
**EUROPEAN COMMITTEE OF SOCIAL RIGHTS**
**COMITÉ EUROPÉEN DES DROITS SOCIAUX**

21 December 2023

**Case Document No. 1**

***Federación de Servicios a la Ciudadanía de Comisiones Obreras Región de Murcia* (FSC-CCOO) v. Spain**
Complaint No. 229/2023

# COMPLAINT

**Registered at the Secretariat on 31 July 2023**

CCOO

Federación de
servicios a la ciudadanía
Murcia

**COLLECTIVE COMPLAINT**

Executive Secretary of the European Committee of Social Rights
Department of the European Social Charter
Directorate General of Human Rights and Rule of Law
Council of Europe
F-67075 Strasbourg Cedex
social.charter@coe.int

**Federación de Servicios a la Ciudadanía**
**Región de Murcia (CCOO)**
**Calle Corbalán, 4, 30002, Murcia**
**Email:** murcia@fsc.ccoo.es, salvadorsoto@fsc.ccoo.es

**SUBJECT**

**Collective complaint by CCOO for violation, by the Collective Agreement on road haulage of the Region of Murcia, of Article 4.2 of the Revised European Social Charter**

*Summary*:

**I. BACKGROUND TO THE COMPLAINT**

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

On 23 October 2000 Spain signed the European Social Charter (Revised) – hereinafter THE CHARTER or ESCR – done in Strasbourg on 3 May 1996. The instrument of ratification was issued on 29 April 2021 and published in the BOE on 11 June 2021. The instrument of ratification was deposited on 17 May 2021, with all 98 paragraphs being accepted. By application of Article K.3, the Charter entered into force on 1 July 2021.

Spain accepted the collective complaints procedure by means of a declaration made upon ratification of the Revised Charter on 19 May 2021, and the procedure came into force with respect to Spain on 1 July 2021. The respective instrument of ratification included a declaration stating, in relation to Part IV, Article D, paragraph 2, of the European Social Charter (revised), that Spain declared that it accepted the supervision of its obligations under the Charter in line with the procedure provided for in the additional protocol to the European Social Charter, done in Strasbourg on 9 November 1995, which established a collective complaints system.

That protocol has been applied by Spain since 1 July 2021, the date of the entry into force of the Revised European Social Charter.

These considerations have already been assessed by the Committee in relation to Spain in the decision of admissibility of 14 September 2022 regarding Collective Complaint no. 207/2022, in which the following can be found:

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

Spain has been required to observe this provision since the entry into force of the respective Treaty on 1 July 2021.

In accordance with Article 4 of the Protocol, the complaint was submitted in writing and concerns Article 4.2 of the Charter, a provision accepted by Spain upon its ratification of the Treaty on 19 May 2021. Spain has been required to observe this provision since the entry into force of the Treaty as of 1 July 2021.

**2. THE RIGHT OF WORKERS' COMMISSIONS TO LODGE COLLECTIVE COMPLAINTS.**

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

The CCOO Trade Union Confederation is the most representative trade union organisation in Spain. It has one million affiliates and a total of 97 684 elected delegates who represent 35.6% of the

representatives elected from among working people as a whole in both the private and the public sectors. It is therefore the most representative trade union at State level and meets the requirements laid down in Article 6 of Organic Law 11/1985 of 2 August 1985 on trade union freedom, which determines, among other things, the right to institutional participation and the right to engage in collective bargaining.

The CCOO took part in negotiating over 854 Collective Agreements that were signed in 2021, covering some 98.5% of working people.

The CCOO Trade Union Confederation is affiliated in international organisations with participatory status with the Council of Europe.

The European Committee of Social Rights has systematically accepted allegations from the CCOO concerning reports on compliance with the European Social Charter and its protocols, and we have set out allegations regarding compliance with such instruments on a regular basis.

Since the entry into force of the Revised European Social Charter, the CCOO has been entitled to lodge collective complaints relating to compliance in our country.

