EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

20 April 2022

Case Document No. 1

Unión General de Trabajadores (UGT) v. Spain
Complaint No. 207/2022

COMPLAINT

Registered at the Secretariat on 24 March 2022

COLLECTIVE COMPLAINT
(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

UNION GENERAL DE TRABAJADORES (UGT)
Avenida América, 25 28002 Madrid
Spain
email: flujan@cec.ugt.org ; sindical@cec.ugt.org

SUBJECT MATTER

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1. Subject matter of the collective complaint

Through this document concerning the Kingdom of Spain, the Union General de Trabajadores (UGT), represented by its Secretary-General, José María Álvarez Suárez, and its Vice Secretary-General for trade union policy, Mariano Hoya Callosa, with legal assistance overseen by Fernando Luján de Frías, lawyer, member no. 43.294 of the Colegio de Abogados de Madrid (Spain) [Bar Association], Confederal Secretary of the UGT, asks the European Committee of Social Rights (ECSR) to declare that **the provisions of Article 56 of the Estatuto de los Trabajadores [ET - Workers' Statute] and Article 110 of the Ley Reguladora de la Jurisdicción Social** [LRJS - Law governing employment courts] and other provisions in its rules on dismissals found to be unlawful (unfair dismissals) due to lack of justification, lack of grounds or artificial or bogus grounds, on disciplinary grounds or for objective reasons (Art. 53.5 ET refers to Art. 56) **openly contradict Art. 24** (right to protection in the event of dismissal) **of the European Social Charter (Revised)** (ESCR).

More specifically, the subject matter of the collective complaint is the mechanism for calculating compensation established by the above-mentioned regulation in the event of unjustified dismissal (unfair in domestic law): **the employee is entitled to compensation predetermined purely automatically by law,** and settled simply by reference to length of service, with a cap set in accordance with the latter (maximum legal ceiling). **The resulting compensation is global, exclusive and not connected to compensation for harm caused**, in accordance with decades of settled case-law, such that it is not effectively possible for a court to assess and recognise major damage suffered by an employee as a result of dismissal without just cause or on bogus grounds. In addition, **this involves in practice the standardisation of reduced compensation,** which is clearly **insufficient to fully compensate for damage** arising out of unfair, fraudulent or abusive dismissal, **and** is completely unrelated to **any dissuasive purpose** of the compensation with respect to unlawful dismissals.

2. Regulatory framework of the Spanish State on unlawful, artificial or bogus dismissal

2.1. Legislation applicable to unfair dismissal prior to the 2012 reforms to the Workers' Statute (Article 56 of Royal Legislative Decree 2/2015 of 23 October 2015, approving the recast text of the Law on the Workers' Statute) and the Ley Reguladora de la Jurisdicción Social [Law governing employment courts] (Article 110 of Law 36/2011 of 10 October 2011)

2.1.1. Right to reinstatement: a solution of limited scope in Spain following successive legal reforms, except in the case of invalidity (exceptional solution)

In Spanish labour law on private employment relationships, the right to mandatory reinstatement for a worker dismissed without just cause (unfair dismissal) or on unlawful or bogus grounds (fraudulent or abusive dismissal) is determined in most cases by the respective undertaking. According to Article 55 ET, prior to the 2012 labour reform, dismissal without just cause or on bogus or artificial grounds was classified as "**unfair dismissal**" (Art. 55.4 ET). In this case, the undertaking may opt for reinstatement or compensation. According to Art. 56 ET (and Art. 110 LRJS [Ley Reguladora de la Jurisdicción Social - Law governing employment courts]), **the option for compensation will entail the annulment of the contract of employment, which shall be deemed to have taken effect on the date of the actual cessation of work.** If neither method is specified, it is deemed to have taken effect by the reinstatement of the unfairly dismissed employee.

In the pre-2012 version of these provisions, either the party concerned opted for reinstatement or the undertaking decided to pay compensation, in which case the employee would be "entitled to post-dismissal remuneration during proceedings". The latter was equivalent to an amount equal to the sum of the remuneration unpaid between the date of dismissal and the date on which notice of the judgment declaring the dismissal to be unfair is served or the date on which the worker takes up other employment, if he is recruited before judgment is delivered and if the employer is able to furnish evidence of the sums paid so that these may be deducted from the outstanding remuneration.

