29/06/2022 RAP/Cha/ESP/34 (2022)

EUROPEAN SOCIAL CHARTER

Comments by the Confederation syndical de Comisiones Obreras (CCOO) and

Unión general de trabajadores de España (UGT)

on the 34th National Report on the implementation of the European Social Charter

submitted by

THE GOVERNMENT OF SPAIN

Articles 2, 4, 5 and 6 of the European Social Charter of 1961
Articles 2 and 3 of the Additional Protocol of 1988

for the period 01/01/2017 – 31/12/2020

Report registered by the Secretariat

on 29 June 2022

CYCLE 2022

ALLEGATIONS OF THE CCOO AND UGT TRADE UNIONS IN RELATION TO THE 34th NATIONAL REPORT, PRESENTED BY THE SPANISH GOVERMNENT TO THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS, ON THE FULFILMENT OF THE EUROPEAN SOCIAL CHARTER (ESC)

THEMATIC GROUP ON LABOUR RIGHTS AND ADDITIONAL INFORMATION REQUIRED IN CONCLUSIONS XXI-3 (2018) OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS (ECSR)

June 2022

Spain has presented the 34th report, corresponding to the procedure for controlling the application of the European Social Charter of 1961 and the Additional Protocol of May 5, 1988.

Specifically, in this period, it involves analysing the **THEMATIC GROUP ON LABOUR RIGHTS, which consists of the following articles:**

- **2 (right to just conditions of work).**
- **4 (right to a fair remuneration).**
- **5 (right to organise).**
- **6 (right to bargain collectively).**
- **and Articles 2 (right to information and consultation) and 3 (right to take part in the determination and improvement of the working conditions and working environment) of the Additional Protocol of 1988.**

The Report likewise incorporates allegations on the ADDITIONAL INFORMATION REQUIRED IN CONCLUSIONS XXI-3 (2018) OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS SOCIALES (CEDS).

The reference period is from January 1, 2017, to December 30, 2020.

UGT and CCOO are the trade union organisations with the greatest representation in Spain, based on nationwide trade union elections. Consequently, we enjoy constitutional recognition for promoting and defending workers in Spain and abroad, forming part of international organisations with participatory status at the Council of Europe. We are therefore legally qualified to make these Allegations and submit them to the European Committee of Social Rights:

ALLEGATIONS

ON THE FULFILMENT OF ARTICLE 2: RIGHT TO JUST CONDITIONS OF WORK.

1.1.- On the declaration of non-compliance in relation to maximum weekly working hours.

Paragraph 1 – Establish reasonably daily and weekly working hours, progressively reducing the workweek, to the extent permitted by increased productivity and other relevant factors.

The CSR concluded that the situation in Spain did not comply with Article 2.1 of the 1961 Charter, because maximum weekly working hours may exceed 60 in the context of flexible working arrangements and with regard to certain categories of workers.

The situation in the reference and control period was worrying, and this is still the case, especially in relation to **certain categories of workers.**

According to the Report on the State of Social Security and Occupational Health in Spain of 2017[1], and in fulfilment of the 2017-2018 Action Plan of the Spanish Strategy for Occupational Health and Safety (EESST), 2015-2020, the Research and Information Department of the National Institute of Occupational Health and Safety (INSST) carried out the technical study "Analysis of professional drivers' working conditions," which was a specific application of the results of the European Working Conditions Survey (6th EWCS) for Spain centred on professional driving, studying the labour conditions of certain professions such as: cleaners, service personnel, professionals of law, culture, and professional associations, administrative and commercial personnel, metal workers, machinery operators and related trades, some workers of the construction sector, and healthcare professionals.

In relation to worktime, it is worth noting that, on average per month, professional drivers –according to the previous report– work almost 6 times more at night, extend their workweek for more than 10 hours per week on 3 occasions, and work twice as much on Saturday, and more than half did not have fixed working hours.

In the case of non-driving professionals –mentioned above– the figures are as follows: they work 3 times more at night, extend their workweek for more than 10 hours per week on 4 occasions, and work twice as much on Saturdays than other groups under observation.

Once again, in the case of drivers and for an important percentage of workers, there is also the fact that the workload and working times are unstable, with the resulting impact on their life and health, and for the development of basic rights and even of leisure.

According to the Universal Declaration of Human Rights (UN, 1948), leisure includes significant aspects and expressions, not only as an explicit right to rest, to the enjoyment of free time and paid periodical holidays. The same Article 24 of the Universal Declaration of Human Rights presents the other side of the right to work set out in Article 23 as not working in excess.

The right to leisure is a human need that is one more situation that enables the development of personality, social inclusion, and the promotion and reception of education and culture. It is therefore hindered and not respected with the abuse of behaviours and labour requirements that even go beyond production needs and should be corrected, and not merely sanctioned, by public authorities.

For example, the need for rest and leisure (and, of course, balancing work and family life), along with the precariousness of labour relations, increased the number of occupational accidents in 2017 compared to 2016 by 1.3%, resulting in 3,407 occupational accidents with temporary incapacity in the case of the above professionals, according to the aforementioned report.

