



**EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX**

25 July 2024

Case Document No. 1

Unión General de Trabajadores (UGT) v. Spain
Complaint No. 235/2024

**SUBMISSIONS BY THE GOVERNMENT
ON THE MERITS**

Registered at the Secretariat on 18 July 2024



MINISTERIO
DE LA PRESIDENCIA, JUSTICIA
Y RELACIONES CON LAS CORTES

ABOGACÍA GENERAL DEL ESTADO

SUBDIRECCIÓN GENERAL
DE ASUNTOS CONSTITUCIONALES Y
DERECHOS HUMANOS

ÁREA DE DERECHOS HUMANOS

TO THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

**COLLECTIVE COMPLAINT
NO 235/2024**

U.G.T.

vs.

SPAIN

CORREO ELECTRÓNICO:

aetedh@mjusticia.es

C/ SAN BERNARDO, 45
28015 MADRID
TEL.: 91 390.45.11

SUMMARY

A. SUBJECT MATTER OF THE COMPLAINT	2
B. OBSERVATIONS ON THE MERITS	4
1. Relevant international rules: Revised European Social Charter	4
2. Relevant domestic law:	4
3. Remarks:	7
4. In conclusion:.....	13
5. Annex. Evolution of overtime by branch of activity	16

1. By letter dated 12/01/2024, notice was given of the Collective Complaint filed by the trade union organisation Unión General de Trabajadores (UGT) registered on 09/01/2024 under reference number 235/2024.
2. On 14/05/2024, the Committee issued a Decision which declared the admissibility of the Complaint under the provisions of Article 7.1 of the Additional Protocol to the Revised European Social Charter on a system of collective complaints, inviting the Government to submit written observations on the merits by 19/07/2024.
3. We hereby proceed, within the time limit granted for this purpose, to make observations on the merits of the Complaint submitted:

A. SUBJECT MATTER OF THE COMPLAINT

4. The Unión General de Trabajadores (UGT) has lodged a collective complaint before the European Committee of Social Rights, in which it considers that the Spanish legislation on overtime pay (Article 35.1 of the Estatuto de los Trabajadores [Workers' Statute]) contravenes the provisions of the revised European Social Charter (Article 4.2), in conjunction with Article E. In its complaint, it requests:

- A declaration that the Spanish rules on overtime (Art. 35 of the Workers' Statute) and *all related rules* (as expressed in the complaint) are contrary to
 - Article 4(2) of the revised European Social Charter, since it does not guarantee increased remuneration for overtime as compared to normal working hours.
 - And, moreover, to Article E of the Charter, because this failure to guarantee increased overtime pay is unfairly detrimental to women workers.
- That the necessary measures be adopted to ensure that the Kingdom of Spain corrects this alleged violation and, in particular:
 - An entitlement to receive remuneration for overtime at a rate 25% higher than that for ordinary hours should be recognised.
 - A requirement for a system for registering or monitoring working hours actually worked should be included.

The complaint also states that a large number of overtime hours are ultimately unpaid and that the evolution of the Spanish law has been detrimental to the value of overtime.

B. OBSERVATIONS ON THE MERITS

1. Relevant international rules: Revised European Social Charter

Article 4 - The right to a fair remuneration

With a view to ensuring the effective exercise of the right to a fair remuneration, the Parties undertake:

1 (...)

2 to recognise the right of workers to an increased rate of remuneration for overtime work, subject to exceptions in particular cases;

(...)

The exercise of these rights shall be achieved by freely concluded collective agreements, by statutory wage-fixing machinery, or by other means appropriate to national conditions.

Article E - Non-discrimination

The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.

2. Relevant domestic law:

-Spanish Constitution:

Article 35

1. All Spaniards have the duty to work and the right to work, to free choice of profession or trade, to promotion through work and to sufficient remuneration to satisfy their needs and those of their families, without discrimination on grounds of sex in any case.