This solution worked both for dismissals for disciplinary reasons and for dismissals for objective reasons (economic, organisational, on grounds of incapacity, absenteeism in the workplace - the latter being repealed in 2020). Article 53 ET (and the procedural mechanism compatible with that substantive provision) has frequently referred to Art. 56 ET. Reinstatement of the employee has therefore been used in Spain as an exceptional and moderately effective solution, so that essentially, and although Spain has ratified ILO Convention 158 (Art. 10 of which covers reinstatement as a more effective response, even if it is not imposed), only three exceptions were considered:

a) **Invalid dismissal**. A finding that a dismissal is invalid entails mandatory reinstatement. Invalidity is **an exceptional solution in Spain**, envisaged only for dismissal in breach of fundamental or discriminatory rights (Art. 55.5 ET), or when expressly established by law (e.g. dismissal without authorisation for collective dismissals - in the version prior to the 2012 reform).

It is interesting to note that since the 1994 reform, the law and social case-law have declined to classify such dismissal without just cause or on bogus or artificial grounds as invalid. The case-law was different prior to 1994, since fraudulent or abusive dismissal (i.e., without genuine cause or on grounds fabricated by the

undertaking), was recognised as eligible for mandatory reinstatement. In addition, in that legal reform the invalidity of dismissal on grounds of procedural defect was eliminated, and therefore once again the possibility of mandatory reinstatement was substantially reduced.

b) Unfair dismissal of persons in labour and/or trade union representative positions. In this case the option for reinstatement or compensation lies with the trade union representative employee (Art. 56.4).

c) Unfair dismissal in the event that a contractual provision grants the option to reinstate or compensate the employee. This approach has hardly been taken in practice, except in a very limited number of agreements in public employment.

2.1.2. The right to compensation: automatic compensation model, but involving greater amount plus outstanding remuneration, except for dismissals involving breach of fundamental rights

Other than in exceptional cases in which mandatory reinstatement (invalidity of dismissal) was appropriate, or in rare cases in which the undertaking opted for reinstatement by a freely adopted decision, the legislative response to unfair dismissal (without just cause, on artificial or bogus grounds or fraudulent or abusive grounds) was the right to legally assessed compensation, besides the damage actually caused by the decision and its dissuasive function or otherwise, as the general rule. This right involved two elements:

a) The right to lawfully fixed or predetermined compensation for the hypothetical damage caused by the unjustified dismissal (unjust or improperly structured).

The compensation was calculated (prior to the 2012 reform) **at the level of 45** days' salary per year of service **(length of service of the employee in the employment relationship), with a limit of 42 monthly payments.** Compensation is established in accordance with length of service (determined by the beginning of the labour relationship, taking all kinds of labour contracts into account, including time worked via temporary employment agencies - known as ETT in Spain), and salary - the larger the salary and the greater the length of service, the greater the compensation. The compensation amount was therefore established solely according to this dual criterion - length of service and salary - without considering any other parameter or criterion that would make it possible to identify either a full remedial effect or a dissuasive effect.

b) **Post-dismissal remuneration during proceedings.** This is equivalent to the remuneration payable to the employee from the time of termination, given the immediate enforceability of dismissal for business reasons. Prior to the

2012 labour reform it was recognised not only in cases of invalidity of dismissal and mandatory reinstatement, but also for dismissals declared by a court to be unfair, whether reinstatement is granted or compensation is opted for, except in certain cases involving the release of these sums, which are also dependent on the business decision (e.g. immediate recognition of the illegality of dismissal and payment into court of the respective amount).

Accordingly, post-dismissal remuneration during proceedings formed part of the compensation as a concrete form of "*lucrum cessans*" (income foregone). This rule largely reflected an attempt by Spanish law to respect the right to adequate compensation for damage and losses suffered, as provided for in Art. 10 of ILO Convention 158.

2.2. Existing legislation on unlawful dismissal (dismissal without cause or bogus or artificial dismissal) after the 2012 reform

2.2.1. Objective and grounds for the reform: reduction in compensation for dismissal without cause or with real cause (illegality) as an essential adjunct to a model for reducing labour costs to stimulate business competitiveness

In such conditions, the 2012 labour reform represented a further turn of the screw restricting the right to adequate compensation. The reasons for this were purely economic and market driven, so that **devaluing the cost of unjustified dismissal was legally assumed to be suitable for creating employment**, despite the fact that it significantly reduced protection against arbitrary dismissal.

