair, even if the reality of the facts included in a legal cause for dismissal is accredited.

II. RELEVANT DOMESTIC RULES

The relevant national rules for the examination of the various complaints about the adequacy of the "compensation" that the Spanish system provides in the event of "unjust" or "unfair" dismissal (this category includes all forms of dismissal in contravention of legal requirements, whether unfair or null and void) are essentially those set out in our observations on the merits regarding the Collective Complaint No. 207/2022, which are reproduced below, including some additional elements to those contained therein.

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

1.1 Types of dismissal in the Spanish system

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

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

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

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

    Disciplinary dismissal, for serious and culpable breach by the workers of their obligations, when any of the reasons provided for in Article 54 of the Workers' Statute apply [2].

    Dismissal for objective reasons, when any of the reasons provided for in Article 52 of the Workers' Statute apply[3], in particular, reasons related to the worker's

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

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

Moreover, Article 51.1 of the WS provides as follows:

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

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

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

    In the event of **dismissal for objective reasons** and **collective dismissal**, also provided that such dismissal is agreed on a lawful reason and in compliance with the formal and procedural requirements laid down by law, the employer must compensate the dismissed worker with 20 days of salary per year of service, with a maximum of 12 months, compensation fixed according to the salary and seniority of the worker in the company.

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

15. The judge hearing the case will deal with the proceedings through the dismissal procedure, which is regulated in Articles 103 to 113 of the Law Regulating Social Jurisdiction[5] (LRSJ, hereinafter), and after due processing must declare a **fair**

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

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

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

dismissal, provided that the dismissal has been properly adopted, or otherwise declare the dismissal **unfair** or **null and void**. In particular:

i. **The dismissal will be declared null and void provided that the premises are under Article 55 § 5 of the Workers' Statute**

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

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

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

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

- Dismissal of a worker who has applied for or is enjoying any of the leaves referred to in Article 37, Sections 4, 5 and 6 of the WS.

The abovementioned leaves are provided for in the following cases:

(i) accident or serious illness, hospitalisation or surgery without hospitalisation requiring home rest of the spouse, unmarried partner or the family members determined or cohabitants in the worker's home (Article 37 § 3.(b) of the WS);
(ii) birth, adoption, fostering for the purpose of adoption or foster care (Article 37 § 4 of the WS);
(iii) premature birth of a child, or a child who, for whatever reason, must remain hospitalised following childbirth (Article 37 § 5 of the WS);
(iv) direct care of a child under 12 years of age or a disabled person who does not carry out a paid activity, a spouse or unmarried partner, or a family member who for reasons of age is unable to

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

look after him/herself, or a minor affected by cancer or another serious illness, among other cases.

- Dismissal of a worker who has requested or is benefiting from the working day adaptations foreseen in article 34 § 8 of the WS[7];

- Dismissal of the worker who has applied for or is enjoying the leave provided for in Article 46 § 3 of the WS[8];

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

- Dismissal of workers following their incorporation at work after enjoying the suspension of the contract due to childbirth, adoption, guardianship for the purpose of adoption, foster care, provided that no more than twelve months have elapsed since the date of birth, adoption, fostering or care.

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

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

  Thus, Law 39/1999[9] has incorporated some cases where the dismissal is rendered null and void linked to pregnancy -since the beginning of it- and maternity and reconciliation of work and family life; a further extension of nullity grounds to periods of suspension of the contract due to paternity, risk during breastfeeding and sickness due to pregnancy, childbirth or breastfeeding, or to a number of permits linked to the work-life balance, with Organic Law 3/2007[10]; or the extension of the period for protection of objective nullity from 9 to 12 months following the reincorporation of the worker provided for in Royal Decree-Law 6/2019; or, more recently, the incorporation with Royal Decree-Law 5/2023

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

among the grounds for nullity of the cases in which the dismissed person had requested or was enjoying the leave provided for in Article 37 § 3 (b) of of the WS, or the adaptations to the working day provided for in Article 34 § 8 of the WS.

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

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

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

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

19. The average processing duration of a dismissal at first instance in Spain, from the beginning to the end and according to the most recent available information is 7.4 months[11].

As per the appeal for reversal[12], the average processing duration is 5 months[13][14].

1.1.2 Consequences of the characterisation of the dismissal as unfair or null and void under current legislation

Unfair dismissal

20. In the case where the dismissal has been declared unfair, the employer may generally choose between reinstatement of the worker and compensation for *salarios de tramitación* or accrued wages (that is, sums payable by way of remuneration during proceedings challenging dismissal), or payment of compensation equivalent to 33 days of salary per year of service with a maximum of 24 monthly payments[15]. In this case, the employment relationship shall be extinguished from the date of termination.

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

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

[11] Information published at the Judiciary web, available at: https://www.poderjudicial.es/cgpj/es/Temas/Transparencia/ch.Estimacion-de-los-tiempos-medios-de-duracion-de-los-procedimientos-judiciales.formato1/?idOrg=25&anio=2021&territorio=Espa%C3%B1a&proc=ASUNTOS%20SOCIALES

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

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

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

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

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

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

    The case-law on this issue is flexible and favourable to the worker as regards the definition of the concept of "salary" concerning compensation for dismissal. Thus, the Supreme Court holds that the concept of salary for these purposes includes "everything that the worker receives for the provision of his services", regardless of its formal denomination, its composition or its form of payment, recognising in dismissal proceedings, for the purposes of fixing the compensation, the salary nature of different concepts which, during the term of the employment relationship, had not been considered as such[16].

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

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

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

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

the civil regime, and the impossibility of applying the civil regime as subsidiary legislation.

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

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

Null and void dismissal.

25. In this case, the employer is forced to reinstate the dismissed worker, without the possibility to replace the reinstatement with the compensation, which implies the payment of unpaid wages to the worker.

This is provided for in Article 55 § 6 ("*Null and void dismissal shall produce the immediate reinstatement of workers, along with the payment of those wages that they stopped receiving*").

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

Thus, according to Article 183 of the LRJS:

> *"Article 183. Compensations.*
>
> *1. Where the judgment declares that an infringement has taken place, the court shall rule on the amount of any damages that may be payable to the applicant for discrimination suffered or any other infringement of his/her fundamental rights and civil liberties, on the basis of both the non-material damage linked to the infringement of the fundamental right and the additional damage and losses arising therefrom.*

2. The court shall rule on the amount of the damage, making a careful determination of it where it is too difficult or costly to prove the exact amount, in order to compensate the victim sufficiently and, so far as possible, fully restore him/her to the position he/she was in prior to the damage, and to contribute to the objective of preventing damage.

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

4. …"

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

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

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

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

The conclusion reached by the Court was to rule out this second option, on the basis that **the institution of "punitive damages" forms part of the legal culture only of certain States**, and taking into account that **this concept is alien to Spanish law**. Therefore, in the opinion of the Court of Justice of the European Union, the appropriate remedy as a consequence of discriminatory dismissal is full compensation for the damage caused to the victim, but without incorporating an additional punitive component into that compensation.

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

27. As we will explain below, the system of legal predetermination of compensation for unfair dismissal based on automatic factors (salary and seniority), with a fixed amount, with no minimum rates, has been applied in Spain for more than 40 years; Specifically, since the approval of the Workers' Statute in 1980, in the period of transition to democracy following the end of the dictatorship.

28. This system was, at the time, peacefully accepted by the social partners, both at the time of its implementation and afterwards, without any proposals made by the trade union organisations in the framework of the social dialogue to replace this system by a method of determining the actual damages on an individual basis in each dismissal procedure, as ultimately advocated by the complainant organisation in its complaint.

1.2.1 The Workers' Statute

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

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

1.2.2. The 2012 Labour Market Reform

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

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

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

32. With regard to choosing between compensation for the dismissed worker or reinstatement in the event of a declaration of unlawful dismissal, the existing system has not been modified, with this option generally being attributed to the employer, without prejudice to this option for the worker in particular cases.