2. A statute for workers shall be established by law.

Article 37

1. The law shall guarantee the right to collective bargaining between workers' and employers' representatives, as well as the binding force of such agreements.

-Estatuto de los Trabajadores (Workers' Statute, Royal Legislative Decree 2/2015)

Article 34

1. The length of the working day shall be that agreed in collective agreements or employment contracts.

The maximum length of the ordinary working day shall be forty hours per week of effective work on an annual average.

2. The irregular distribution of working hours throughout the year may be established by collective agreement or, alternatively, by agreement between the company and the workers' representatives. In the absence of an agreement, the employer may distribute ten per cent of the working day irregularly throughout the year.

Such distribution shall in all cases respect the minimum daily and weekly rest periods provided for by law, and the worker shall be informed at least five days in advance of the day and time of the resulting work.

The compensation of the differences, due to excess or shortfall, between the working day and the maximum length of the ordinary legal or agreed working day shall be enforceable as agreed in the collective agreement or, in the absence of any provision in this respect, by agreement between the employer and the workers' representatives. In the absence of an agreement, the differences arising from the irregular distribution of working hours must be compensated within twelve months of their occurrence.

(...)

Article 35

1. Overtime shall be considered to be those hours of work that are performed in excess of the maximum length of the ordinary working day, set in accordance with the previous article. By collective agreement or, failing this, by individual contract, a choice shall be made between paying overtime at an amount to be fixed, which may in no case be less than

the value of the ordinary hour, or compensating them by equivalent paid rest periods. In the absence of an agreement to this effect, it shall be understood that overtime worked shall be compensated by rest within four months of its completion.

2. The number of overtime hours may not exceed 80 per year, except as provided for in paragraph 3. For workers who, due to the type or duration of their contract, work an annual working day that is less than the general working day in the company, the maximum annual number of overtime hours shall be reduced in the same proportion that exists between those working days.

For the purposes of the provisions of the preceding paragraph, overtime that has been compensated by rest within four months of being worked shall not be computed.

The Government may abolish or reduce the maximum number of overtime hours per specified period, either generally or for certain sectors of activity or territorial areas, in order to increase employment opportunities for unemployed workers.

3. Excess hours worked to prevent or repair accidents and other extraordinary and urgent damage shall not be taken into account for the purposes of the maximum length of the ordinary working day, nor for the calculation of the maximum number of authorised overtime hours, without prejudice to their compensation as overtime.

4. Overtime work shall be voluntary, unless it has been agreed in a collective agreement or individual employment contract, within the limits of paragraph 2.

5. For the purposes of calculating overtime, the working day of each worker shall be registered day by day and shall be totalled in the period established for the payment of remuneration, and a copy of the summary shall be given to the worker in the corresponding receipt.

-Ley de infracciones y sanciones en el orden social (Act on Infringements and penalties in the social order, Royal Legislative Decree 5/2000 of 4 August).

Article 7. Serious infringements.

These are serious infringements:

(...)

5. The transgression of the rules and legal or agreed limits on working hours, night work, overtime, additional hours, rest periods, holidays, breaks, leave, working hours registration and, in general, the working time referred to in Articles 12, 23 and 34 to 38 of the Workers' Statute.

3. Remarks:

a) -On current rules:

5. The legal rules on the matter are limited to the provisions of Article 35 of the revised text of the Workers' Statute Act, approved by Royal Legislative Decree 2/2015, of 23 October, which, in its first section, defines the concept of overtime in the following terms:

Overtime shall be considered to be those hours of work that are performed over the maximum length of the ordinary working day, set in accordance with the previous article.

6. The same article refers to the collective agreement for regulation, setting a limit:

By collective agreement or, failing that, by individual contract, there shall be a choice between paying overtime in the amount to be fixed, which in no case may be less than the value of the ordinary hour, or compensating it by equivalent paid rest periods. In absence of an agreement in this respect, it is understood that the overtime worked must be compensated by rest within four months of its completion.