To that end, firstly Royal Decree Law 3/2012 and subsequently Law 3/2012 provided the wording that is actually used in the aforesaid Articles 56 ET and 110 LRJS, according to which:

a) Compensation for unfair dismissal (without just cause, arbitrary or fraudulent) **is reduced** (for employment relationships entered into since the date of entry into force of the reform) **from 45 days to 33 days** (around 30% less), while the maximum ceiling established **changes from 42 to 24 monthly payments** (almost 50% less).

b) **Post-dismissal remuneration during proceedings is eliminated** (amount equivalent to loss of earnings for the period of cessation of dismissal until the decision that declares the illegality), unless the undertaking opts for reinstatement (unfair dismissal), or this becomes mandatory (invalid dismissal).

Spanish law thus not only maintains a strict automaticity (simple legal predetermination) in the method for calculating compensation for dismissals without just cause or on bogus or incorrect grounds (arbitrary dismissals), but also the criteria for establishing it are reduced so that the resulting amount is lower. In addition, criteria for taking actual damage into account (loss of earnings), such as "post-dismissal remuneration during proceedings", now depend, in the case of unfair dismissal, on the undertaking, which means that the general rule will be to abandon them completely.

The reduction in the standard of protection against unfair dismissal in Spain was explained by the legislature in the statement of reasons as follows:

"**In order to improve labour market efficiency it is thus deemed necessary …. The traditional compensation for unfair dismissal of 45 days' salary per year of service… is an element… that distorts the competitiveness of companies, particularly smaller ones in times such as these when it is difficult to access sources of funding**".

With respect to the second measure for restricting compensation, depriving it of elements compensating for in rem damages as well as deterrence effects and the elimination of post-dismissal remuneration during proceedings, the statement of reasons explains as follows:

"… **the non-payment of post-dismissal remuneration during proceedings is justified by the fact that the duration of court proceedings does not appear to be an adequate criterion for compensating for the loss arising out of loss of employment**…. Otherwise, **post-dismissal remuneration during proceedings sometimes acts as an incentive for procedural delaying tactics**, in addition to the fact that it ends up by becoming a cost which is partially shared, given the provision that the business will be able to claim against the State for the part of such wages that exceeds 60 days."

The questions of constitutionality raised by these reforms in an important aspect of Spanish social jurisdiction were resolved in favour of their legitimacy at this stage of the multilevel system of protection of social rights, though it was met with a variety of dissenting opinions (see TC [Tribunal Constitucional] Order 43/2014 of 12 February 2015 and STC 8/2015 of 22 January 2015). To justify the reasons for this compensation system, which is set out by law and involves reduced sums, Spain's Constitutional Court expressly accepts that this legislative decision arises out of a purely economic appraisal of its market impact, whether economic (favouring competitiveness) or labour (possibly creating employment). The Constitutional Court is aware that this purely economic-commercial view "is not uncontested among the experts". However:

"…what is clear is that this idea has been a feature in many of our labour legislation reforms since 1994, in which, through either mechanism, stress has been laid both on reducing compensation for particular dismissals (1997 reform) and limiting post-dismissal remuneration during proceedings (1994 and 2002 reforms). However, in the light of the current economic crisis and the high unemployment

rate… Royal Decree Law 3/2012 has also once again opted for this formula as a means to foster employment and efficiency in the labour market…"

For the Spanish TC, Spanish law has full legislative discretion for that purpose, since it would involve:

"…**a legislative policy option which… is linked to other precedents… and which in constitutional law corresponds to passing judgment on… the opportunity, suitability or effectiveness of the measures introduced** (SSTC 182/1997 of 28 October 1997, FJ 4; 332/2005, 15 December 2005, FJ 7, and 64/2013 of 14 March 2013, FJ 2).

For the Spanish TC and TS, this system does not contradict Art. 10 of ILO Convention 158, despite the fact that its Art. 12(a) provides for the social right to compensation for termination of services "the amount of which shall be based inter alia on length of service and the level of wages…", i.e., despite making provision for the fact that there are other criteria for its calculation, rather than the level of wages and simple length of service alone. As yet, no comparison has been made with Art. 24 ESCR, as will be seen, since Spain had not ratified this version or accepted the collective complaints procedure, which is in fact the case at this time (via the declaration provided for in Art. D, ESCR). Along the same lines, the highest Spanish national courts have also not yet taken this international standard reflected by Art. 24 ESCR into consideration.