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

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

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

35. In particular, it questioned, *inter alia*, the compatibility with various provisions of the Constitution, and with Article 10 of ILO Convention No. 158, of the establishment of a system of fixed compensation, based on the application of only two criteria - length of service and salary - "with no margin for the judge to establish

[compensation] in accordance with what is established in the proceedings", considering it contrary to the principle of equality to establish different treatment for damages arising from civil liability (contractual or non-contractual) when there is serious misconduct, which must be compensated "with a tendency towards integrity", compared to damages established in the labour sphere, in which a fixed compensation is established.

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

37. On the one hand, the Court expressly endorsed the compliance of the system with Article 10 of ILO Convention No. 158, "which, in addition to reinstatement, provides for the payment of adequate compensation as one of the possible responses to unjustified termination", stating that the legislator's choice of a system for establishing compensation with fixed calculation elements (as well as the option for their regulatory review) is lawful, without any arbitrariness in any of the elements considered by the legislator being discernible[17].

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

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

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

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

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

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

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

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

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

43. Article 24 of the Revised Charter, whose violation is attributed to the Spanish system, deals with the right of workers to protection in cases of termination of employment, recognising on the one hand the right of workers to not having their employment terminated "without valid reasons for such termination connected with their capacity or conduct or based on the operational requirements of the undertaking, establishment or service", and, on the other, the right of workers whose employment is terminated without a valid reason "to adequate compensation or other appropriate relief."

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

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

46. Therefore, in order to make an assessment of the system of protection against dismissal (in particular unfair dismissal) in the Spanish system, which in turn allows an assessment of the "adequacy" of the compensation given to the worker affected by a dismissal decision in the light of Article 24 of the Charter, **in addition to taking into account the specific system for calculating the compensation to be received by the worker affected by the dismissal decision, it is necessary to**

know the set of measures referred to in the two preceding paragraphs: both the **existing measures to favour employment stability and avoid situations of dismissal,** and **the existing measures to protect those who have lost their job.**

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

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

2.1 The 2021 Labour Market Reform

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

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

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

52. On the other hand, **internal flexibility mechanisms** have been strengthened through the new *expediente de regulación de empleo* [labour force reduction scheme] (ERTE, by its Spanish acronym) - incorporating many of the solutions that were adopted during the health crisis and which have enabled a large number of jobs to be maintained in Spain - and the incorporation of a new permanent mechanism that allows companies to adapt to the requirements of the economic situation at any given time, combining the maintenance of employment with staff training and

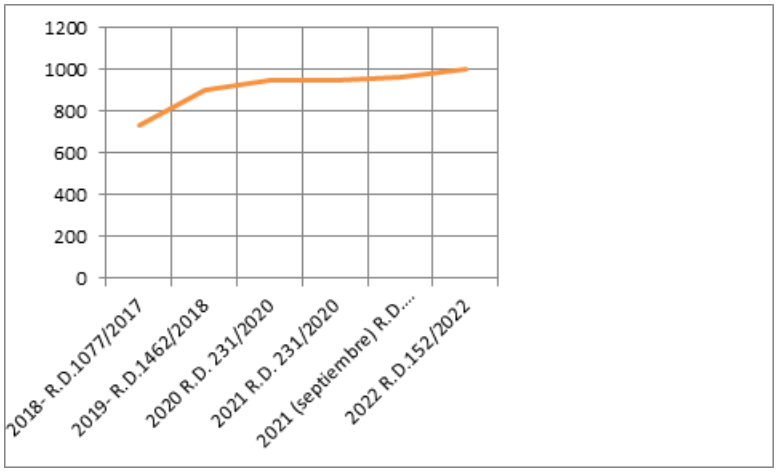
retraining policies, and exemptions and bonuses on social security contributions as a support measure for this maintenance, either through the technique of reduced working hours or through the suspension of the contractual relationship for a duly justified cause.

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

2.1 Increase in minimum wage

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

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



56. Following the submission of the complaint, in 2023 the minimum wage has undergone a new and significant increase to 1,080 euros gross per month as of 1/01/2023, in accordance with Royal Decree no. 99/2023, of 14 February.

2.3 Other disincentive measures to unfair dismissal provided for in the Spanish system

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

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

59. For its part, *Law 3/2012, on urgent measures for the reform of the labour market*, temporarily incentivised the measures adopted for the suspension of contracts and reduction of working hours by providing for a 50% refund on employer' Social Security contributions, provided that companies had not terminated contracts due to recognised or declared unfair dismissal in the 12 months prior to the application of the refunds (Article 15).

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

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

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

2.4 The State's actions taken regarding unemployment protection

61. In order to assess a State's system of protection from dismissal from a comprehensive perspective, it is necessary to take into account a perspective that is

complementary to that corresponding to the compensation to be received by the worker from the employer who breaks the contractual link -or, in general, consequences to be assumed by the employer-, such as the social protection that the State offers to the person who is in a situation of unemployment as a consequence of the breaking of the contractual link.

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

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

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

1. Relevant international law.

- Article 24 of the Revised European Social Charter

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

"With a view to ensuring the effective exercise of the right of workers to protection in cases of termination of employment, the Parties undertake to recognise:
a. the right of all workers not to have their employment terminated without valid reasons for such termination connected with their capacity or conduct or based on the operational requirements of the undertaking, establishment or service;

b. the right of workers whose employment is terminated without a valid reason

to adequate compensation or other appropriate relief.

To this end, the Parties undertake to ensure that a worker who considers that his employment has been terminated without a valid reason shall have the right to appeal to an impartial body."

65. Moreover, the **Appendix** to the Revised Charter, which is an integral part of it as expressly stated in Article N of the Charter, provides the following with respect to Article 24:

1. It is understood that for the purposes of this article the terms "termination of employment" and "terminated" mean termination of employment at the initiative of the employer.
2 It is understood that this article covers all workers but that a Party may exclude from some or all of its protection the following categories of employed persons:
a. workers engaged under a contract of employment for a specified period of time or a specified task;
b. workers undergoing a period of probation or a qualifying period of employment, provided that this is determined in advance and is of a reasonable duration;
c. workers engaged on a casual basis for a short period.
3 For the purpose of this article the following, in particular, shall not constitute valid reasons for termination of employment:
a. trade union membership or participation in union activities outside working hours, or, with the consent of the employer, within working hours;
b. seeking office as, acting or having acted in the capacity of a workers' representative;
c. the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;
d. race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
e. maternity or parental leave;
f. temporary absence from work due to illness or injury.

4 It is understood that compensation or other appropriate relief in case of termination of employment without valid reasons shall be determined by

national laws or regulations, collective agreements or other means appropriate to national conditions."

66. In interpreting Article 24 of the Revised Charter, account should also be taken of the content of its **Explanatory Report**, which in relation to Article 24 states the following::

"Article 24: The right to protection in cases of termination of employment

84. This provision, which must be accepted in its entirety, sets out two general principles:

a. the right not to be dismissed unless there are valid grounds;
b. the right to adequate compensation or other relief in cases of unfair dismissal.

85. It further establishes the right for a worker who considers that his rights under paragraph a have been interfered with to an appeal to obtain, if appropriate, his rights under paragraph b.

86. The provision has been inspired by ILO Convention No. 158 (Termination of Employment) of 1982. As to the nature of the impartial body mentioned in the last paragraph of the Article, reference is made to Article 8 of the ILO Convention.

87. The appendix clarifies the terms "termination of employment" and "terminated" which shall mean termination of employment at the initiative of the employer.

88. The second paragraph of the appendix deals with the scope ratione personae of the provision. It makes it possible for the Parties to exclude some categories of employed persons from its scope.

89. The third paragraph of the appendix contains a non-exhaustive list of non-valid grounds for termination of employment.

90. The fourth paragraph of the appendix clarifies that compensation or other appropriate relief in case of termination of employment without valid reasons shall be determined by national laws or regulations, collective agreements or other means appropriate to national conditions."