7. Collective agreements in the Spanish system are binding and effective erga omnes, as can also be seen in Article 37 of the Spanish Constitution, transcribed above.

8. Thus, the same Article 35 of the Workers' Statute, which regulates overtime, refers to the collective agreement for the regulation of a right of option, which allows workers to choose between payment or rest as a form of compensation for overtime. In the absence of a collective agreement, this matter can also be regulated by means of an employment contract.
9. The legislator also leaves it up to the collective agreement to set the value of overtime, provided that it is guaranteed that this cannot be lower than that set for ordinary working hours. In this case, in the absence of agreement, it is understood that the overtime hours worked must be compensated by rest within four months of being worked.
10. In addition, Article 35(2) of the Workers' Statute establishes an annual maximum of 80 hours of overtime, while Article 35(4) establishes the principle of voluntary overtime.
11. With particular reference to the amount of compensation (either financial or in terms of time or both), it should be remembered that the current rule (which establishes a minimum amount of compensation for overtime equivalent to the amount of the ordinary hour) replaced a previous regulation which provided for an increase in the amount of compensation for overtime of at least 75 per cent of the value of the ordinary hour. This reform was introduced in 1994 by Act 11/1994 of 19 May 1994, which amended certain articles of the Workers' Statute, the text of the Labour Procedure Act and the Act on Infringements and Penalties in the Social Order.
12. The elimination of this increase in the amount (as well as the suppression of other surcharges on work, such as night work, for example) was in line with the logic of making it easier (and also more flexible and cheaper) for companies to use their time. This meant, on the one hand, the suppression of the minimum legal surcharge on the amount of overtime compensation, without prejudice to the referral for its possible setting to collective agreements or, failing that, to individual agreement.

13. On the other hand, this amendment also entailed an increased in the use of overtime to deal not so much with extensions of the working day, but rather with an irregular distribution of working time. For this reason, the current law provides, for example, that overtime that is compensated with rest time within the four months following its completion does not compute for the purposes of the absolute annual limitation of 80 hours per year. In other words, if overtime is compensated in periods close to the end of the working day, it is understood to be a mechanism of irregular distribution so that, if the working time is calculated over the total period, the average working hours do not exceed the ordinary working hours.
14. Another aspect of the rules currently in force is the preference in the legislative option for compensation by means of rest, as a policy aimed at favouring a better distribution of employment and a consequent reduction in unemployment rates. This is one more element, among many others that have been put into practice in recent years, in the fight against unemployment. The final objective of the legal regulation is the elimination of overtime as a way of organising work activity.

b) -The measures taken by the Kingdom of Spain:

15. The collective complaint submitted by UGT states (paragraphs 34 and 35) that in Spain "practically one out of every two overtime hours is not paid (49%)" and that "the starkest reality highlights the great insufficiency of the current labour and social security inspectorate intervention to tackle this recurrent phenomenon".
16. However, the most recent data (2022) show a positive evolution of the Spanish government's action in this area, since according to the Labour Force Survey (E.P.A. in Spanish) the percentage of overtime worked and not paid has decreased in the period 2020/2022 by almost 19%, standing at 30.7%. Undoubtedly, both the regulatory measures introduced in recent years, which have imposed the legal obligation to establish a time register covering all types of contracts and all types

of working hours, including overtime, and the inspection and sanctioning function are beginning to have a positive impact. This obligation to register overtime is imposed in Article 35 of the Workers' Statute, transcribed above; furthermore, to give greater force to this obligation to keep a working hours register, the law has made it a specific infringement not to keep such a register (Article 7 of the Act on infringements and penalties in the social order, as we have seen), imposing the corresponding penalties on those who fail to do so.