2.2.2. Severance payment for unjustified dismissal: standardisation in the practice of legally determined compensation of low actual amount

In the light of summary though precisely described legislation and its consolidated legal and constitutional interpretation (outside the critical minority that the dissenting opinions of constitutional decisions along such lines represent), it is clear that in Spanish law, **compensation for unlawful dismissal** (without just cause, without cause or on artificial or bogus grounds) **based on pure economic calculation and on parameters predefined automatically by law, with no margin for assessing actual damage (property, personal, loss of earnings, lucro emergente, *pretium doloris*, etc.), is the general rule.** This is indeed the system that has been followed in Spain for decades.

It is, however, no less certain that each labour law reform has focused on reducing these parameters. Thus, in short:

a) There was a fall in compensation for unfair dismissal (undue or without sufficient or actual cause) for relationships established after 12 February 2012, from 45 to a mere 33 days per year (or, which is the same, **it changed from being worth 3.75 days per month worked to a mere 2.75 days per month**). There is, therefore, a progressive approximation to the amount of compensation envisaged for appropriate objective dismissals, i.e., with due cause established and not connected to the will of the persons employed, generally in line with the needs of the undertaking (20 days per year of service with a limit of 12 monthly payments).

b) **The compensation provided for has a legally predetermined maximum ceiling** which also fell significantly, from 42 to 24 monthly payments. This means that from a certain length of service, the assessment of any damage caused by the unjustified termination decision is frozen.

The application of the above parameters (a and b) is highlighted in the following table, which lists the damages that would be payable to workers facing dismissal without just cause:

Length of service in years	Monthly compensation payments	Minimum inter-professional salary 2022 (€1 166.66*)	Average remuneration (€1 695.92*)	Most frequent salary (€1 540.81*)
1 year	1.1	€1 282.60	€1 865.51	€1 694.89
2 years	2.2	€2 565.20	€3 731.02	€3 389.79
3 years	3.3	€3 847.80	€5 596.53	€5 084.68
4 years	4.4	€5 130.40	€7 462.04	€6 779.57
5 years	5.5	€6 413.00	€9 327.55	€8.474.46
6 years	6.6	€7 695.60	€11 193.06	€10 169.36
7 years	7.7	€8 978.20	€13 058.57	€11 864.25
8 years	8.8	€10 260.80	€14 924.08	€13 559.14
9 years	9.9	€11 543.40	€16 789.59	€15 254.04
10 years	11	€12 826.00	€18 655.10	€16 948.93
11 years	12.1	€14 108.60	€20 520.61	€18 643.82
12 years	13.2	€15 391.20	€22 386.12	€20 338.71
13 years	14.3	€16 673.80	€24 251.63	€22 033.61
14 years	15.4	€17 956.40	€26 117.14	€23 728.50
15 years	16.5	€19 239.00	€27 982.65	€25 423.39
16 years	17.6	€20 521.60	€29 848.16	€27 118.29
17 years	18.7	€21 804.20	€31 713.67	€28 813.18
18 years	19.8	€23 086.80	€33 579.18	€30 508.07
19 years	20.9	€24 369.40	€35 444.69	€32 202.96
20 years	22	€25 652.00	€37 310.20	€33 897.86
21 years	23.1	€26 934.60	€39 175.71	€35 592.75
22 years or more length of service	24	€27 984.00	€40 702.04	€36 979.48

Source: Encuestas de Estructura Salarial. INE (2019, final statistical year).
*Salaries include the proportion of allowances.

It is once again easy to conclude that **there is an absolute disconnection between the harm brought about by dismissal and the compensation recognised by Spanish legislation**. A Spanish worker of 52 years of age (age at which the Spanish rules provide for a subsidy due to their very difficult employment situation), with two years' length of service in the undertaking, family responsibilities and having earned the most common salary, according to the Instituto Nacional de Estadística [National Statistics Institute], would receive €3 389.79 in compensation in the event of unjustified dismissal - the same as for a childless 25 year-old whose contract is terminated without just cause.

It is clear in both cases that compensation for unjustified, arbitrary and unlawful dismissal neither offers redress nor is dissuasive.

c) **To reinforce the calculation on a purely economic basis pre-determined by law, post-dismissal remuneration during proceedings, i.e., compensation for loss of earnings since dismissal, has been eliminated** (in Spain it is immediately enforceable once the employer takes the decision) until the judgment finding the unlawfulness, unless the employer decides to reinstate, which clearly occurs very rarely. In any event, the inclusion of this component of the prejudice of dismissal remains the prerogative of the undertaking, which may simply accept the increasingly lower compensation to avoid payment of that compensation for loss of earnings.