In the same year, the building sector exceeded that amount with 7,465.5 occupational accidents with labour incapacity in the case of construction workers, also according to the same report.

The Industry Sector comes in second with regard to accidents, with 5,397.9, closely followed by the Agriculture Sector with 5,381.5, both of which are above average.

Only the Services Sector was below average, amounting to 2,677.0.

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1 file:///C:/Users/Susana%20Bravo/Documents/RESUMEN%20EJECUTIVO%20INSPECCI%C3%93N%20DE%20TRABAJO%20Y%20SEGURIAD%20SOCIAL%20A%C3%91O%202017.pdf

The accident rate increased in all sectors, except for the Services Sector, as follows: 5.9% in Construction, 4.6% in the Agriculture Sector, and 2% in Industry. The rate decreased by 0.4% in Services.

In relation to conventional regulation and using the same report above:

The decrease in the workweek compared to 2016, taking into account the fact that Article 34 of the Workers' Statute (WS) determines a 40-hour workweek on average, resulting in annual working time of 1,826 hours and 27 minutes, was only: 127.7 hours, which amounts to an average daily reduction of less than 1 hour.

On the other hand, the irregular distributions of working time throughout 2017 were negotiated in 831 collective agreements, resulting in an ordinary workday that may be longer than 9 hours, in 195 collective agreements, affecting more than 520,000 workers (regardless of what is stated below in point 1.2).

These are just some examples of how working time in Spain still does not comply with the regulation of the European Social Charter, because there has been a lack of legislative will to reduce it and adapt it to the aforementioned rights, perpetuating the situation that has existed since 1980.

The determination of the 40-hour workweek is still almost the same compared to the aforementioned year, being determined by Law 8/1980, of March 10, concerning the Workers' Statute, which is still in force with some slight changes.

This workweek can result in a workday longer than 9 hours, as long as a there is a 12-hour rest between workdays. The reduction of the workday has stagnated due to the permissiveness of the said regulation since it has not been limited again since then.

Although there have been agreements, collective agreements, company commitments, etc., that have resulted in a reduced workweek, this has not become generalised. On the contrary, the aforementioned lack of limitation, along with a perverse irregular distribution (which is discussed below) and a further lack of limitation regarding overtime (the regulation of overtime –also from 1995– in which overtime was reduced from 100 to 80 hours, the maximum amount per year) has resulted in a larger workweek that is more extended, which does not enable workers to organise, manage or reorder their rights: the right to equality as regards balancing work and family life, and the right to leisure.

We therefore believe that, in this regard, the workweek in Spain, and especially its gradual reduction over time, does not comply with the European Social Charter.

1.2.- In relation to the Committee's request for information regarding the regulations that apply to on-call time and the specific question about whether the periods of inactivity during the said time are counted, totally or partially, as rest time.

We believe that the right to reasonable daily and weekly worktime is not respected since companies are entitled to freely assign 10% of annual worktime, as an irregular workday, without this having to be authorised by collective bargaining, and without the need for reasons linked to the organisation or production circumstances to justify such.

The Committee points out that the reference period for calculating the average workday must not be greater than four to six months, or twelve months under exceptional circumstances

(General Introduction to Conclusions XIV-2). Extending the period up to twelve months by a collective agreement is acceptable if this is justified due to objective reasons, or technical reasons related to organising the work.

However, in Spain's labour legislation, starting from 2012 and down to the present, not only has this situation not been corrected but companies now have even more scope for establishing the workday, without the need for determining factors linked to objective reasons, or technical reasons related to organising the work, as indicated by the CSR, and without specifying an express authorisation of collective bargaining either.

Specifically, the labour reform introduced in 2012, endorsed by Law 3/2012, of July 6, concerning urgent measures for reforming the job market, incorporated the possibility that the employer could establish an irregular distribution of worktime throughout the year if this is not regulated by an agreement or collective agreement.

Article 34.2 of the WS stipulates the following:

> *2. By means of a collective agreement or, failing that, an agreement between the company and the workers' representatives, an irregular distribution of worktime can be established throughout the year.* ***If no such agreement exists, the company may distribute ten per cent of the worktime irregularly throughout the year.***
>
> *This distribution must respect, in any case, the minimum periods of daily and weekly rest contemplated in the law, and* ***the worker must be notified at least five days in advance regarding the day and time that the corresponding work is to be carried out.***
>
> *Compensation for the differences (hours in excess or short) between the workday carried out and the maximum duration of the legal or negotiated ordinary workday will be enforceable as per the collective agreement or, failing any specific direction, as agreed between the company and the workers' representatives. In the absence of an agreement, any differences derived from the irregular distribution of worktime must* ***be compensated within twelve months of taking place.***

Therefore, the decision to carry out an irregular distribution of 10% of the worktime unilaterally, without having to present any justification, corresponds to the employer, as long as no agreement exists in this regard. All that the regulation requires is respecting the minimum periods of daily and weekly rest (although these can be accumulated) and notifying the worker at least five days in advance regarding the day and time the work will be carried out.