The complaint has been brought by the FEDERACION DE SERVICIOS A LA CIUDADANÍA [federation of services to citizens] and is signed by the person with the capacity to bring legal proceedings in this regard relating to the Collective Agreement of regional territorial scope, SALVADOR MIGUEL SOTO FERNANDEZ, in his capacity as SECRETARY GENERAL OF THE FEDERACIÓN DE SERVICIOS A LA CIUDADANIA DE LA REGIÓN DE MURCIA [FEDERATION OF SERVICES TO CITIZENS OF THE REGION OF MURCIA].

Among the powers conferred in the Statutes and the respective annex is that of appearing before bodies of any kind to introduce, follow up on and conclude, as a party to or in any other capacity, all types of files, hearings, measures and proceedings, including complaints of any kind or collective proceedings.

The complaint satisfies the stipulations in Article 4 of the Protocol, since it has been submitted in writing, concerns a provision of the Charter accepted by Spain, i.e. Article 4.2, and specifies the extent to which Spain has failed to ensure satisfactory application of the respective provision on the basis of the grounds detailed herein.

As set out in Article 5 of the Protocol, this complaint is addressed to the Secretary General.

## II. PROVISION OF THE REVISED EUROPEAN SOCIAL CHARTER THE INFRINGEMENT OF WHICH IS ALLEGED: ARTICLE 4.2 THE RIGHT TO AN INCREASE IN REMUNERATION FOR OVERTIME, EXCEPT IN CERTAIN PARTICULAR CASES, ESTABLISHED BY THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS AND ITS EFFECTIVE SCOPE

### 1. REGULATION OF THE RIGHT OF WORKERS TO AN INCREASE IN REMUNERATION FOR OVERTIME, EXCEPT IN CERTAIN PARTICULAR CASES, IN THE REVISED EUROPEAN SOCIAL CHARTER DONE IN STRASBOURG ON 3 MAY 1996

According to Article 4.2 of the Revised European Social Charter, to ensure the effective exercise of the right to a fair remuneration, the Parties undertake to recognise the right of workers to an increase in remuneration for overtime, subject to exceptions in particular cases.

Article 4.2 is inextricably linked to Article 2.1, which guarantees the right to reasonable daily and weekly working hours.

Overtime means work carried out above and beyond normal working hours.

The principle of this provision is that work carried out beyond normal working hours requires greater effort on the part of the worker, who should be paid at a higher rate than their normal wage.

The Committee is only required to determine, in accordance with Article 4(2) of the Revised Charter, whether those concerned receive remuneration for overtime worked and, above all, whether this is at a higher rate than their normal pay.

There may be exceptions to the right of workers to a higher rate of remuneration for overtime in particular cases. These "special cases" have been defined as "State employees and executives in the private sector".

## 2. PRECEDENTS IN THE CASE-LAW OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS ON THE INTERPRETATION AND APPLICATION OF ART. 4.2 OF THE CHARTER IN COLLECTIVE COMPLAINT PROCEDURES

There have been many decisions on the merits that have been delivered by the European Committee of Social Rights in relation to the interpretation and violation of Article 4.2 of the European Social Charter: Complaints 149/2017, 154/2017, 68/2011, 60/2011, 57/2009, 56/2009, 55/2009, 38/2006, 9/2000, 16/2003, etc.

Of these as a whole and with reference to this complaint, the following will be focused on:

1.- Decision on the merits of 23 October 2012 of Complaint 68/2011: "*86. Not only must the worker receive payment for overtime, therefore, but also **the rate of such payment must be higher than the normal wage rate**."*

2.- Decision on the merits of 23 June 2010 of Complaint 56/2009: *"77. **The Committee considers that the number of hours of work performed by employees who** come under the annual working days system and who, under this flexible working time system, **do not benefit from a higher rate for overtime is abnormally high**. The fact that an increased remuneration is now laid down for the days worked which correspond to the days of leave which the employee under the annual working days system has relinquished cannot be considered sufficient under paragraph 2 of Article 4. In such circumstances, a reference period of one year is excessive."*

3.- Decision on the merits of 3 December 2007 on Complaint 38/2006:

> *"18. The CESP [European Council of Police Trade Unions] states that **payment of overtime work by police officers is done on the basis of a flat rate** in accordance with Decree No. 2000-194 of 3 March 2000, irrespective of the grade or salary point of police officers, and without taking account of Decree No. 2002-60 of 14 January 2002 on hourly payments for overtime, which applies to all civilian employees of the State.*
> *"19. The CESP also argues that under Article 2 of the latter decree, overtime payments apply only to certain categories of civilian employees of the state, namely category C and category B officials,*

*and not to members of the command corps of the national police force, which is classified as category A of the national public service."*

*"20. According to the Government, payment for overtime worked by national police officers is covered by Article 22 of Decree no. 95-654 of 9 May 1995, which provides for compensatory rest periods or, under conditions established by decree, a suitable overtime payment system. The conditions are specified in Decree No. 2000-194 of 3 March 2000, which provides that payments may be made to all national police officers other than those in the senior planning and management corps (Article 1) and establishes the basis for calculating the hourly rate of this payment, which takes the form of a flat-rate payment (Article 3)."*

*"22. The Committee considers that* ***the system of flat-rate payments for overtime*** *established by Article 3 of Decree No. 2000-194 – resulting from the fact that, for national police officers, all such pay is determined with sole reference to salary point 342 –* ***has the effect of denying the proper increase required by Article 4§2 of the Revised Charter*** *to officers who cannot be excluded from entitlement to increased remuneration because of the nature of their duties. In particular, the functions of senior officers and commanders do not always equate to planning and management tasks."*

*"23. The Committee finds therefore that the French system for the payment of overtime worked by national police officers is in breach of Article 4§2 of the Revised Charter."*

**3. REVIEW OF THE CASE-LAW OF THE ECSR ON THE RIGHT OF WORKERS TO AN INCREASE IN REMUNERATION FOR OVERTIME, EXCEPT IN CERTAIN PARTICULAR CASES**

It can therefore be concluded that, for the purposes of this complaint, Article 4.2 of the European Charter of Social Rights, in its requirement that an increase in remuneration for overtime be granted to workers, except in certain particular cases, provides as a minimum that:

- The amount or rate which is paid to each worker for such time should be higher than that paid for ordinary or normal working time (time worked within the worker's habitual or ordinary working time).

- The calculation of the payment for such time should depend directly on the number of hours worked, thereby excluding lump-sum or flat-rate payment systems which do not take into account the number of hours by which the worker extends their working hours beyond those for which they are contractually expected to work.

- The exceptions provided for in Article 4.2 should be restricted to particular cases involving senior government officials and senior executives in the private sector, with particular importance being attached to the number of workers affected by each exception.

**III. REVISION OF THE COLLECTIVE AGREEMENTS IN ACCORDANCE WITH THE EUROPEAN SOCIAL CHARTER**

Part II of the Appendix to the Revised European Social Charter, Articles 21 and 22.2, provides that the terms "national legislation and practice" embrace, as the case may be, in addition to laws and regulations, collective agreements, other agreements between employers and workers' representatives, customs as well as the relevant case law.

## IV. REGULATION OF THE PAYMENT OF OVERTIME WORKED BY DRIVERS IN THE COLLECTIVE AGREEMENT ON ROAD HAULAGE IN THE REGION OF MURCIA

### 1. REGULATION OF WORKING HOURS AND OVERTIME AS A GENERAL RULE OF THE COLLECTIVE AGREEMENT

Working time in the road haulage sector is regulated by Article 26 of the Collective Agreement on road haulage.

This provides for an annual total of 1 826 hours 27 minutes distributed irregularly, without exceeding 10 daily hours of actual working time, unless, by agreement between the company and workers' representatives, a higher or lower limit is set for ordinary working time, provided that the daily and weekly rest periods in this Collective Agreement or in mandatory legal or regulatory rules are complied with.

Therefore:

- The said Article 26 provides for working time of 1 826 hours 27 min per year, distributed irregularly.

- The working day may not exceed 10 hours, unless the company has entered into an agreement with workers' representatives.

- In the event of such an agreement, the mandatory rest periods provided for in the legislation or the Collective Agreement shall be complied with.