To complete the Spanish regulatory (and administrative) landscape of compensation for unfair or unjustified dismissal, or for incorrect dismissal, it should be noted that:

a) **even when the employer opts for reinstatement** and must assume responsibility for post-dismissal remuneration, **no reference is made to any possibility of claiming possible losses actually arising out of the dismissal** (actual loss and non-material or health damage - provided it does not constitute a violation of the right to personal integrity under Art. 15 of the Spanish Constitution) in the personal, family and property matters of the unfairly dismissed employee, even if they are reinstated. They therefore escape any action for compensation.

b) The same compensatory, automatic and identified mechanism arises in so-called **"indirect dismissals"** under Art. 50 ET, i.e., **contractual terminations effected by the employed persons, but because of serious breach of contract** (generally, though not necessarily, culpable) **by the undertaking.**

Furthermore, even when severance occurs due to a failure of the undertaking "which adversely affects the dignity of the worker", such as a substantial change in working conditions independently of the procedure established (Art. 50.1(a) ET), the corresponding compensation will be only that pre-determined automatically by law for unfair dismissal (Art. 50.2 ET). Therefore, personal injuries such as those relating to the dignity (Art. 10, Spanish Constitution) or health of the person (Arts. 40 and 43, Spanish Constitution) are not covered or in practice taken into account unless it is proven that they in turn constitute a breach of a fundamental right, such as the right to personal integrity under Art. 15 SC.

c) **Also for cases of collective dismissals without just cause, i.e., "unlawful", compensation for an arbitrary decision or a decision without effective cause will be that arising out of unfair dismissal (Arts. 51 ET and 124 LRJS).** Consequently, this is a sum which is also dissociated from any assessment of actual damage by application of the legally and automatically predetermined redress mechanism according to salary and length of service. Once again it must be stressed that, even if the collective dismissal in itself or an individual dismissal arising out of an objection by each worker to their dismissal due to collective dismissal (Art. 124, 11 LRJS) is declared null, compensation for any actual damage should also not apply in such cases, where only reinstatement and post-dismissal remuneration during proceedings are applicable.

2.2.3. The recent reform (2021) has not amended the regulation of dismissal

The recent Royal Decree-Law 32/2021 of 28 December 2021, concerning urgent measures for labour reform, guaranteed stability in employment and transformation in the labour market, sought to reduce temporary work in Spain, which is well above the European average, and to reinforce the sectoral level to ensure that downward unfair competition between companies would not be prejudicial to workers' labour rights. The social partners therefore did not address arrangements for terminating employment. The right to compensation in the event of unfair dismissals, dismissals without cause or bogus dismissals (disciplinary, objective or collective) has remained outside the reform, despite the fact that the UGT is aware of the urgency and need for reform in this area.

In this case, however, preference has been given to consensus, and in response to employers' fundamental opposition to addressing this particularly "damaging" aspect of the 2012 reform, including for unjustified dismissals of workers with extremely poor salary conditions and with little length of service, it has been assumed that this issue will have to wait, or that another legal approach will have to be taken. This is precisely what the UGT is now doing at the first opportunity it has had to do so, i.e., challenging this situation at international level, primarily the Council of Europe, since Spain has ratified both the revised European Social Charter

and the collective complaints procedure – a socio-legal approach which obviously could not be used thus far since it was not accepted.

In response to the merely opportunistic politico-social reasons put forward by the government and employers' refusal to engage with this measure, purely for the financial calculation of cost saving (not even of competitiveness, since competitivity depends more on investment and labour than on devaluing labour costs), the UGT, as the most representative State level trade union, considers that under Art. 24 ESCR, legal and social reasons regarding the right to adequate compensation should take precedence.

2.3. Lack of practicable or effective alternative legal avenues

Spanish legislation does not have real and genuine alternatives for analysing damage specifically arising due to **unfair or invalid dismissal** (except for - exceptional - violation of fundamental rights in the strict sense - Arts. 14 to 30 ET, which do not include either the right to health or the right to dignity at work strictly speaking). **Theoretically and technically it would indeed be possible to open some sort of pathway** to that end, **but** they have either been closed in terms of practical application under the case-law, which generally sets them aside for particular cases also - since it is the special and exclusive labour standard compared to other civil standards, or rather, although they are directly accepted for very exceptional cases, **there has yet to be a single case in which it has been applied by a final decision.**