Compensation for the differences (hours in excess or short) between the workday carried out and the maximum duration of the legal or negotiated ordinary workday can be made within twelve months of taking place.

This is undoubtedly an excessive period that omits the intervention of collective bargaining and any justification regarding the need for carrying out an irregular distribution of the worktime. This authority on the part of employer has a very negative impact on the workers' right to balance work and family life, especially in the case of female workers (as well as on leisure and rest time, as mentioned in the previous section).

We can cite some examples from Spanish courts as regards the interpretation of what work time is and is not, such as the Supreme Court (SC) ruling of April 6, 2022 (rec. 85/2020), which considers that the so-called "activatable days" of bodyguards (private security) should not be classified as worktime. This is mainly so because, during these days, bodyguards, who must be on call via mobile phone, do not have to be at a certain place determined by the employer and

can go about their daily or family chores, and do not have a certain period of time when they must report for duty. Under these conditions, the on-call time without providing a service "is not working time" because it does not prevent the worker from enjoying his personal and social life.

However, Supreme Court ruling 485/2020, of June 18, 2020 (rec. 242/2018), stipulates that, based precisely on the Court of Justice of the EU's ruling 485/2020, of June 18, 2020, (C-518/15, Matzak case), "it is apparent that on-call time is considered working time when the worker is obliged to remain in the company's facilities, or in any other place designated by the employer (even his/her own home), so as to respond to the employer's request within a short period of time, and which therefore limits his/her freedom of movement and prevents him/her from using his/her time freely for their personal interests and any activities they deem appropriate."

The application of these criteria leads Supreme Court ruling 485/2020, of June 18, 2020 (rec. 242/2018), to discard the on-call shifts under consideration by it from being considered working time, "since it has been proved that the workers are not obliged to remain in a specific place during on-call shifts nor to respond to any incidents within a certain, brief period of time after being notified. They can therefore freely enjoy the social, personal, and leisure activities that they deem appropriate."

For its part, Supreme Court ruling 1076/2020, of December 2, 2020 (rec. 28/2019), which cites the aforementioned Supreme Court ruling 485/2020, June 18, 2020 (rec. 242/2018), reasons that the Court of Justice of the EU's ruling of February 21, 2018 (C-518/15, Matzak case) "has reached the following conclusions with regard to the configuration of the working time concept: the spatial element: working time requires that the worker is obliged to remain in the company's facilities or in any other place designated by the employer –including his/her home– to attend to the employer's request, and the time element, identified as a short response time to the employer's request to report to the workplace. Both elements, in short, must result in a limitation of the worker's freedom of movement and use of time for personal, family, and social interests."

We therefore believe that Spain ignores the Committee's criterion, expressed in the ECSR's decision on the merits of May 19, 2021, complaint 149/207, Confédération générale du travail (CGT) and Confédération française de l'encadrement-CGC (CFE-CGC) against Francia (published on November 10, 2021), which points out that: the right to reasonable working time ex Article 2.1 ESC excludes that any remote on-call time be considered rest time and should be mainly considered work, even if no effective intervention on the part of the worker takes place, especially if such on-call periods that coincide with rest time take place on days traditionally considered as non-working ones, such as Sundays (Article 2.5).

It therefore ignores the fact that the right to reasonable working time cannot be distorted by means of on-call time, which transfers to the worker the risk that productive tasks may not be continuous but broken down according to the company's service requests.

We therefore believe that the CSR should declare that:

- It is still apparent that the situation in Spain does not comply with the Charter's Article 2 § 1.
- Another infringement of the Charter's Article 2 § 1 is the regulation of the irregular distribution of up to 10% of annual working time, since this is an excessive reference period.

- The right to a reasonable workday and workweek is infringed due to the lack of explicit legal criteria on the calculation of working time. This has even led Spain's Supreme Court to determine that a worker's on-call time is not working time, also involving a lack of prior warning, except for a few moments in advance rather than a reasonable minimum notification time.

1.4.- On the declaration of non-compliance with regard to the right to paid annual holidays.

Paragraph 3 – Granting a minimum of four weeks of paid annual holidays.

The Committee concludes that the situation in Spain does not comply with Article 2.3 of the 1961 Charter since not all employees are entitled to at least two weeks of uninterrupted holidays per year.

This is an infringement of the Charter, to the extent that the law does not guarantee a minimum period of two consecutive weeks of holidays per year.

The legal regulation, Article 38.2 of the WS, merely declares that:

"*2. The period or periods of their enjoyment shall be established by mutual agreement and the worker, in accordance with what is established, where applicable, in the collective agreements on annual holiday planning (…)".*

Therefore, when collective bargaining does not guarantee minimum periods for taking holidays, it is left to individual agreements, without imposing any limit as regards the possibility of dividing up these periods. Moreover, in the absence of any agreement between the parties, the regulation does not establish a minimum period either, leaving it up to the legal authority to establish holiday periods without complying with any specific criteria.