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

67. The European Committee of Social Rights has ruled on several occassions[18] on the meaning and scope of Article 24, in particular on the provision contained in paragraph (b) concerning the right of workers dismissed "*without a valid reason to adequate compensation or other appropriate relief."*

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

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

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

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

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

70. Article 10 of the ILO Convention no. 158, stating that when the termination is found "unjustified" and, in accordance with national law and practice, is not

[18] *Confédération Générale du Travail Force Ouvrière (CGT-FO) c. Francia* y *Confédération générale du travail (CGT) v. France* (Complaint No. 160/2018 and 171/2018) – Decision on the merits of 23/03/2022.
Syndicat CFDT de la métallurgie de la Meuse v. France (Complaint No. 175/2019)– Decision on the merits of 5/07/2022.
Confederazione Generale Italiana del Lavoro (CGIL) v. Italy (Complaint No. 158/2017) – Decision on the merits of 11/09/2019.
Finish Society of Social Rights v. Finland (Complaint No. 106/2014) – Decision on admissibility and merits of 8/09/2016.

applicable to declare the termination invalid and order reinstatement of the worker, they shall be empowered to "order payment of adequate compensation or such other relief as may be deemed appropriate";

71. Article 30 Charter of Fundamental Rights of the EU, headed "Protection in the event of unjustified dismissal" states that every worker has the right to "protection against unjustified dismissal, in accordance with Community law and national laws and practices."

72. As per Article 10 of the ILO Convention no. 158, the Spanhis system in force of protection in the event of unjustified dismissal provided for in Article 56 of the Workers' Statute is regarded as compatible with such provision, as set forth above (2014 ILO Report).

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

2. Assessment on the merits of the case

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

75. We will focus our presentation on the six different complaints submitted by the complainant organisation, although, for systematic reasons and for the sake of clarity, in our response we consider it appropriate to modify the order in which the complaints are presented.

Thus, we shall begin by responding to the complaints raised by the complainant trade union organisation in points (4) and (5) of the "plea" of the complaint, which refer to the system for calculating compensation in the event of "unjust" dismissal [*despido injusto*] (the complainant refers in general to "unjust" dismissal when formulating its complaints, although, as we shall see, these only make sense in the case of "unfair" dismissal [*despido improcedente*] in the Spanish system), and which

denounce the incompatibility of this calculation system with Article 24 (b) of the Revised Charter, since it is based on objective criteria of seniority and salary and the regulations do not expressly provide for the possibility of claiming additional compensation linked to actual damages, and because the minimum amount of compensation is not set at 6 months' salary.

We will now proceed to respond to the complaint raised by the complainant in point (3) of the "plea" of the complaint, referring to the suppression, with the 2012 Reform, of the employer's obligation to pay "accrued wages" in the event that the "unjust" dismissal is qualified as "unfair" -and the employer decides upon the compensated termination of the employment relationship, instead of reinstatement-, a suppression that the complainant considers incompatible with Article 24(b) of the Revised Charter.

In the following section, we will respond to the complaints made by the complainant in points (1) and (2) of the "plea" of the complaint, which refer to the fact that the national regulations do not attribute to the courts the possibility of obliging the employer to reinstate the worker in the event of "unjust" dismissal, when "the circumstances and conduct of the parties" may make this advisable, and which we consider to be manifestly unfounded, as we have already stated in our observations on the admissibility of the complaint.

Finally, we will explain how, contrary to what the claimant organisation states in point (6) of the "plea", the protection that the Spanish system grants to the worker in the event of dismissal does not vary or is not reduced when the dismissed worker had been subject to an irregular temporary contract.

2.1.- Response to the complaint raised in relation to the alleged incompatibility of the Spanish system for setting compensation for "unjust" dismissal with Article 24(b) of the Revised Charter

76. In points (4) and (5) of the 'plea' of the complaint, the complainant trade union organisation requests the Committee to declare that the Spanish system for setting compensation for “unjust” dismissal does not comply with Article 24(b) of the Revised Charter, which it considers to be insufficient for two reasons: (i) for not providing for the possibility of claiming compensation in addition to that legally provided for, linked to the damage actually suffered by the worker; (ii) for not establishing a minimum compensation, to be quantified on the basis of the worker's salary and seniority, of six months' salary.

77. The claims set out above, which are developed in the FOURTH and FIFTH paragraphs of Section IV of the complaint (under the heading "*Claims of non-compliance with Article 24 of the Revised European Social Charter*"), will be answered jointly, due to their close connection.

In both cases, what is at issue is whether the compensation for "unjust" dismissal applied in Spain meets the standards of "adequacy" provided for in Article 24(b) of the Revised Charter.

78. In the following lines we will explain how, in the Spanish Government's view, **the Spanish system for fixing the compensation for dismissal is in line with the standard of protection resulting from Article 24(b) of the Charter** -as well as, moreover, with other international provisions such as those cited above, on protection for dismissal-; **the fact that the Workers' Statute does not provide for the possibility of fixing an additional compensation in certain cases, or that it does not provide for a minimum compensation of 6 months, as suggested, is not per se contrary to the conventional rule.** The complaints set out in points (4) and (5) of the 'plea' of the complaint must therefore be dismissed.

79. In order to reach this conclusion, we will assess the following aspects, essentially reiterating the line of argument that we set out in our observations on the merits in collective complaint no. 207/2022, brought by the trade union organisation UGT:

A. The limited scope of the complaint raised by the complainant organisation when applied in practice, verifying that, although it describes a situation in which apparently the majority of cases of "unjustful" dismissal[19] would fall within the scope of the object of the complaint, in fact there are few cases in which abusive or fraudulent actions by the employer, which represent an extra seriousness that makes their conduct particularly reprehensible, are treated as "unfair" dismissal in the Spanish system. Thus, in case of "null dismissal" Spanish law does not raise any doubt of compatibility with Article 24(b) of the Revised Charter.

B. The advantages offered by the Spanish system, in which compensation is established on the basis of predetermined objective factors, for which the reasons justifying the maintenance of this system, peacefully accepted, since the approval of the Workers' Statute must be taken into account, without prejudice to the fact

[19] Although in certain passages the complainant organisation makes specific reference to "unfair" dismissal, in its submission it refers recurrently to "unjust" dismissal, in a general manner and without distinguishing between the two main categories of "unjust" dismissal in the Spanish system.

that the specific determination of the number of days of salary (33 days, since 2012) is disputed.

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

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

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

A. THE LIMITED NATURE OF THE SCOPE OF THE COMPLAINT.

80. The complainant organisation raises the complaint in Fourth and Fifth paragraphs of Section IV of the complaint in relation to a specific issue - the system for calculating the compensation for dismissal – raised, according to the complaint (although the terminology used is ambiguous and even contradictory in certain parts), not in every situation of dismissal but in those situations described in different ways throughout their submission, in general as "abusive", "arbitrary" or "without a valid reason"[20].

81. At this point it should be noted that the scope of the complaint is certainly restricted, since it would not cover all the situations which in the Spanish system are classified as 'unfair dismissal', but only a set of situations within the dismissals which can be classified as unfair and which involve particularly reprehensible conduct on the part of the employer. Moreover, it should be borne in mind that many of these cases involving particularly serious circumstances in the employer's

[20] Thus, throughout the complaint, expressions such as "abuse of process" and "abuse of rights" are continually used, referring to dismissal resulting from "abusive or fraudulent" behaviour on the part of the employer, dismissal "for arbitrary reasons", dismissal "without legitimate cause", "without just cause", "without real and serious cause", dismissal resulting from "fraudulent action" to obtain the dismissal of the worker, with invocation by the employer of a "fraudulent cause", termination of the employment relationship in an "unfair or arbitrary manner".

conduct will be included in the Spanish system in the category of null and void dismissal, in which case the complainant organisation does not criticise the regulatory treatment of the consequences of the dismissal.

82. It is also worth highlighting the tendency of the Spanish system, as mentioned above, towards a progressive extension of the cases of dismissal declared null and void, as well as, especially, the extensive jurisprudential interpretation of the concurrence of such cases.