It should be noted firstly that, in cases of flagrant unlawful conduct affecting not only the contractual relationship but also the very dignity of the employee, such as arbitrary dismissal or dismissal without actual cause, where the undertaking makes not even the slightest effort to prove the grounds that it says exist to justify the dismissal, so far as to acknowledge immediately that the grounds set out in the letter of dismissal are unjustified, the full claim for damages provided for in Art. **1101 et seq. of the Civil Code would be opened**. Therefore, in the abstract and on a formal basis, Article 56 ET could be regarded as compatible with Article 1101 CC, which awards full compensation for all damage arising out of breach of contract. Nevertheless, as recently recognised by STSJ Asturias 2094/2021 of 19 October 2021, ratification of both the consolidated case-law and constitutional law - Article 1101 CC - relating to contractual fault, would not apply to the arbitrary termination of a contract of employment, since that concept is intrinsically linked to the legal nature of the contract it is alleged had been breached. The contract of employment would be a specific contract that is regulated by its own legislation, and only in its absence would ordinary civil law come into play. Employment law here, however, is in keeping with a complete and special regulation which excludes any other.

"… under the rules governing unfair dismissal, the legal concept of which encompasses, with its procedural rules, limitation periods and substantive provisions, the consequences in terms of legal redress for the illegal nature of wrongful termination of contract. It is not appropriate… to put forward the damaging results of a dismissal in a manner differing from that laid down in law, and consequently a generic provision cannot be applied when there is a specific provision - Article 56 ET - that postpones the applicability of the provision relied upon. In the absence of a finding of a breach of fundamental law, an action for damages that cannot be linked to the declaration of illegality made in the decision at first instance cannot be successful…".

It is therefore not in fact possible either to combine the terminating compensation of Art. 1101 CC with that of Art. 56 ET (Art. 26 LRJS), or to introduce a concrete assessment criterion for actual damage because:

"For loss of employment for legal reasons, the law provides for making good the loss, on a strict liability basis, without a real direct connection with the actual loss arising, irrespective of the actual amount of the losses, but also without the need to prove their existence, deeming that the damage always arises, at both the labour or professional level and on an emotional or non-material level (STS 29-1-97). The purpose of the compensation is to replace the shortened reinstatement, shifting the obligation to reinstate to legally assessed compensation for damage and loss (SSTC 61/1992 of 23 April 1992), since any termination of employment decided by the employer always gives rise to damages (STC 103/1990 of 4 June 1990)".

Thus the High Court of Justice of the Community of Asturias - whose resolutions take the form of "appeals", since it is exceptional for an action for harmonisation against it to be admissible, taking effect when there is another appeal involving case-law to the contrary, or a TC or CJEU decision that could be enforceable - **set aside the judgment of the lower court that had in fact accepted Art. 1101 of the Civil Code** to overcome the inadequate protection afforded by Art. 56 ET. The established case-law thus maintains the tradition of Spanish case-law, of the TS and of the Constitutional Court.

That this is the majority position of the case-law and legal doctrine is confirmed by other recent judgments handed down by Regional or Autonomous Community Courts, which act as "quasi-appeal courts", such as SCSJ País Vasco 916/2021 of 1 June 2021. This ratifies long established case-law, which is accepted with greater or lesser reluctance by the majority of regional or autonomous Courts. Thus:

"The fact remains that this Court has a contrary opinion for establishing other compensation differing from that already envisaged in Article 56 of the Workers' Statute (…) in the case of unfair dismissal. This is because, on the basis that Article 10 of ILO Convention 158…. and also the right to "protection in the event of dismissal" laid down in Article 24 of the European Social Charter (Revised)… were deemed to have been fulfilled by the legislature by putting the successive

reforms of Article 55 and 56 ET into effect… and specifically, that is the case in our current legislation - a product of the 2012 labour reform, so that **traditional settled case-law held that such compensation legally provided for in those articles for unfair dismissal has the status of statutory compensation… on the assumption that that system does not correspond to the idea of 'restitutio ad integrum' [restoration to original condition] of the damage caused, but to what the legislature deems to be 'adequate' compensation….** Along those lines, reference can be made to **the judgment of the Full Court of the Fourth Chamber of the Supreme Court of 7 December 1990 (Judgment 1450) and what was cited therein"**.