An uninterrupted period of holidays, with the corresponding remuneration, forms part of the essential content of the right to holidays, which is linked not only to a reduction in working time but also to the capacity for recovering sufficiently in order to carry out personal or family activities, or tasks that require a designated time that is incompatible with a mere weekly rest, and with the balancing of work and family life, which is part of the right to equality. But also of the right to leisure and recreation that is necessary in today's society, in which the tourist sector has proved to be a means of channelling important social and cultural exchange activities, and leisure in which a very important part of our personality is developed.

Therefore, as mentioned above and like the right to holidays, the right to leisure forms part of the rest and rights established by the United Nations.

Until recently, the mention of leisure time or "being idle" had negative connotations. However, from a social and economic point of view, the situation of leisure has changed, acquiring considerations of greater value and, above all, great economic, commercial, and human importance. So much so that leisure channels social inclusion; social inclusion projects take into account leisure projects and also help to avoid undesirable situations such as drug addiction, disputes, and vandalism, among others.

Leisure is essential for an individual's development. Minors learn by developing their capabilities during leisure time. The right to play is a human right of childhood, and of adults, families, and social groups. Freedom is a necessity, one of the most important values of

humans, and it forms the basis of personal dignity. Leisure is a field in which freedom can be obtained.

Leisure defines societies and can also define forms of cultural expression. The level of leisure is quality and quantity for residents, as a determining factor of their wellbeing and their quality of life.

In relation to the right to work, to housing, to education, even to holidays, leisure appears in opposition to the exercising itself of the said right to work (rest, holidays, leaves, etc.).

The ownership of these rights extends to the person, to the individual that develops his/her existence as a social being, within a group, being extended to certain types of human groups, such as trade unions, political parties, associations, senior citizens, the disabled, etc.

It is therefore illegitimate to divide weekly rest into such small periods that they are incapable of satisfying the aforementioned objectives.

Surprisingly, however, a minimum period of holidays does appear for a certain type or category of workers, namely domestic workers. Article 9.7 of Royal Decree 1620/2011, of November 14, which regulates the special labour relationship of domestic workers, establishes that: *"The period of annual holidays shall be thirty calendar days, which may be divided into two or more periods, although at least one of them shall be at least fifteen consecutive calendar days."*

This highlights the great need for adapting and reducing working time in Spain. Therefore, we likewise believe that what is mentioned above, in relation to working time, is an infringement of the Charter.

1.5.- On the request for additional information to evaluate the situation regarding Article 2.4 of the Charter: To eliminate risks in inherently dangerous or unhealthy occupations.

Paragraph 4 – To eliminate risks in inherently dangerous or unhealthy occupations, and where it has not yet been possible to eliminate or reduce sufficiently these risks, to provide for either a reduction of working hours or additional paid holidays for workers engaged in such occupations.

The CSR points out that it requires additional information to evaluate the situation with regard to Article 2.4 of the Charter.

Labour legislation still does not recognise the compensatory measures established in the Charter for dangerous or unhealthy occupations, with regard to a reduction of working hours or additional paid holidays.

Royal Decree 1561/1995, of September 21, concerning special working time, only contemplates measures to limit the periods exposed to risk, but not the working hours or increasing paid holidays.

According to Article 23.1 "*Limitation of periods exposed to risk:*

"The periods exposed to especially harmful environmental risks shall be limited or reduced in those cases in which, despite the observance of applicable legal regulations, ordinary working time involves a special risk for the workers' health due to the existence of exceptional

circumstances of hardship, danger, unhealthiness or toxicity, without it being possible to eliminate or reduce the risk by adopting other suitable protective or preventative measures."

A reduction in working time is only guaranteed in the case of agricultural work, in those tasks that involve an extraordinary physical effort or especially arduous circumstances derived from abnormal temperature or humidity conditions (Article 24), and in work inside mines (Article 25) or construction or public works in underground environments (Article 29) and compressed air tanks (Art. 30).

On the contrary, there is no reduction in working time or increase in holidays in the case of work in cold-storage rooms (Article 31) or nightshift work (Articles 32 and 33 in relation to Article 36 WS), since all that is contemplated is a reduction in periods of exposure, or limitations in the irregular distribution of working time, respectively.

The purpose of the compensatory measures is to provide suitable relief and regulate stress and recovery time from fatigue, which is not the case if the worker is still at the company's disposal with the obligation to provide services, even if not exposed to risk or the same level of intensity.

Furthermore, the lack of a reduction in working time, or an increase in holidays, involves an economic stimulus for the business organisation to reduce the tasks subject to these arduous or dangerous conditions.

It is therefore necessary to establish a reference for the proportional reduction in working time with regard to each activity's maximum workday, linked to the level of danger, hardship, and the need for recovery and relief measures.

This should be a direct requirement of the system for evaluating the respective jobs, after exhausting the possibilities of reducing such risks.

Therefore, we also believe that the matter discussed in this section also infringes the Charter.

ON COMPLIANCE WITH ARTICLE 4: THE RIGHT TO A FAIR REMUNERATION.

2.1.- On the declaration of non-compliance with regard to Article 4, paragraph 1, concerning the right to a sufficient remuneration.