83. This means that, for example, the system offers maximum protection - by classifying the dismissal as null and void - to workers who show a critical attitude towards the company with a view to exercising their rights before the channels of complaint provided for by the regulations, thus "shielding" their permanence in the company; As well as "shielding", among many other cases, people who exercise their rights to reconcile work and family life, or pregnant women, whose protection is produced from the very moment the pregnancy begins, whether or not the company is aware of this fact (even if the worker herself is not aware of it); also noteworthy is the extension of protection by this means -declaration of nullity of dismissal, in this case through infringement of the right to personal privacy- against technological control in the workplace.

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

85. In particular, it should be noted that the grounds which Appendix I of the Revised Charter considers shall not constitute "valid reasons" for termination of employment, and therefore to merit the protection of Article 24(e) of the Revised Charter, are in the Spanish system cases of "null and void dismissal".

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

(a) Consensual nature of the Spanish system of fixed compensation

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

87. This **system** was, at the time, **peacefully accepted by the social agents**, both at the time of its implementation and afterwards for all the time it has been in force.

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

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

90. For example, in the case of France, the most recent case examined by the Committee, prior to 2017 the rules for fixing compensation in the event of "unjustified dismissal" provided for a minimum amount of 6 months' salary if the worker had been employed for more than two years, with no maximum amount, the courts having to determine the compensation to be fixed in each case; for companies with fewer than 11 employees, there was no minimum or maximum amount.

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

of seniority of less than one year, to 20 months' salary in the case of seniority equal to or greater than 29 years of service).

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

(b) Advantages of a system of fixed compensation

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

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

- In the event of unfair dismissal, the workers are exempted from the burden of proving the actual damages that such a decision has caused them, which, in practice, may mean that in certain cases the actual damage may be higher than the amount of compensation, or it may be otherwise that the actual damage is lower than the amount of compensation (e.g. when the employee finds a job shortly after termination of the employment relationship), and the employee is still entitled to full compensation.

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

  From a theoretical and empirical point of view, firing costs are found to directly affect employers' hiring decisions, especially in random contexts where employers must form rational expectations about the variables

affecting hiring and firing. In other words, in a context where dismissal is uncertain (it may or may not happen), employers, taking into account all available information, make their current hiring decisions on the basis of possible future dismissals and their associated costs. Therefore, greater predictability about dismissal costs can have a positive effect on employers' hiring decisions.

- The system applies to all companies, irrespective of their larger or smaller size. Unlike other systems, where the smaller the size of the company, the lower the compensation for dismissal, in the Spanish system the calculation of such compensation applies equally to all companies.

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

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

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

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

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

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

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

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

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

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

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

D. THE SET OF BENEFITS AND ACTIONS INCORPORATING THE SO-CALLED “PROTECTIVE ACTION AGAINST UNEMPLOYMENT", WHICH SHOWS AN INTENSE STATE INTERVENTION FOR THE PROTECTION OF PEOPLE WHO HAVE LOST THEIR JOBS, UNTIL THEY FIND A NEW JOB.

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

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

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

> *“A worker whose employment has been terminated shall be entitled, in accordance with national law and practice, to:*
>
> *(a) a severance allowance or other separation benefits, the amount of which shall be based inter alia on length of service and the level of wages, and paid directly by the employer or by a fund constituted by employers' contributions; or*
>
> *(b) benefits from unemployment insurance or assistance or other forms of social security, such as old-age or invalidity benefits, under the normal conditions to which such benefits are subject; or*
>
> *(c) a combination of such allowance and benefits.”*

103. At this stage, reference is made to Section II, 2.4 above.

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

105. In the same way that, we should add, when assessing the "appropriate" relief that a system provides to a worker who has been made redundant, the situation of the labour market at that moment must also be taken into account, which influences the greater or lesser ease of finding a new job. In this respect, the situation in Spain has changed considerably over the last 10 years, since in 2013 (first quarter) the unemployment rate stood at 26.94%, while in 2023 (also first quarter) it was 13.26%, with the government's announcement, of the 2023-2026 Stability Programme, with a projected progressive reduction to a rate of 9.5% in 2026.

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

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

107. In the complaint at the origin of present proceedings, it is repeatedly stated that the compensation provided for in the Workers' Statute is not dissuasive (it is certainly not disputed that it was so before the 2012 Labour Reform, given that before and after the Reform the system for determining compensation is based on pre-established factors of an objective nature).

108. Frente a ello debemos efectuar diferentes precisiones:

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

In the Spanish system for determining compensation in the event of dismissal, the amount of compensation determined by law is significantly higher in the case of unfair dismissal than in the case of fair dismissal:

- As per *unfair* disciplinary dismissal, the legal compensation is 45 days’salary per year of service (in periods prior to 12/02/2012) and 33 days’salary per year of service (in periods after 12/02/2012), whereas in case of *fair* dismissal, no compensation is awarded to the worker.

- As per *unfair* objective dismissal, the legal compensation is 45 days'salary per year of service (in periods prior to 12/02/2012) and 33 days'salary per year of service (in periods after 12/02/2012), whereas in case of *fair* dismissal the compensation awarded is 20 days'salary per year of service.

(2) The function of discouraging the employer from practising "unjust" dismissals is not achieved exclusively through the fixing of the amount of compensation.

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

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

(3) In any event, this party considers that the greater or lesser intensity of the measures taken in a system to *discourage* the employer from engaging in unlawful dismissal practices should not be examined from the perspective of the protection afforded by Article 24(b) of the Revised Charter.

This is because measures to deter "unjust" dismissal - including the amount of compensation, if any - are rather aimed at protecting employment stability, or the right of workers not to be dismissed without valid reasons, which is precisely the scope of protection of Article 24(a) of the Revised Charter.

The case under Article 24(b) of the Revised Charter assumes that "unjust" dismissal has taken place, and seeks appropriate relief for the worker affected by the employer's decision.

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

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

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

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

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

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

F. AVENUE FOR CLAIMING A HIGHER AMOUNT THAN THAT RESULTING FROM THE PREVIOUS CALCULATION SYSTEM FROM THE EMPLOYEE WHO HAS SUFFERED DAMAGES AS A RESULT OF THE UNFAIR DISMISSAL AGREED BY THE EMPLOYER

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

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

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

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

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

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

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

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

121. Despite stating the prevalence of the provisions of the treaties over the rules of domestic law, Law 25/2014 does not specify to whom it corresponds to carry out the control of the adequacy of the latter to the treaties, nor how it should be carried out, as well as its scope and effects. Therefore, it remained open whether, for example, it was the Constitutional Court that should carry out this control, including in its examination of the constitutionality of the legislation the assessment of their conformity with the treaties (in which case, if it were to assess the incompatibility of the rule with a treaty, it should declare it unconstitutional on the grounds of non-compliance with Article 96 of the WS, and "expel" it from the legal system), or whether it is the "ordinary" courts who should carry out this assessment when in the

ordinary exercise of their jurisdictional function they find that an internal rule could be contrary to a treaty.

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

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

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

Adoption of the conventionality control doctrine by labour courts.

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

124. The Social Chamber of the Supreme Court has recently had occasion to rule on this issue in its judgment of 29/03/2022, in which it adopts the doctrine of the Constitutional Court contained in its judgment no. 140/2018 and, in application thereof, recognises the need to carry out **an assessment of the adequacy of various international treaties** (Article 6 of ILO Convention No. 158, Articles 4.1 and 5 of ILO Convention No. 155, Article 3 of the European Social Charter and Article 11 of the CEDAW) **of the regulation of dismissal for absenteeism that was regulated in [now repealed] Article 52 (d) of the Workers' Statute, with a view to the possible non-application, where appropriate, of the provision in question**.

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

> *"The CC Plenary Judgment no. 140/2018 ... expresses it clearly: "the assessment of conventionality that has a place in our constitutional order is not a judgment of the validity of the internal norm or of its mediate constitutionality, but a mere judgment of applicability of normative provisions; of selection of applicable law, which is, in principle, outside the competences of the Constitutional Court ...*

126. Subsequently, the Constitutional Court has reiterated that "the ordinary courts may decline to apply a legal norm in order to apply in its place a precept contained in an international treaty ... the constitutional legal framework therefore makes the control of conventionality in the Spanish system a mere rule of ordinary jurisdiction (judgment of the Constitutional Court no. 120/2021, of 31 May, Third Legal Ground among others)."