17. Without prejudice to the above, the rule transposing Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union is now in parliamentary procedure as a Draft Bill. It is a Draft Bill to amend the revised text of the Workers' Statute Act (approved by Royal Legislative Decree 2/2015, of 23 October) and other provisions on labour matters, in order to transpose Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union (BOCG of 16 February 2024) into Spanish law; This law currently in the pipeline should include new regulatory provisions aimed at improving the monitoring of ordinary and extraordinary working hours.
18. As the complaint states, the Eurozone unemployment rate has reached an all-time low in December 2023. The average of 6.4% contrasts with the Spanish figure of 11.7% in the last quarter of the year, which is nevertheless almost 4.5% lower than the rate at the end of 2020 (16.13%). This positive evolution of the unemployment rate in Spain has been accompanied by an intense growth in the number of employed persons, which rose from 19,344,300 in the fourth quarter of 2020 to 21,246,900 persons in the fourth quarter of 2023. Despite all this, Spain maintains a remarkable unemployment rate within the Eurozone, and so the number of overtime hours should be reduced, as proposed by the collective complaint, because it is a form of business organisation that feeds precariousness and unemployment.

19. However, there are reasonable doubts as to whether the increase in the cost of overtime is really the right measure, i.e. a measure that could actually provide a negative incentive in the development of overtime. This contrasts with the fact that the measures implemented by the Kingdom of Spain to monitor working hours, as mentioned above, are making it possible to progressively reduce the total number of overtime hours and, in the future, will help to achieve the objective of completely removing unpaid overtime.
20. In the same logic, a social dialogue process has recently been initiated between the Ministry of Labour and Social Economy, the trade unions Comisiones Obreras (CC.OO.) and the UGT itself, as well as the employers' organisations CEOE and CEPYME, which aims to agree on the reduction of the maximum legal working day (40 hours per week). The Spanish government's commitment is that by 2024 the maximum legal working week will be reduced to 38.5 hours per week on an annual basis and by 2025 a maximum legal working week of 37.5 hours per week on an annual basis will be established. These measures, once agreed and transposed into law, should in no way encourage an increase in overtime, but rather the opposite, by absorbing the reduction in ordinary working hours by extending them through the use of overtime. For this reason, we do not agree with the argument in the collective complaint that the statutory increase in the economic value of overtime would have a beneficial effect on the distribution of work.
21. Paragraph 38 of the complaint refers to a so-called gender bias in the non-payment of overtime, the same complaint alleging discrimination proscribed by Article E of the revised European Social Charter. The complaint cites Labour Force Survey data for the years 2020 and 2021, in which women only received pay for 45% and 43.3% respectively of the overtime worked. In contrast, it must be said that the situation has clearly begun to improve, since by 2022 the percentage of overtime paid was 51.3%, which also demonstrates the effectiveness of the measures adopted by the Kingdom of Spain so far, without prejudice to the need to insist on or deepen them. Thus, the argument of the collective complaint is not shared on this point

either, since it is not clear to what extent the increase in the value of overtime proposed in the complaint would serve to alleviate the lack of payment of overtime.

22. Following on from the gender bias argument, the complaint states that part-time work has a greater impact on women (paragraph 39). Specifically, although there has been a slight reduction between 2020 and 2023, 73.91% of part-time contracts are signed by women.
23. Without prejudice to the foregoing, overtime and additional hours should not be confused either conceptually or materially. In the first case, they are hours worked over and above the legally or conventionally established maximum working hours. On the other hand, additional hours, which can be agreed exclusively for part-time contracts, involve the possibility of agreeing on specific increases in working hours that are shorter than the ordinary working hours, in which it is not possible to reach (let alone exceed) the maximum working hours established by law or by agreement for a full-time job (art. 12.c of the Workers' Statute).
24. The collective complaint also mentions in paragraph 40 that the legal regulation on time registration "*presumes a full-time working day if this obligation is not complied with*", whereas this presumption is not established with regard to ordinary working hours or overtime. In this regard, it should be borne in mind that the Draft Bill amending the consolidated text of the Workers' Statute Act and other provisions on labour matters, for the transposition of Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union (BOCG of 16 February 2024)¹, does amend Article 12.4.c) of the Consolidated Text of the Workers' Statute to establish such presumptions, thus satisfying the claimant's request on this point.