Article 4 – The right to a fair remuneration

Paragraph 1 – To recognise the right of workers to a remuneration such as will give them and their families a decent standard of living.

The Committee concludes that the situation in Spain does not comply with Article 4.1 of the 1961 Charter since the Minimum Wage for workers in the private sector and the Minimum Wage for personnel in public service are not sufficient to guarantee a decent standard of living.

We would like to point out that, in Spain, regulation of the Minimum Wage has been stimulated by the Committee's declaration (although we have also had to work hard to bring this about).

Specifically, in accordance with Royal Decree 152/2022, of February 22, which established the Interprofessional Minimum Wage for 2020: *"The aforementioned increase is aimed at putting*

into effect the right to a fair remuneration that suffices to provide a decent standard of living for workers and their families, in harmony with what is established by the European Committee of Social Rights, which has calculated this threshold as being 60% of the mean wage, guaranteeing the spending power of wages to deal with the cost of living, taking into account the general economic situation."

However, there are elements that do not guarantee the right to a just remuneration, when the remuneration paid by the company is not linked to respecting the value of the work assigned by the negotiators of the applicable collective agreement, or by the contract itself.

The above opinion is based on the jurisprudential interpretation in relation to the way the Interprofessional Minimum Wage is applied, when the collective agreement previously regulated the said salary regarding lower amounts.

According to the aforementioned jurisprudential doctrine –SSTS April 1, 2022, Rec. 60/2020, March 29, 2022, Rec. 162/2019, January 26, 2021, Rec. 89/2020 (the alleged facts take into account the control period)– when a worker receives a wage bonus that, in addition to the basic wage, attains the amount of the Minimum Wage, he/she receives the same remuneration as another person doing a job that is not entitled to such wage bonuses, to the extent that they both receive the amount of the Minimum Wage.

However, this interpretation clearly infringes the right to receive a fair remuneration because:

- When these wage bonuses are derived from doing arduous, dangerous work, or being in contact with toxic substances, they involve assigning a greater value to this work compared to when such circumstances do not exist. Moreover, this involves a clear financial cost for the company, so as to eliminate these conditions of risk for the workers' occupational health. By paying the same remuneration, the amount of the Minimum Wage, to those that work under these conditions and those that do not, the right to a fair remuneration is infringed, and this eliminates a measure for restricting conditions that put workers' health at risk, thereby going against the will of the collective agreement's negotiators, who assigned a higher wage to work carried out under such conditions, since the judicial doctrine, by applying the compensation established by labour regulations, absorbs and compensates the said amounts with the Minimum Wage.

  We believe that this infringes Article 2.4 of the European Social Charter.

- The same applies to nightshift work, or to shift work, which affects the valuation of fair remuneration, involving a financial cost in order to avoid these practices, and assigning a value to this work established by negotiations that the national practice supresses by applying the amount of the Minimum Wage.

- On the other hand, wage bonuses linked to seniority in the company express the value of the work derived from professional experience, and the worker's commitment to the company by carrying out his/her professional career therein.

  When they are absorbed in application of the Minimum Wage, the right to a fair remuneration is not respected and the right to bargain collectively, which assigns value to this experience, is infringed.

- Wage compensation is a measure that applies more intensely to groups with low wages, especially women and youths, who are the beneficiaries of the Minimum Wage. Nevertheless, they do not receive specific remuneration for arduous, dangerous, toxic, shift, and nightshift work or their experience in the company.

- The regulation expressly contemplates that the Minimum Wage will be increased by such bonuses. However, the practice accepted and generalised by the Supreme Court, Social Affairs Section, is to discount these amounts from the effective wage, by applying the regulation of absorption and compensation.

  Specifically, Article 2 of the annual Royal Decrees that established the Minimum Wage, stipulates: *"The Minimum Wage assigned in Article 1 shall be increased, serving as a module, where applicable, as established in the collective agreements and work contracts, with the wage bonuses referred to in Article 26.2 of the revised text of the Workers' Statute Law, approved by Legislative Royal Decree 2/2015, of October 23, as well as the amount corresponding to the guaranteed wage increase as a bonus or production incentive."*

  However, Article 28.5 of the WS stipulates that: *"The compensation and absorption shall be applied when the wages that are actually paid, as a whole and annual total, are more favourable for workers that those established by the corresponding regulations or conventions."* This means that the aforementioned does not correspond to the consideration of a decent wage with the said compensation and its application by our Supreme Court.

It is necessary to also highlight that women's average wage in 2019, 21,682.02 euros gross per year, amounts to a 19.50% wage gap compared to men's average wage for the same year, 26,934.38 euros, and to a 10.41% gap in relation to men's average wage in 2008, which amounted to 24,203.33 euros gross per year.

Another discrimination affecting women is access to employment. The discrimination experienced by women in their access to the job market lies in the fact that, in the case of an important number of women, they work part-time.

In the case of women, 24.88% of women work part-time, one in four, compared to 7.37% of men; 27.21% have a temporary contract, compared to 25.39% of men. In other words, women experience twofold discrimination in their access to employment, both in the type of contract and in the type of workday, resulting in lower remuneration.