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

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

128. Despite the short period of time that has elapsed since this doctrine was developed, it is possible to find a number of cases - a gradually increasing number, by the way - in which it has been applied by various High Courts of Justice in specific cases in which a worker has claimed recognition of a higher compensation than that resulting from Article 56 of the WS, a fact that the complainant trade union organisation acknowledges (although it denies, surprisingly, that the fixing by the courts of the higher compensation by direct application of the Revised Charter does not meet the requirements of Article 24).

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

- Judgment of the *Castilla y León* High Court of Justice of 1 March 2021
- Judgment of the Catalonia High Court of Justice of 23 April 2021
- Judgment of the Catalonia High Court of Justice of 20 May 2021
- Judgment of the Navarre High Court of Justice of 24 June 2021
- Judgment of the Galicia High Court of Justice of 27 May 2022
- Judgment of the Catalonia High Court of Justice of 14 July 2021
- Judgment of the Catalonia High Court of Justice of 4 July /2022
- Judgment of the Catalonia High Court of Justice of 16 September 2022
- Judgment of the Galicia High Court of Justice of 21 October 2022
- Judgment of the Catalonia High Court of Justice of 25 November 2022
- Judgment of the Andalusia High Court of Justice in Granada, of 14 December 2022
- Judgment of the Catalonia High Court of Justice of 30 January 2013

130. In all these cases, which are cited by way of example, the possibility of the court hearing the dismissal proceedings to set an additional compensation is expressly recognised when exceptional circumstances duly accredited by the worker occur that make the compensation derived from the application of the regulations "inappropriate".

131. The last of the above-mentioned judgments is of particular interest, since it recognises the possibility of the court to set additional compensation provided that certain circumstances are met: (i) notorious insufficiency of the legally established compensation; (ii) the existence of a clearly illegal, fraudulent or abusive decision by the company, and also for the first time it is found that, in contrast to what occurred in previous cases, in the present case it had been proven that the damage actually caused to the worker was notably higher, the legal compensation set in this case being "clearly insignificant", which was less than EUR 1,000, not compensating "the damage unjustly caused to the dismissed worker by the loss of her job."

132. As has been shown, this is a very recent doctrine. This is because of the recentness of the Constitutional Court's doctrine being applied, which is being strengthened by

the High Courts of Justice. In fact, an examination of the case-law of different High Courts of Justice that have expressly ruled on the possible application of the doctrine of the conventionality control in the case of compensation for unfair dismissal shows that the judgments that have ruled against it are certainly scarce[21].

133. The doctrine that we have pointed out has not had access to cassation so far. This is due to the fact that the Supreme Court has not detected a case of contradiction of judgments, with the identity required by the procedural regulations, which would have allowed such court to hear the case. However, it should not be forgotten that, as has been explained, the Social Division of the Supreme Court has already expressly endorsed the fact that ordinary courts carry out an assessment of domestic labour legislation in accordance with international treaties, in particular with ILO Convention No. 158 and the Revised European Social Charter.

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

135. Where appropriate, it could be considered whether it would be advisable for this route to be expressly transferred to the regulations. In this sense, certain doctrinal voices have been raised suggesting that it would be advisable. However, this is still an assessment of appropriateness which, in the opinion of the Spanish Government, falls within the State's margin of discretion.

136. It is highly striking that the complainant organisation, which expressly acknowledges the existence of judicial doctrine concerning the application of conventionality control by courts in the case of the fixing of compensation for dismissal, nevertheless denies that such a route meets the requirements of Article 24(e) of the Revised Charter, relying on the wording of its Appendix, which states that severance pay "*shall be determined by national laws or regulations, collective agreements or other means appropriate to national conditions.*"

This is because, on the one hand, the text precisely allows compensation to be fixed "by any other means" appropriate for the relevant purposes, not only by means of an instrument of a regulatory nature.

On the other hand, the application of the doctrine of conventionality control derives precisely from the application of national regulations - in particular Article 31 of Law 25/2014, of 27 November, on Treaties and Other International Agreements, which expressly provides for the preferential application of international law over State law, providing that the rules contained in international treaties validly concluded and published "shall prevail over any other rule of domestic law in the event of conflict with them, except for rules of constitutional rank" -from which it follows that in the event of contradiction between law and Treaty, the national rule, whether prior or subsequent, shall be displaced in favour of the application of international law-[22]. and the attribution through this legal provision of direct applicability to Article 24(e) of the Revised Charter.

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

2.2.- Response to the complaint raised in relation to the alleged incompatibility of the Spanish system with Article 24(b) of the Revised Charter derived from the lack of attribution to the court hearing the dismissal of the power to impose the reinstatement of the worker

138. In section (1) of the "plea" of the complaint, the complainant trade union organisation requests the following: "(1) *Declaration of non-compliance with Article 24(b) of the Charter, by not allowing the court to assess reinstatement as an appropriate remedy for unfair dismissal, irrespective of the circumstances and conduct of the parties.*"

139. That complaint, raised in point (1) of the "plea", is developed in the complaint, in particular in Section IV thereof ("Allegations of non-compliance with Article 24 of the Revised European Social Charter"), section FIRST, headed as follows: "NON-COMPLIANCE WITH ARTICLE 24(B) OF THE REVISED EUROPEAN

[22] On the other hand, as stated above, Article 29 of the same Law indicates that "all public authorities, organs and bodies of the State must respect the obligations of the international treaties in force to which Spain is a party and ensure that these treaties are properly complied with."

SOCIAL CHARTER, FACED WITH THE IMPOSSIBILITY FOR THE COURT TO DECIDE ON REINSTATEMENT IN THE JOB ***IN THE EVENT OF AN UNJUSTIFIED DISMISSAL OR WITHOUT REASON, REGARDLESS OF THE CONDUCT OF THE PARTIES OR OF THE CIRCUMSTANCES IN WHICH THE DISMISSED PERSON OCCURS***.

140. For its part, the complainant organisation, in describing and explaining the background to the complaint in Section I, devotes point 3 to establish certain preliminary considerations on the subject-matter of the complaint, and explaining in a summarised manner, by way of introduction, what is essentially sought by the complaint. They note first that the Committee should have "the opportunity to assess the possibility that the court may consider the reinstatement of the employment relationship in the event of unfair dismissal as appropriate". In particular, the complainant organisation alleges infringement of Article 24 of the Revised Charter "by not allowing the judicial body to assess reinstatement as an appropriate means of redress in the event of unjust dismissal, regardless of the circumstances and the behaviour of the parties", and this "not even when the dismissal is a fraudulent act aimed at expelling the workers from their job, as a means of preventing the exercise of any rights to which they may be entitled."

Previous remark on the scope of the complaint

141. First of all, we must reiterate the clarification made in our observations on admissibility. It is hard to understand the generic statement made by the complainant organisation when describing this complaint, stating that Spanish law "does not allow the courts to assess reinstatement as an adequate remedy for unjust dismissal, regardless of the circumstances and behaviour of the parties". This statement is clearly not correct, because:

- In all cases in which the dismissal is qualified by the court as "null dismissal" (a large number of cases of "unfair", "unjustified" or "without reason" dismissal), Spanish law obliges the employer to reinstate the dismissed worker;

- In certain cases where it is considered appropriate to grant special protection to the worker, the regulations give the workers themselves, and not the company, the right to choose between reinstatement and the fixed compensation, according to their convenience.

142. Therefore, the assumption on which the complaint is based must be corrected, in order to delimit the proper scope of the complaint: only in cases of "unjust" dismissal in which the dismissal is classified as "unfair", due to the absence of any of the "aggravated" circumstances contemplated in the regulations which determine the nullity of the dismissal, when none of the circumstances which determine the attribution of the right of option to the worker are present, does the Spanish system attribute to the employer the right to choose between the reinstatement of the worker or the payment of compensation.