Article 27 of this Collective Agreement defines overtime as follows:

> *Overtime shall be deemed to be working hours exceeding the ordinary, daily or weekly working time, established in this Agreement or in company agreements as provided for in Article 26.*
>
> *With the exception of drivers whose calculation and payment arrangements are established in Article 42 of this agreement, the rate for the overtime hour of each professional category shall be the result of dividing the amount of the sum of the following items, on an annual basis: basic wage (BS) + March, July and December extraordinary bonuses (EC), + attendance bonus (AB) + individual length-of-service allowance (AA) where applicable/by working time (WT) on an annual basis, with the result being increased by 0.50%.*

Under the agreement, therefore, all hours which exceed the maximums established in Article 26 constitute overtime, and the agreement sets out a method of calculation for determining the respective rate or value:

- The basic wage of the professional category of the worker is taken, plus the March, July and December extraordinary payments, plus certain bonuses, all of which is divided by the annual working time (1 826 hours 27 min).

- The respective result is the rate for each hour of those 1 826 hours and 27 minutes of work.

- This must be increased by 0.50%, and the result will be the rate to be paid to each worker for each overtime hour worked.

As can be seen, this system contains the guarantee that:

- The amount or rate applied to each worker for such time is higher than the rate for ordinary working hours,

- the calculation of payment for such time depends directly on the number of hours worked, avoiding lump-sum or flat-rate payment systems which do not assess the number of hours by which the worker extends their working time.

## 2. EXCEPTION APPLICABLE TO DRIVERS UNDER THE COLLECTIVE AGREEMENT

The method of calculation in the preceding section (Article 27 of the Collective Agreement) is based on a first step involving the basic wage, regulated in Article 39 and set for each occupational category in Annex I, which in turn determines the amount of the overtime payments, since Article 42 of the Agreement uses the basic wage to calculate them because it establishes that it should be equivalent to the basic wage plus the individual length-of-service allowance, if any.

This means that the professional category of each worker determines their basic wage, which in turn determines their overtime payments, all of which determines the rate for the working hour, whether ordinary or overtime.

The above notwithstanding, the Collective Agreement states that workers who are classified as drivers will be governed by the provisions of Article 43.

According to the Collective Agreement, there are three categories of driver: Driver Mechanic, Driver, and Driver-Distributor.

As can be seen in Article 20(4), (5) and (7), each of these categories has a particular definition of their functions and their position.

As can be seen in Annex I, furthermore, the basic wage of Driver Mechanics is higher than that of Drivers, which is in turn higher than that of Driver-Distributors.

By contrast, the alternative overtime payment system set out in Article 43 reads as follows:

> *"In the light of the difficulties involved for the employer in controlling the activity of drivers, making it impossible in many cases to determine the performance of activities other than the specific activity of driving (and this only in vehicles equipped with tachographs), for the purpose of payment of attendance and overtime hours that may be worked, and any night-work bonus, they shall also receive, in addition to the fixed remuneration referred to in Article 39 of this Agreement, the amounts of which are indicated in Annex 1, the amounts shown in Annex 2, depending on the scope of the transport, monthly kilometres driven, number of journeys carried out and type of vehicle driven."*

Annex II, meanwhile, provides for a system which, in differentiating between drivers who drive vehicles of over 26 tonnes of goods or vehicles of under 26 tonnes of goods, establishes a table scaled

solely according to kilometres travelled each month, generating an additional payment, a supplement known as the additional kilometrage bonus.

***"Article 43. Additional kilometres***

*43.1. Long-haul: drivers whose daily distance exceeds a radius of 100 km from the place of employment and who drive over 7 000 km per month:*

*a) Drivers of vehicles of up to 26 MT of TGW:*

*I.- Up to 10 000 km driven per month shall receive €0.0153/Km.*
*II.- From 10 000 km driven per month shall receive €0.0294/Km.*

*b) Drivers of vehicles of over 26 MT of TGW:*

*I.- Up to 10 000 km driven per month shall receive €0.0175/Km.*
*II.- From 10 000 km driven per month shall receive €0.0312/Km*.