The traditional case-law has remained unaltered, as can be seen, for example, in the SCS of 31 May 2006, action for the harmonisation of case-law 5310/2004. Dual compensation, one in the area of civil law and the other in the particular and special area of labour law, cannot apply. Almost endless reliance is placed on judgments that decide appeals reaffirming the exclusive nature of compensation set under Art. 56 ET with respect to any other in the Spanish legal system, including by application of international standards, whether ILO or Council of Europe. To focus on the latter alone, for example, this non-conformity is reaffirmed by the case-law of the High Court of Justice of Madrid (e.g. STSJ Madrid 1 March 2021, rec. 596/2020, and STSJ Madrid 18 March 2021, rec. 360/2021) or of the Tribunal Superior de Justicia de Galicia (e.g. STSJ Galicia 23 March 2021, rec. 360/2021).

There are, nevertheless, other very recent principles which, by application of the enforceability of treaties (*juicio de convencionalidad*) under Art. 96 of the Spanish Constitution in relation to the above-mentioned Art. 10 of ILO Convention 158, consider it to be possible to accept supplementary compensation. In their view:

"…**our positive legislation regulates a specific assumption of availability with respect to the compensation assessed**; specifically, Article 281.2 b) LRJS allows increases in the limits of Article 56 ET **by up to 15 days per year of service and a maximum of 12 monthly payments**. Certainly… in our opinion this is by analogy a relevant provision in the exceptional assumptions analysed, since it highlights the will of the legislature to make it possible to exceed the ordinary thresholds, imposing another further limit…" (STSJ Cataluña 3812/2021, 14 July 2021 - reiterating many others handed down throughout 2021). The High Court of Navarra (STSJ Navarra 24 June 2021, rec. 198/2021) and of Castilla y Léon (STSJ Castilla-León/Valladolid 1 March 2021, rec. 103/2021) ruled along the same lines.

At this point a number of clarifications are required to highlight the confusion and ambiguity that may arise out of this possible theoretical or formal approach to claims for damages. i.e.:

a) Firstly, this is another automatic and objective means which, rather than an actual assessment of damages, in fact only allows one amount or more on the basis of an evaluation made by the court according to its criteria, linked more to its failure to fulfil the legally accepted obligation than to the breach

of contract per se. This is required in order to avoid any "subjectivity in assessing damages" that may give rise to uncertainty among operators.

b) Secondly, in effect, the additional compensatory measure takes the form more of a "dissuasive sanction" for failure to comply with judgments, since it presupposes a defective or irregular execution of the judgment in the action for dismissal. The compensation therefore assumes the addition of new damage to the damage that might arise out of unfair or arbitrary dismissal, such as irregular reinstatement of the employee when the undertaking has already opted for post-judgment reinstatement, which would not now be fulfilled.

Literally, the provision in question provides that:

"**Bearing in mind the surrounding circumstances and the harm caused by failure to reinstate or irregular reinstatement, additional compensation of up to 15 days' salary per year of service and a maximum of 12 monthly payments could be established**. In both cases, periods of time of less than one year are satisfied pro rata and the time worked will be counted as the time lapsing until the date of the order" (incident of non-reinstatement).

In short, the compensation continues to be assessed - within a certain court-determined band - with a maximum ceiling, linking the bonus not so much to the damage typical of unfair or arbitrary dismissal but associated to "non-reinstatement or irregular reinstatement". Ultimately, what is "penalised" is disrespect for the judgment and the word given by the undertaking concerned, despite the fact that the decision to reinstate was free for that undertaking, such that failure to comply or compliance in a defective or irregular manner, i.e. the arbitrariness of dismissal, would be compounded by the arbitrariness of reinstatement.

c) In any event, this more open legal doctrine expressly indicates that such complementary compensation **should apply as an "exceptional rule"**, never as a general rule or even as a probable or frequent situation. This is because three requirements must be met for such an additional claim for actual damage arising out of unjustified dismissal to be successful:

- that the "well-known and clear inadequacy of compensation is established because it is clearly meagre" (fact: clear inadequacy of the legally assessed compensation in the specific case);

- that "the existence of an unlawful act, abuse of rights or abuse of rights in the business decision to cancel the contract is clear and evident" (fact: more unlawfulness of dismissal associated with the clearly arbitrary nature of the termination);