Women with a temporary contract even receive 20.40% less than the average wage of women, and 25.39% less than female workers with a permanent contract, compared to 30.99% and 37.08%, respectively, in the case of men.

The temporary work rate can be considered as a measure that divides the wage-earning population: one part with well-regulated and -protected jobs, and another part that is vulnerable to economic ups and downs without being able to plan their lives. Temporary employment is a factor of precariousness.

Therefore, we also believe that, with regard to this matter, the aforementioned does not comply with the Charter.

2.2.- On the declaration of non-compliance with regard to Article 4, paragraph 2, on the right to an increased rate of remuneration for overtime work.

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

The Committee concludes that the situation in Spain does not comply with Article 4.2 of the 1961 Charter because the Workers' Statute does not guarantee the granting of an increased rate of remuneration, or an increase in compensatory free time, due to overtime work.

This non-compliance with the Charter had already been observed by the Committee in the past, and there have been no changes in regulations or the national practice to avoid this situation.

Legally, there is no obligation to increase the rate of remuneration (either in the form of time or money) to compensate for overtime work.

According to data from the 2017 Active Population Survey (APS), there was an average of five million eight hundred thousand hours of overtime work **per week**.

However, what is even more alarming is that almost half of them were unpaid, even though this figure (unpaid overtime) was smaller in 2016 and 2017, compared to 2015. Neither were Social Security contributions made for these unpaid hours of overtime, which were not compensated for with rest time either. This has therefore become a practice with an important impact on workers' rights, and on public income and public services.

Furthermore, the percentage of hours of overtime increased by 1% in 2017, compared to 2016. However, that year, unpaid hours of overtime decreased by 14.5%, coinciding with an Employment and Social Security Inspectorate (ITSS in Spanish) campaign regarding working time, which checked whether companies were using systems to record daily worktime.

We have been promoting the consideration of new elements in our legislation to adapt the regulations to society's demands and to provide greater protection for workers, putting an end to these infringement situations that no job market can put up with.

However, Article 34.1 WS stipulates that (…) "by means of a collective agreement or, in its absence, an individual contract, the worker can choose to be paid for the overtime work according to the established rate, which cannot be less than the ordinary rate under any circumstances, or be compensated with an equivalent number of hours of paid rest. In the absence of an agreement in this regard, it shall be understood that the hours of overtime must be compensated for by means of rest time within the following four months."

And, moreover, this lack of guarantees is more serious in the group subject to a part-time contract, where any work carried out beyond the agreed hours is not considered overtime but, in the words of national legislation, "supplementary hours," which are paid at the same rate as normal time.

A group that works part-time but also does overtime. Proof of this is an example, taking into account the National Employment Institute's Three-monthly Survey of Labour Costs, that shows that part-time workers in the Castile and Leon region worked an overage of 0.51 hours of overtime per month in the second quarter of 2017. The figure was less than half in the same quarter in 2016 (0.24) and only amounted to 0.05 in 2008.

The Charter is therefore infringed not only due to a lack of extra remuneration or compensation in the case of overtime. It is also infringed by not granting the same treatment to overtime worked by part-time workers, mainly women, that is considered supplementary hours, and not establishing appropriate limits to prevent fraudulent hours of overtime that infringe other workers' rights, with serious consequences for their health, rest and leisure time, and the corresponding lack of contributions and payment of such.

2.3.- On the declaration of non-compliance with regard to Article 4, paragraph 4, on the right to a reasonable period of notice for termination of employment.

Paragraph 4 – To recognise the right of all workers to a reasonable period of notice for termination of employment.

The CSR concludes that the situation in Spain does not comply with Article 4.4 of the 1961 Charter since the two-week period of notice is not reasonable for workers with more than six months of service; also, in the case of the employer's incapacity or death, there is no period of notice, as is true for workers during their trial period.

This situation has not been modified, which means that non-compliance still exists.

This measure is aimed at providing workers with a reasonable time in order to seek employment in the job market, before the termination of their employment.

This is not an inconvenience that can be compensated for by possibly receiving unemployment benefits. Having to apply for unemployment benefits due to not being given a period of notice causes direct inconveniences to workers, not only by reducing the time that such benefits can be received but also due to the regulation of these benefits when they are received. In this case, such benefits are cancelled due to working for more than twelve months, which means that the new job does not entitle the worker to receive unemployment benefits for more time. Rather, the legislation obliges the worker to choose between the unused benefits from the previous period and the period generated by the new job, without being able to accumulate both.

Therefore, the lack of a compulsory period of notice in such cases means that the worker cannot begin to look for work in advance. Moreover, there is no obligation on the part of the employer to pay the worker's salary for the omitted period of notice.

It is therefore necessary to ensure that, in all cases of termination of employment, there is **a 2-week period of notice for contracts of less than six months, unless the contract establishes the date on which it terminates at the time of its signing, and a 4-week one for contracts of more than 6 months.**

The only exception would be the case of termination due to serious non-fulfilment of the contract, when it would not be reasonable to continue providing services while working out the period of notice, since this would be harmful to the company.