¹ https://www.congreso.es/public_oficiales/L15/CONG/BOCG/A/BOCG-15-A-8-1.PDF

4. In conclusion:

25. Article 35 of the Workers' Statute refers to the collective agreement (which is binding in Spain) for the regulation of the amount for overtime, establishing as a minimum limit (for such amount) the value of the ordinary hour: "By collective agreement or, failing that, by individual contract, there shall be a choice between paying overtime in the amount to be set, which in no case may be less than the value of the ordinary hour, or compensating it by equivalent paid rest periods".
26. Article 4 of the (revised) European Social Charter states that *"The exercise of these rights shall be achieved by freely concluded collective agreements, by statutory wage-fixing machinery, or by any other means appropriate to national conditions"*, so that the right of workers to an increase in remuneration for overtime does not necessarily have to be recognised in a legal text, insofar as it is set by collective agreements.
27. As a consequence of the legal regulation provided for in Article 35 of the Workers' Statute, the recognition of the right of workers to an increase in remuneration for overtime is not guaranteed by law but is left to collective agreements, so that the increase in remuneration for overtime is possible under the current law thanks to the participation of the social partners in collective bargaining.
28. Currently, 60.68% of all registered collective agreements contain clauses setting increased remuneration for overtime² . In addition, 20.14% of the agreements contain clauses whereby overtime is paid at a higher rate than ordinary hours and, as a complementary measure, allow overtime to be accumulated and compensated for in rest periods longer than those legally stipulated.

² These agreements cover 55.57% of workers.

29. However, as collective bargaining is dynamic and constantly changing, it is difficult to determine when (at what point in time and for which part of the wage-earning population) the entitlement to such additional remuneration might not be fulfilled.
30. Article 35 of the Workers' Statute itself establishes the obligation to keep a working-hours register for overtime. In case of non-compliance with this obligation, sanctions are imposed in the Law, as we have seen, so this request of the claimant is already covered, with the latest regulatory measures.
31. The measure proposed in the collective complaint (increasing overtime pay) could have the opposite effect to that intended. However, the measures implemented by the State to control the working day (such as time monitoring) are making it possible to progressively reduce the total number of overtime hours and, in the future, will help to achieve the goal of completely suppressing unpaid overtime. Reduction of working hours is another measure that would also help to achieve this and on which the government is working with those involved (employers and workers).
32. The Draft Bill amending the consolidated text of the Workers' Statute Act and other provisions on labour matters, for the transposition of Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union (BOCG of 16 February 2024)³ , does amend Article 12.4.c) of the Consolidated Text of the Workers' Statute to establish the presumptions mentioned in the collective complaint.
33. As regards the alleged infringement of Article E of the Charter on the basis of alleged discrimination on grounds of sex, it has not been proven that, if it exists, it arises from the regulation of the cost of overtime in Spain. Indeed, the fact is that it

³ https://www.congreso.es/public_oficiales/L15/CONG/BOCG/A/BOCG-15-A-8-1.PDF

is not clear why the increase in the value of overtime could alleviate this alleged situation.

In the light of the foregoing, the Kingdom of Spain respectfully requests the Committee to consider the present observations in relation to the collective complaint submitted, and by virtue thereof, to declare that the Spanish legal system is in full compliance with the revised European Charter of Social Rights.

In Madrid, 18 July 2024,

The Agent of Spain,

A handwritten signature in blue ink, appearing to read 'Alfonso Brezmes Martínez de Villarreal', with a long horizontal stroke extending to the right.

Alfonso Brezmes Martínez de Villarreal

5. Annex. Evolution of overtime by branch of activity