143. We consider it important to insist on this precision, since the cases of "unjust" dismissal in which there are particularly aggravated circumstances with regard to the conduct of the employer, which make his decision to dismiss particularly reprehensible, in the Spanish system constitute precisely cases of "null and void dismissal", and, although the complainant organisation insists that in the Spanish system there is no possibility for the judicial body to order reinstatement in the event of unfair dismissal "regardless of the conduct of the parties", it is glaringly ignoring the fact that when the employer's conduct is particularly serious (because the dismissal decision violates a fundamental right of the worker, or is one of the number of cases established by law), these cases would be classified as null and void dismissal and reinstatement would automatically be appropriate.

144. In fact, as explained above, the cases listed in the Appendix to the Revised Charter as not constituting "valid reasons" for dismissal, and therefore deserving the protection of Article 24(e) of the Charter, are in general in the Spanish system cases of "null and void dismissal".

145. The complainant organisation, in its reply to the observations on admissibility, acknowledges - albeit not as clearly as would be desirable - that, as we have stated, its complaint does not refer to all cases of "unjust" dismissal, but only to cases of unfair dismissal, and cites to this effect a certain passage of Ground One in which it refers specifically to "unfair dismissal".

However, the complainant organisation does not explain why, since it is so obvious that the complaint he raises can only be relevant in the case of an "unfair" dismissal under the Spanish system - even, in such a case, when the legislation does not grant such option to the dismissed worker - throughout the complaint they repeatedly refer to "unjust dismissal" in general terms, when it is clear that this category in the Spanish system corresponds to two different ones, null and void dismissal and unfair dismissal, and in the first case the complaint would be completely meaningless. This

reveals a certain intention to confuse, and a doubtful good faith towards the Committee.

Manifest lack of reasoning of the complaint

146. As already stated in our observations on admissibility of the complaint, the Spanish Government's believe that this first complaint, raised in an autonomous manner, and independently of the other claims contained in the complaint, is unfounded.

147. The above is because:

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

148. In this regard, Article 24 of the Charter provides for "the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief".

149. This implies that a system complies with Article 24 if it provides for **either** compensation that is considered "adequate" - sufficient to compensate for the damage resulting from the loss of employment - **or other** measures of relief, which may include the reinstatement of the dismissed worker by the company. This is an aspect in which States have a certain margin of appreciation, which must be respected.

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

As can be seen, the provision envisages the possibility that the law or practice of a State does not confer on courts the possibility of ordering the reinstatement of an

unfairly dismissed worker, and for such a case in particular the system should provide for adequate compensation or other appropriate redress to be awarded to the worker concerned.

151. It should be recalled once again that Article 24 of the Revised Charter is directly inspired, precisely, by ILO Convention No. 158, as expressly recognised in its Explanatory Report, commenting on Article 24 (*"86. The provision has been inspired by ILO Convention No. 158 (Termination of Employment) of 1982".*

152. Therefore, it may well be questioned - as precisely the complainant organisation does, in the complaints described in points (4) and (5) of the fifth "plea" - whether or not the compensation or reparation that the Spanish system articulates in case of dismissal "without valid reason" complies with the Charter, and whether or not such compensation or reparation is considered to meet the standard of "adequacy" determined by the Charter, and if not, the system may be considered incompatible with Article 24.

However, in no case is the mere fact of not providing, in certain cases, for the employer to be required to reinstate the worker in the job *per se* contrary to the Charter: such a system would only be contrary to Article 24(b) of the Charter and Article 10 of ILO Convention No. 158 if the circumstances are such that, since the employer is not required to reinstate the unfairly dismissed worker, the compensation - or relief - provided for were 'insufficient' or 'inadequate'. This is precisely what has been examined in the first section of our observations.

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

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

- The system provides compensation that is regarded as "proportionate" in the meaning of Article 24 (b) of the Revised Charter.

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

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

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

157. Even if Article 24 of the Revised Charter (or rather Article 24(a), which does not allow dismissal not based on "valid reasons") could be considered as giving rise to a preference for reinstatement, there is no doubt that Article 24 does not prevent the national legislature from providing alternative solutions: national systems may or may not confer on the courts the possibility to order reinstatement. The only obligation deriving from the treaty provision, if a system does not provide for the attribution to the court to order readmission, or if this is not possible in the circumstances, is the establishment of an "appropriate" system of protection in such cases.

158. In so far as the complainant organisation formulates this first claim (complaint described in point (1) of the "plea") autonomously, and without linking it to the fourth claim - in which it questions the adequacy of the compensation provided for in the Spanish system in the event of unfair dismissal - it is manifestly unfounded, since there is no incompatibility with the Charter in the mere fact that a State system does not provide for the possibility of reinstatement of the worker in certain cases of "unjust" dismissal".

Particular case of dismissal which turns out to be "*a fraudulent action to achieve the expulsion of the workers from their employment, as a means of preventing the exercise of the rights to which they may be entitled under the*

***European Social Charter and the Revised European Social Charter and its Protocols*" (complaint raised in point (2) of the "plea").**

159. The manifest lack of reasoning of the complaint is also relevant in relation to the complaint set out in point (2) of the "plea" and developed in the second paragraph of section IV of the complaint, which constitutes a particular application of the same aspect of the complaint set out in point (1) - the failure to confer on the court the power to order the compulsory reinstatement of the dismissed worker: when the dismissal is used for the purpose of preventing the legitimate exercise of their rights by the workers -, so that the same arguments already set out are applicable, and the mere fact that national legislation or practice does not provide for the compulsory reinstatement of the dismissed worker does not imply *per se* that a State is in breach of Article 24 of the Revised Charter.

160. As already explained in our observations on the admissibility of the claim, In this case the claim is, if possible, even more clearly unfounded, since if a dismissal is used for the purpose of preventing workers from legitimately exercising their rights, or to punish them for having exercised their rights, in the Spanish system it must be classified as "null and void dismissal" by the court, and in this case reinstatement - and payment of the accrued wages - is mandatory, without the company being allowed to replace the worker's reinstatement with a compensation .

161. We refer to Section II, to the passages where the cases of nullity provided for in Article 55.5 of the WS are set out, in particular the cases of nullity related to the exercise of fundamental rights.

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

162. Particularly interesting is when the dismissal is **a reprisal for the workers having gone to court to assert certain labour claims, or a means to prevent them from doing so**: in these cases, the **dismissal** would be declared **null and void** for violation of the right to effective legal protection in its aspect of "indemnity bond" of the workers (Article 24 of the Spanish Constitution), an area in which case-law

has been giving a broad interpretation, applying the case not only to cases in which the dismissal is a response to actions of the worker consisting of the presentation of judicial claims, or preparatory acts of legal claims provided for in applicable rules, but also to actions regarding "voluntary" out-of-court complaints - i.e. not imposed by the labour law – lodged by the workers, provided that from the context it can be deduced that is directly aimed at subsequent access to the courts, the filing of a complaint with the Labour and Social Security Inspectorate, if it can be regarded as connected to the purpose of preparing or avoiding a court process, or the filing not of an individual claim by the worker (or counsel), but of a collective claim filed by the trade union.

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

164. Therefore, the claim is absolutely ill-founded.

2.3.- Response to the complaint raised in relation to the alleged incompatibility of the removal of the obligation to pay "accrued wages" in certain cases with Article 24(b) of the Revised Charter

165. In point (3) of the "plea" of the complaint, the complainant trade union organisation requests the following: "(3) *Declaration of non-compliance [with Article 24(b) of the Charter] for not guaranteeing in the case of unfair dismissal with the option of termination, the reimbursement of financial losses suffered between the date of dismissal and the decision of the court declaring the dismissal as unjust, including the costs arising from the social security contribution (accrued wages).*"

166. This complaint, formulated as stated in point (3) of the "plea", is developed in the claim, in particular in Section IV ("Allegations of non-compliance with Article 24 of the Revised European Social Charter"), Third ítem.

167. As has been explained when explaining the regulation of unfair dismissal in the Spanish system, in the event that the dismissal is classified as such by the court, and the option of compensated termination of the employment relationship is applied instead of reinstatement, there is no obligation on the employer to pay the amount of

the "accrued wages" paid between the date of dismissal and the date of notification of the judgment declaring the dismissal to be unfair[23].