*[…]*

*43.2 Short-haul: drivers whose daily distance travelled does not exceed a radius of 100 km from the place of work and who do not drive more than 7 000 km per month:*

1. - Transport of building and public works materials:

a) Drivers of truck mixers. Up to 80 return journeys per month shall receive €1.4309 per journey, and from 80 return journeys per month shall receive €2.8617 per journey.

They shall also receive €0.1472 per km up to 1 900 km driven per month and €0.2945 per km over 1 900 km driven per month.

b) Cement tanker drivers. Up to 55 return journeys per month shall receive €0.7198 per journey and over 55 return journeys per month shall receive €1.4396 per journey.

They shall also receive €0.0382 per km driven up to 7 000 km driven per month and €0.0765 per km over 7 000 km driven per month.

c) Tipper lorry drivers. Up to 105 return journeys per month shall receive €0.7198 per journey and over 105 return journeys per month shall receive €1.4396 per journey.

They shall also receive €0.0382 per km driven up to 5 000 km driven in one month and €0.0765 per km from 5 000 km driven in one month.

II.- Port or similar transport (25 km radius from the port):

They shall receive €1.1849 per return journey and €0.0952 per km driven.

III.- Other types of transport: drivers of lorries of over 26 MT of TGW not included above shall receive a bonus of €0.0478 per km driven per month.

*3.- Distribution: The total monthly earnings for additional kilometres shall be distributed as follows and shall be reflected accordingly in the payslip:*

*- 50% of the total to cover possible overtime.*
*- 40% of the total to cover possible attendance time.*
*- 10% of the total to cover the possible additional overnight bonus."*

## V. COMPLAINTS OF NON-COMPLIANCE WITH ART. 4.2 OF THE REVISED EUROPEAN SOCIAL CHARTER IN RESPECT OF DRIVERS

This system only counts kilometres driven; it does not count the non-driving work included in the three definitions of the three categories of driver:

- Article 20.4: driver mechanic: *"… **assisting**, if asked, in repairing the vehicle, being responsible both for the vehicle and for the load during service, being required to **complete**, where applicable, the **documentation** of the vehicle and of the transport carried out and to supervise, if required to do so, the **loading** of the goods. They are responsible for carrying out the **tasks necessary** for the correct operation, **maintenance** and **upkeep** of the vehicle, and those necessary for the **protection and handling** of the goods.*"

- Article 20.5: driver*: "… with the obligation to direct, if instructed, the process of **loading**, **participating actively therein and in unloading**" …, "being required to carry out the additional tasks necessary for the correct operation, **maintenance** and **upkeep** of the vehicle, and those required for **protecting and handling** the goods."*

- Article 20.7: delivery driver*: "… the additional tasks necessary for the correct operation, **maintenance** and **upkeep** of the vehicle and the protection of the latter and the respective load, being required to **load and unload** their vehicle and to collect, **distribute or deliver the goods**…".*

It is important to remember that Article 4(e) of Regulation 561/2006 of the European Parliament and of the Council on the harmonisation of certain social legislation relating to road transport defines "other work" as all activities which are defined as working time in Article 3(a) of Directive 2002/15/EC except 'driving'.

The tasks set out above in sections 20.4, 20.5 and 20.7 of the Collective Agreement which are not driving but which constitute drivers' obligations are precisely the "other work" defined in Article 4(e) of that Regulation.

This system therefore seeks to pay overtime, attendance time and night-work bonus using a lump-sum calculation, based on the kilometres each driver proves that they have driven each month, and establishes an estimate of how much time they may have worked on the basis of those kilometres, both in relation to driving time and "other work".

This is, however, a case of an imaginary or hypothetical estimate, with no guarantee that it corresponds to the hours actually worked.

## 1. IMPACT OF THE RULES OF THE COLLECTIVE AGREEMENT ON THE RIGHT FOR PAYMENT FOR SUCH TIME TO BE DEPENDENT UPON THE NUMBER OF HOURS WORKED

It must be stated **firstly** that the system applied offers a formula which does not provide any assurance that the remuneration drivers receive for overtime bears any relation to the number of hours worked.