ON COMPLIANCE WITH ARTICLE 6. THE RIGHT TO BARGAIN COLLECTIVELY.

3.1.- On the declaration of non-compliance with regard to Article 4, paragraph 2, in relation to establishing collective bargaining procedures.

Article 6. The right to bargain collectively

Paragraph 2 – To promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

The CSR concludes that the situation in Spain does not comply with Article 6.2 of the 1961 Charter, since the legislation enables employers to unilaterally not apply the conditions negotiated in Collective Agreements.

The new regulation promoted by Royal Decree-Law 3/2012, mentioned above, has revised in depth the legal system of "the substantial modifications in working conditions" established in Article 41 of the Workers' Statute. It now empowers the employer to unilaterally change very important working conditions established by pacts or collective agreements subscribed with the workers' representatives who are legitimised to make general agreements, after holding, although only on some occasions, a period of consultation that ended in disagreement.

This authority granted to the employer to freely change the working conditions contained in a pact or collective agreement, including such important matters as wages or working time, even against the opinion of the workers' representatives, is an infringement of the guarantee regarding the binding force of collective agreements, whose essential content involves granting any instrument that arises from collective bargaining "between representatives of the workers and employers," regardless of its personal application and content, an automatic and binding application.

We cannot accept that agreements attained within the company between the employer and the workers' representatives are not protected against the employer's unilateral decision, since they are undoubtedly an expression of the right to bargain collectively, although the national legislation does not call them "collective agreements," since they regulate specific matters rather than all working conditions. However, these are matters that establish working conditions, such as working time, wages, professional promotion, social improvements, or severance pay. It is therefore not admissible that the formal name of the instrument enables the employer to modify the agreement unilaterally.

Therefore, with all due respect, it must be said that this situation does not comply with the Charter during the control period.

3.2.- On the request for additional information regarding the circumstances in which a company agreement has priority over a national sectorial agreement.

The CSR requests information about the circumstances in which a company agreement has priority over a national sectorial agreement and to what extent. As mentioned in Section 1, this is a matter that does not fall within the content of the Charter's Article 6.2.

The CCOO and UGT trade union organisations would like to highlight the new regulation that came into force after Royal Decree-Law 32/2021, of December 28, concerning urgent measures for labour reform, the guarantee of job stability, and the transformation of the job market, which involves rectifying the reform carried out in 2012, particularly with regard to this point.

Article 84.2 of the WS, after Law 3/2012, established the priority of the company agreement in relation to wages, as opposed to the wage established in the national sectorial agreement. This even takes precedence over the interprofessional agreement contemplated in Article 83.2 of the WS, which established the collective bargaining structure, in relation to the basic conditions determining the content of the labour relationship, such as wages, workday, working time, functions, balancing work and family life, complementary welfare schemes, etc.

What the 2012 reform did was, purely and radically, without any conditions, reduce the binding nature of sectorial collective bargaining, regardless of this having been agreed and subscribed by the most representative trade union and employers' organisations at the national and regional level. This was the case even though certain agreements, in the exercising of collective autonomy, such as II AENC of January 25, 2012, negotiated between the social representatives: UGT and CCOO, and CEOE and CEPYME, established the structure of collective bargaining, determining the matters that should be regulated by a company agreement, or set out minimum labour rights, such as the sector's minimum wage, or maximum workday, or similar measures.

The immediate consequence of this legislative change was the lack of freedom to negotiate, in accordance with the negotiators' reciprocal interests, the rules governing the negotiating structure and the solution to conflicts between the collective agreements governing a certain sector, or in a specific territorial scope of an interprofessional nature. And this directly and openly opposed the constitutional right to bargain collectively, in relation to or connection with the right to free association recognised in Arts. 37.1 and 28.1 EC, as well as the regulations and principles guaranteed by the ILO's Conventions 98 and 154, and by Article 6 of the European Social Charter.

However, the change in the regulations that took place in 2021 did not modify the consequences that, during the years from 2012 up to the change, arose in the negotiating structure and the highly negative impact on the rights of workers, who experienced a setback without any relief as regards their own right to promotion and defence by means of their representatives: the trade unions, and the impossibility of attaining stable agreements and rights due to the said regulations, consequences that are difficult to undo.

We must therefore conclude that this matter does not comply with the Charter during the control period.

3.3.- On the request for additional information about establishing conciliation and voluntary arbitration procedures.

Paragraph 3 – To promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes.

With regard to the Spanish situation in relation to Article 6.3, the Committee requires additional information in order to make an evaluation, and requests information about this matter.

The 2012 reform established compulsory arbitration by means of a public agency: the National Consultation Commission for Collective Agreements (CCNCC in Spanish), ex Article 82.3 of the WS.

As highlighted by these trade union organisations, the European Social Charter promotes voluntary autonomous (or out-of-court) procedures (Article 6.3 of the CSR) to settle disputes. However, this is not the case for compulsory procedures under any circumstances.