168. This obligation, which was previously provided for in our system in the case described above, was abolished by the 2012 Labour Reform[24].

169. The State holds that the abolition of the employer's obligation to pay "accrued wages" in the case described above (but not in the event that the dismissal is declared null and void, or in the event that the dismissed worker is reinstated) is not incompatible with the requirements of Article 24(b) of the Revised Charter.

170. The first thing to note in this respect is that the complainant trade union organisation raised the same issue before the International Labour Organisation as it is raising now, when the 2012 Reform was adopted.

171. It did so by requesting, in the complaint filed under Article 24 of the ILO Constitution, together with the *Union General de Trabajadores* on 10/05/2012, a declaration of non-conformity of the 2012 Reform of the employer's obligation to pay "accrued wages" with Article 10 of ILO Convention No. 158, a provision to which the complainant organisation refers repeatedly throughout the present complaint to the European Committee of Social Rights.

172. In its submission to the International Labour Organisation, the entity that now complains to the European Committee of Social Rights developed a wide-ranging argumentation - which is set out in §§ 58 to 78 of the Report issued for this purpose by the Committee responsible for its examination, which we submit with this submission - maintaining, among other arguments, those on which it insists in the present complaint, that:

- The right to "appropriate" compensation in the case of unfair dismissal recognised in Article 10 of ILO Convention No. 158 must necessarily include the right to receive "accrued wages" if the employer opted for compensation, since the compensation fixed in the WS for unfair dismissal did not compensate the worker for the lack of employment until the date on

[23] If the dismissal is declared null and void, the obligation to pay "accrued wages" is imposed; if it is declared unfair, but either the employer, or the employees in the different cases in which the right of option is attributed to them, opts for reinstatement, the obligation to pay "accrued wages" is also imposed

[24] The abolition of this obligation with the 2012 Labour Reform did not represent an innovation in our legislation, since already in 2002, for a short period of time, the regulations had been modified to abolish the obligation to pay accrued wages in certain cases -recognition of unfairness of dismissal by the

which the judicial decision declaring the termination of the employment relationship was issued with the consequent compensation for unfair dismissal.

- The abolition of "accrued wages" made the employer's option in favour of the worker's reinstatement more burdensome than the option in favour of compensation, in particular in cases where the workers had little seniority in the company (in this sense it was referred to as an "irrational and arbitrary financial incentive in favour of dismissal and against employment stability", contrary to the right to work, due to the lower cost it implied for the employer).

173. The ILO Committee examining the complaint found unequivocally that **Article 10 of Convention No. 158 refers to the payment of "adequate compensation or such other relief as may be deemed appropiate**", **without specifically mentioning the establishment of accrued wages**. It thus concludes that the abolition of the accrued wages (in all or some of the forms of dismissal, if any), **in a legislation which, as in the case of Spain, has known it up to a certain extent, is not incompatible with the Convention** (§§ 278 and 279 of the Committee's Report).

The Committee also observed that the worker can claim unemployment benefits "as soon as the decision to terminate the contract takes effect", without having to await a court decision in the dismissal proceedings that may be brought against the dismissal decision (§276).

174. The Government of Spain considers that the conclusion reached by the International Labour Organisation is applicable to the present case, in which the conformity of the same regulatory provision (the abolition of the obligation to pay "accrued wages" in certain cases following the 2012 Labour Reform) with Article 24 of the Revised Charter, a provision directly inspired by the ILO Convention No. 158, as expressly recognised in the Explanatory Report of the Revised Charter when commenting on Article 24, must be assessed ("86. The provision has been inspired by ILO Convention No. 158 (Termination of Employment) of 1982."

175. Indeed, Article 24(b) of the Revised Charter requires - like Article 10 of ILO Convention No. 158, on which it is directly based - that, in the event of termination of a relationship by virtue of "unjust dismissal", the system should provide the

employer, and option for compensation (RD Law 5/2002), even though the new regime was only in force

dismissed worker with adequate compensation (or other appropriate relief), without requiring that such compensation be accompanied by the right to receive the accrued remuneration between the date of dismissal and the judgment declaring the dismissal unfair.

176. Thus, the requeriment that any system must necessarily entitle the dismissed worker to "accrued wages" in all cases of "unjust" dismissal has no place in Article 24(b) of the Revised Charter.

177. All the more so when the abolition of the figure of "accrued wages", at the time, was justified on the basis of objective reasons, such as those set out in the Explanatory Memorandum of Law 3/2012 - reproduced by the complainant trade union organisation in its submission[25]-, and the purpose of "accrued wages" in cases in which the obligation to pay them has been maintained (dismissal entailing the reinstatement of the worker), is justified precisely by the special characteristics of this case, which mean that with reinstatement the relationship is understood to be "resumed" as if it had not been interrupted, in the same conditions as existed prior to the notice of dismissal, so that the worker is in the same situation as would have existed if the dismissal had not been taken.

2.4.- Response to the complaint raised with regard to the incompatibility with Article 24 of the Revised Charter of the "lack of reparation for the damages suffered by the situation of repeated and systematic abuse of the use of fraudulent temporary hiring."

178. In point (6) of the "plea", the complainant organisation requests a "*Declaration of non-compliance* [with Article 24(b) of the Charter] *in view of the lack of relief for the damage suffered as a result of the repeated and systematic abuse of the use of fraudulent temporary recruitment, which particularly seriously affects staff subject to abusive temporary recruitment in public administrations and bodies who are granted compensation lower than that established for unfair dismissal."*

for a few months.

[25] On the one hand, it is stated that: "**The length of the legal proceedings does not seem to be an appropriate criterion to compensate for the damage caused by the loss of employment, especially bearing in mind that the worker can access unemployment benefit from the moment the decision to terminate the employment takes effect**". On the other hand, it is considered that "**accrued wages sometimes act as an incentive for dilaying procedural strategies, with the added fact that they end**

179. This complaint is developed in the Sixth Ordinal of Section IV of the complaint.

180. In the last plea of the complaint, the complainant organisation - concerning the situation of irregularly recruited temporary staff, in the case of "repeated and systematic abuse of the use of fraudulent temporary recruitment" - is based on a **wrong assumption.**

181. Contrary to what is claimed, **Spanish legislation adequately protects workers who are subject to irregular temporary employment,** and not only those who have been subject to "fraudulent" temporary employment, in an "abusive, repeated and systematic" manner, but in general any worker hired on a temporary basis when the conditions justifying the use of that type of contract were not met, or when those conditions were initially met, but due to unforeseen circumstances the reason for temporary employment is no longer met.

In all these cases, **Article 15 § 4 of the Workers' Statute applies, which provides for the conversion of the temporary relationship into a permanent one** (with a certain particularity that we will see later in the case of workers in the public sector, in which instead of "permanent" workers with irregular temporary contracts become "non-regular permanent"), whether the irregularity is reported in a declaratory judicial process that arises during the term of the employment relationship, or whether the irregularity in the temporary contract is reported at the time the termination of the employment relationship is agreed:

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

ii. In the second case, the termination of the employment relationship due to the alleged expiry of the term of the apparently temporary contract will be considered in any case to be unfair or null and void (depending on the circumstances), with the consequences generally provided for in the regulations for such cases.

up becoming a partially socialised cost, given the provision that the employer may claim from the State the part of these wages that exceeds 60 days."

182. It is also possible for a temporary employee to be subject to objective - or, as the case may be, disciplinary - dismissal, subject to the same regime as that applicable to permanent staff.

183. It is therefore not obvious to what extent the standard of protection of workers in the aforementioned situation, in relation to Article 24 of the Revised Charter, is affected, nor is it particularly apparent what damage is generally caused to a worker initially hired as a temporary worker - subsequently converted into a permanent worker by application of Article 15.4 of the WS - which is greater than that caused to a worker hired as a permanent worker from the beginning, by the dismissal decision adopted by the employer.

184. Additionally, but not least, is the confirmation of the important efforts that have been made by the social partners and the public authorities with the Labour Reform of 2021 precisely to reduce the high rate of temporary employment in the Spanish labour market. As explained in that part of our paper, the Reform has firmly advocated **the generalisation of the permanent contract, abolishing one of the most widely used contractual modalities in the practice of fixed-term contracts - the contract for work or service** - which is often used fraudulently.