A worker who has driven 9 000 km in a month but has only spent a total of 40 hours on "other tasks" could be better paid than another worker who, having driven 8 100 km, has spent a total of 200 hours on "other tasks".

This is because the system established by the Collective Agreement provides for counting not of the hours actually worked but only of the kilometres driven. This is an incomplete estimation that may give figures higher or lower than the hours actually worked.

It is our understanding that this goes against the essential content of Article 4.2 of the Revised European Social Charter and, as stated initially in line with the Decision on the merits of 3 December 2007, Complaint 38/2006, denies the **right to a satisfactory increase** required under Article 4.2.

## 2. IMPACT OF THE RULES OF THE COLLECTIVE AGREEMENT ON THE RIGHT FOR PAYMENT FOR SUCH TIME TO BE HIGHER THAN PAYMENT FOR ORDINARY WORKING TIME

The system of Article 43 of the Collective Agreement cannot guarantee that payment is made for drivers' overtime above the rate for an ordinary hour.

By establishing a system that only covers kilometres driven, a system has been established which, as has been said, does not take hours actually worked into account.

By not taking such hours into account, the system disregards how many of those hours are ordinary and how many are overtime. Their actual number is ignored. They are paid en bloc on a lump-sum basis.

Paying workers a pre-determined rate for such overtime in lump sums means that there is no guarantee of what rate is actually being paid for each hour of overtime.

Depending on the kilometres driven each month – which are counted according to this system and which give rise to the kilometre bonus – and on the number of hours that have had to be spent on "other work," as has already been explained – and which are not counted – the ratio [kilometre bonus/time actually worked] will give a rate per overtime hour that will sometimes oscillate above and sometimes below the ordinary wage/hour.

In our opinion, the above runs counter to the principle – already explained above – that the amount or rate paid to each worker for that extra time should be higher than that paid for ordinary or normal working time (the rate applicable to worker's normal or ordinary working hours), simply because it cannot be guaranteed under the system.

It must be added that this system, when it sets the rate or amount for kilometres driven (the kilometre bonus), does not take into account either the professional category or the basic wage of each worker: it is the same bonus for driver mechanics, drivers and driver distributors, so that while the general overtime payment system for the remaining staff (Article 27 of the Collective Agreement) does start

from the rate of the basic wage – which, in turn, depends on the professional category – the system laid down in Article 43 for drivers does not do so, thereby further reducing the remuneration which the highest categories of drivers receive for their overtime.

**THE CLAIM OF THE CCOO.**

In view of the above,

THE COMMITTEE IS REQUESTED, once the complaint has been admitted and due processes have been followed, to deliver a decision on the merits finding a failure to comply with Article 4.2 of the European Social Charter (revised), as follows:

a) Finding of incompatibility for failure to guarantee THE RIGHT OF DRIVERS SUBJECT TO THE COLLECTIVE AGREEMENT ON ROAD HAULAGE IN THE REGION OF MURCIA FOR PAYMENT FOR SUCH TIME TO ACTUALLY BE DEPENDENT UPON THE NUMBER OF HOURS WORKED

b) Finding of incompatibility for failure to guarantee THE RIGHT OF DRIVERS SUBJECT TO THE COLLECTIVE AGREEMENT ON ROAD HAULAGE IN THE REGION OF MURCIA FOR PAYMENT FOR SUCH TIME TO BE HIGHER THAN PAYMENT FOR ORDINARY WORKING TIME

Documentation attached to this complaint:

- Collective agreement on road haulage in the Region of Murcia
- Extension of the validity of the Collective Agreement on road haulage in the Region of Murcia
- Statutes of the Federacion de Servicios a la Cuidadania de CCOO
- Power of Attorney of Salvador Miguel Soto Fernandez

In Murcia on 31 July 2023

SOTO FERNANDEZ SALVADOR MIGUEL (SIGNATURE)

Signed digitally by SOTO FERNANDEZ, SALVADOR MIGUEL (SIGNATURE)
Date: 31.07.2023 13:12:36 +02’00’