This measure also infringes the right to strike, which is protected by the Charter's Article 6.4, to the extent that the said compulsory arbitration drastically reduces the right to strike, since the new instrument establishes working conditions without any trade union guarantees or participation, and limiting the possibility of striking as an instrument of trade union pressure, in order to negotiate, where appropriate, the said working conditions (agreements that put an

end to a strike are to be applied *erga omnes*, i.e. they are of general application, such as a statutory collective agreement).

This regulation likewise infringes Article 3 of the Additional Protocol since it restricts the negotiating capacity of the organisations representing workers, by imposing compulsory arbitration in situations determined by the said Article 82.3 of the WS.

In relation to 2021, however, which is outside the control period, we would like to highlight something new that clarifies the abovementioned Royal Decree-Law 32/2021, of December 28, namely, the voluntary nature, in the case of the negotiating parties, of arbitration, as a system for settling disputes during the negotiating process.

It is regulated in Article 86.4 of the WS, paragraph two:

> "*Likewise, as long as an express (previous or contemporary) pact exists, the parties shall subject themselves to the arbitration procedures regulated by the said interprofessional agreements, in which case the arbitration ruling shall have the same legal force as collective agreements and can only be appealed in accordance with the procedure and on the basis of the grounds established in Article 9."*

This regulation requires an agreement between the parties, and such parties are the negotiators of the collective agreement. This means that it is impossible for interprofessional agreements to establish the arbitration commitment's nature. It likewise rescinds the legal presumption of the arbitration's compulsory nature in the absence of any indication in the interprofessional agreement, and it preserves an essential requirement of arbitration as a tool for settling disputes, namely its voluntary nature, leaving the regulation of working conditions by virtue of the collective agreement to be derived from the negotiators' will, and not that of third parties, which is at the core of the right to bargain collectively and free association.

However, there has been no change in the regulation, which is therefore still in force, as regards the process of modifying working conditions when these are determined by a collective agreement, ex Article 82.3, or in implementing provisions stipulated by the aforementioned agency: the CCNN, whose Royal Decree 1362/2012, of September, which regulates the National Consultation Commission for Collective Agreements, still makes arbitration binding.

We therefore believe that all of this does not comply with the European Social Charter.

3.4.- On the declaration of non-compliance with regard to Article 6, paragraph 4, on the right to strike.

Paragraph 4 – The right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.

The Committee concludes the situation in Spain does not comply with Article 6.4 of the 1961 Charter, since the legislation authorises the Government to resort to arbitration to put an end to a strike in cases beyond the scope contemplated in Article 31 of the 1961 Charter.

This is something that has not been revised, especially in view of the fact that, in practice, what is observed is the use of different mechanisms on the part of public authorities to override the right to strike.

Restricting the right to strike is carried out in accordance with this article's second paragraph, which empowers the government to determine minimum services (with governing authority).

In strikes affecting essential services for the community, when agreement on minimum services has not been attained, the government has been imposing disproportionate minimum services that, in effect, restrict the right to strike. Although they can be legally appealed, the court's rulings, determining whether they are abusive or not, are usually delivered after the strike is over, while, in the meantime, the imposed minimum services are compulsory.

Practically all the rulings regarding legal appeals of abusive minimum services have been made in favour of trade unions. However, by then the strike was over and the right to strike had been consciously limited, since the minimum services imposed in the case of essential services for the community have been attaining 100% of the workers assigned to them, or between 80% and 100%, based on the abusive use of the legal capacity to impose incomprehensible minimum services.

On the other hand, minimum services are established in services that are not essential in this regard, while favouring the error of negotiating minimum service in private establishments.

No service is essential per se. The corresponding service –transportation, education, healthcare, etc.– is essential or not depending on the size and scope of the strike. A service's essential nature is not the same in a general strike as in a strike in a certain sector, e.g., transportation. However, the Government also ignores this need for considering the essential nature or not of a certain public service by trying to unify all services as essential and, therefore, also infringing the right to strike, since if a service's essential nature was reduced due to the scope of the strike, then it would not be necessary to impose certain minimum services that, therefore, may be abusive.

For example, a ruling on the need for establishing minimum services in education, due to the parents' need to work in other sectors (i.e. the need for a nursery service rather than an educational one, while schools close on Saturdays and Sundays, and on official holidays during the week without there being any problem), is used to justify the establishing of minimum services in universities. This is undoubtedly unnecessary and such minimum services would be abusive.

Therefore, we likewise consider that the matter considered in this section does not comply with the Charter.

REQUEST.

AND, IN VIEW OF THE ABOVE, CCOO and UGT hereby submit to the European Committee of Social Rights the above Allegations to the 34th Report presented by the Spanish Government, highlighting:

- **The repeated non-compliance on the part of the Spanish Government.**

- **The insufficient information provided by the Spanish Government, in relation to the indicated aspects, in all of this report's sections.**

- **The infringement of the European Social Charter in the aspects cited in each of the above sections, and of all the articles referred to by these Allegations.**

And calling for the adoption of the necessary measures to ensure the labour and social rights guaranteed by the said instruments.