- **Particular reference to the situation of staff subject to irregular temporary contracts by public administrations.**

185. The situation is similar in the case of employees hired by the Public Administrations under temporary contracts used in an irregular manner, i.e. without there being a real reason for the temporary nature of the contract in question, or if there is such a reason but the maximum time limits for its use have been exceeded.

186. In these cases - in which, when the situation is reported to the labour courts, the employment relationship is considered "non-regular permanent"[26]- if the

[26] The figure of the "non-regular permanent" worker is a construction of a jurisprudential nature that is applied in the public sector to those workers who, hired through temporary contracts (it is also applied in other situations of irregularity in hiring), report the situation of irregularity in the use of temporary hiring, and the judge verifies that their temporary hiring has indeed been irregular. Given the impossibility for the judge to recognise their status as permanent employees in these cases, given that the Constitution and legal regulations require that access to public employment must take place after passing a selection process governed by the principles of equality, merit and ability, the Supreme Court, from the mid-1990s, created the figure of "non-regular permanent" for these situations: in accordance with this doctrine, in cases in which the judge detects that the temporary contracting of the worker is irregular, he recognises the worker as an "non-regular permanent" worker, being able to continue to occupy his job, without being subject to the time-limit derived from the formally used temporary contractual modality, until such time as the position occupied is filled by a selective process based on the principles of equality, merit and ability.

employment relationship is subsequently terminated by the employer, the dismissal may be classified as fair - in the event of validly agreed disciplinary dismissal or validly agreed dismissal for objective reasons - or as unfair, or null and void.

187. In the last two cases (unfair dismissal or null and void dismissal) the consequences that apply are identical to those that apply in the case of dismissal of workers hired on a permanent basis from the beginning: in the case of unfair dismissal, the employer may choose between reinstatement of the worker, or payment of the compensation provided for in Article 56 of the WS (33 days' or 45 days' salary per year of service, depending on the period worked), while in the case of null and void dismissal, reinstatement and payment of accrued wages are mandatory.

188. In the event of fair disciplinary dismissal, the termination will take place without compensation, as in the case of dismissal of a worker hired on a permanent basis from the beginning of the working relationship, or of a worker validly hired on a temporary basis.

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

190. It is therefore not correct to claim that this group is subject to less protection, and that the compensation paid to "non-regular permanent" workers in the event of dismissal is "reduced" - as is insistently claimed by the complainant organisation[27].

The regime and scope of this figure, which can be assimilated to the employment relationship of the worker contracted as a "temporary worker for vacancy", has given rise to numerous doubts over the years, with case-law having evolved regarding the same, and in particular regarding the effects of the termination of the relationship at the moment when the post is definitively filled, if the worker has not been awarded the post in the selection process organised for this purpose.
The detailed development of the explanation of the regime of this figure will be carried out, where appropriate, in the observations on the merits of the case.

[27] In fact, the evolution of the figure of the non-regular permanent worker, of jurisprudential origin (in fact, it is a figure whose regime continues to be defined to a large extent by the case-law) has been advancing in the interests of greater protection of the worker affected by this situation, The working conditions of these workers have been fully assimilated to those of permanent workers, despite the fact that they have not passed - like the latter - a regulated selection process with the requisite requirements for access to the status of permanent worker in the Administration, and they have been recognised the right to maintain their employment relationship until the post is definitively filled - in addition to a number of important stabilisation processes to allow them to consolidate their relationship.

191. This is without prejudice to the fact that, in the case of "non-regular permanent" workers in the service of the Administration, there is a specific reason for which the temporary employment relationship may be validly terminated (the filling of the post by the statutory procedure). In these cases, due to the very nature of the relationship, there is **an objective reason** that justifies the termination of the relationship, given that the post is then filled by a worker who has passed the selection process established for this purpose - which is undoubtedly covered by Article 24 (a) of the Revised Charter or by Article 4 of ILO Convention No. 158. It should be borne in mind that the principle of equality, merit and capacity for access to public administration prevails, a principle that is enshrined in Article 103 § 2 of the Spanish Constitution and, at the legal level, in Article 55 of the Basic Statute on Public Employment, regarding access to public employment, which provides as follows:

"Article 55. Guiding principles.

1. All citizens have the right of access to public employment in accordance with the constitutional principles of equality, merit and ability, and in accordance with the provisions of this Statute and the rest of the legal system.
2. The public administrations, entities and bodies referred to in Article 2 of this Statute shall select their civil servant and labour staff by means of procedures that guarantee the aforementioned constitutional principles, as well as those set out below:
a) Publicity of the calls for applications and their bases.
b) Transparency.
c) Impartiality and professionalism of the members of the selection bodies.
d) Independence and technical discretion in the actions of the selection bodies.
e) Adequacy between the content of the selection processes and the functions or tasks to be performed.
f) Agility, without prejudice to objectivity, in the selection processes."

192. The principle of equality, merit and ability in access to public employment, which as we have seen has constitutional status, is what therefore prevents the acquisition of permanent status for employees in the service of the Public Administrations who have been subject to irregular temporary contracts, without passing the selection processes that determine access as permanent employees to public employment, unlike what happens in the private sector, and obliges us to consider the regulatory coverage of the interim position covered by a "non-regular permanent" employee as an objective reason of termination, which is in accordance with law and the very nature of the post.

193. It is particularly striking that the complainant organisation holds that case-law states "without an express legal basis" that the termination of the contract by filling the post through a selective process is legitimate, when such termination is, as we have said, the logical corollary of the very nature of this figure, which is justified precisely by the principle enshrined in Article 103 § 2 of the EC and in Article 55 of the Basic Statute. All the more so if we bear in mind that, precisely, the figure of the "permanent non-regular" employee is a figure whose origins lie in case-law - it was established by the Supreme Court in 1998 -, aiming precisely to protect workers who were subject to irregular temporary contracts in the Public Administrations, and to allow them to continue providing services for the Administration, despite the fraudulent nature of the contract they had been subject to while the Administration did not proceed to fill the post in accordance with the regulations.

194. As regards the situation of temporary staff (temporary workers or interim civil servants) who provide services for the public administrations, it is worth noting the adoption of an important package of measures through *Law 20/2021, of 28 December, on urgent measures to reduce temporary employment in the civil service*, which aims to solve the problem of the high rate of temporary employment in public administrations, and its consequences for public employees who have been subject to temporary contracts, articulating processes of stabilisation of temporary employment and defining the bases for its development, as well as establishing the right to a compensation equivalent to 20 days' salary per year of service up to a maximum of 12 monthly payments for temporary employees whose relationship with the Administration is terminated due to failure to pass the corresponding stabilisation process.

This measure has a markedly "punitive" nature for the Administration given the abuse of temporary contracts, as the Supreme Court has recently assessed in its judgment of 9/05/2023, stating that the existence of an objectively abusive situation does not automatically imply that the interim civil servant subsequently dismissed has suffered effective and proven damage. Therefore, this alone does not mean that a right to compensation should be recognised, without prejudice to the possibility of claiming, through the ordinary channels of the Administration's patrimonial liability, for pecuniary or non-pecuniary damages, for a decrease in assets or for a loss of opportunity that the temporary public employee has not the legal duty to bear.

Due to its interest, the aforementioned judgment is attached hereto.

195. In view of the foregoing, we conclude that the authorities have adopted sufficient measures to protect temporary staff of the Public Administrations who are subject to abusive practices in the use of temporary contracts, and in particular to protect this group at the time of termination of their relationship with the Administration. Therefore, it is not possible to assess the existence of a situation contrary to the protection provided by Article 24 of the Revised European Social Charter.

Accordingly, the following is respectfully REQUESTED from the Committee:

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

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

Madrid for Strasbourg, 30 October 2023

The Agent of Spain — The Co-Agent of Spain

Alfonso Brezmes Martínez de Villareal — Heide-Elena Nicolás Martínez