- that the employee prejudiced by obvious arbitrary behaviour in dismissal due to the clear inadequacy of the legal compensation involved presents detailed evidence of all the alleged damage, both pecuniary and non-pecuniary. In this case, Art. 1106 of the Civil Code (procedural fact or requirement: the factual evidence of the damage, including the non-pecuniary damage) would apply;

d) In conclusion, rather than in terms of assessment (which will be done in the section on the merits, the factual grounds of this claim), but purely describing the actual situation, and providing clear evidence of the very limited aspect of that possibility in practice, **there has yet to be a single case in which a Spanish High Court of Justice (at first instance or appeal) has confirmed social judgments assessing this supplementary compensation, all of which have been overturned.**

All in all, Spanish courts do not accept any means to add to the compensation referred to in Art. 56 ET, by virtue of the evidence of actual damage, to correct its insufficient redress (inadequacy of compensation for arbitrary dismissal) and/or to ensure the due dissuasive effect, and neither has the minority legal doctrine that allows it, in theory and exceptionally, yet heard of any case of the success of such action. Therefore, **the view that the Spanish rules favour this additional avenue would arise only out of a purely formal, abstract and strictly theoretical or merely hypothetical interpretation which is rather ineffective, in addition to being extremely uncertain, since it has no reasonable basis**.

To reaffirm the situation created by the relevant Spanish legislation, reference will be made to a recent official report (by the Ministry overseeing the sector, the Spanish Ministry of Labour). Without prejudice to the assessment that will be made in the section covering the basis of this collective complaint, since it represents an important argument in terms of statistical testing, we believe it will suffice to complete the image of the legal, factual and social situation regarding unjustified dismissal with a report published for the first time in Spain in 2020, concerning a statistic on the cost of dismissals in the country. The study considers the years between 2015 and 2018:[1]

- In Spain, average annual dismissals amount to around 435 000 and affect 429 000 employed persons.
- **The average compensation is €9 642.**
- In 2017 and 2018 the average fell considerably.

[1] Available at: https://www.publico.es/economia/coste-despido-radiografia-despido-espana-facil-barato-desigual.html

- The compensation disparity is huge and growing, since it may range from 200 to 1, according to the case. In the case of dismissals in the banking sector (with more employees and greater length of service), dismissal involved average compensation of €59 128 - the highest of all - while **the dismissal of a person employed in catering, with the same kind of fixed contract, stood at €6 000, i.e. 10 times lower.**
- The same person employed in catering **would only have received €661.3 - almost 10 times less - if they were on a temporary contract**, even if they were full-time.

In addition, average compensation in the last two years has fallen in response to the reform and to the growing devaluation of the labour market because of the crisis and legislative decisions. **It fell from an average of €10 000 in 2015 to €9 300 in 2018.**

2.4. Marginal nature of the right to reinstatement: invalid dismissals for breach of fundamental rights or rights under specific provisions of law (e.g. collective dismissals outside the legal procedure or which are fraudulent)

As has already been seen, although the right to reinstatement does not ensure the right to adequate compensation, since no legal margin remains to assess the actual damage - except for breach of fundamental rights[2] - it is clear that protection against unfair dismissal or invalid or unjustified dismissal has improved. Not only is it possible to resume the labour relationship, but compensation is also included for loss of earnings, i.e., time periods that have elapsed since the effective dismissal - when the employer takes the decision - until the judgment.

In Spain, however, as has already been said, this possibility is extremely limited if not exceptional, since it arises purely in cases of dismissal involving breaches of fundamental rights, or if it is expressly provided for in labour law (not because of the possible application of civil rules, such as Art. 6.4 of the Spanish Civil Code). This will be the case for collective dismissals involving breach of established procedure or bad faith, or even collective dismissal with abuse of rights. However, as has also been pointed out and is emphasised here, **the Spanish Supreme Court does not agree to regard as null an individual or group dismissal which is deemed to be fraudulent or abusive**, since that would be arbitrary when invoking a ground of dismissal, knowing it to be bogus or artificial, as would be proven by one that recognises the illegality upon delivery of the letter attributing disciplinary grounds (e.g. lack of performance) or objective grounds (e.g. production or organisational needs, or economic causes)

[2] Even though, according to STC 61/2021 of 15 March 2021, the breach of a fundamental right in the decision to dismiss does not obligatorily result in nullity, which is a State legislative policy option. By contrast, compensation for losses and damage for breaching such a law must always be presumed. This doctrine has been widely criticised, including internally, since it involves a reasoned dissenting opinion.

and those that do not seek to ensure accreditation in legal proceedings. The case-law has generally limited the effects of judicial nullity to the assumptions explicitly set out in the rule (STS 5 May 2015, rec. 2659/2014).

2.5. Guaranteed social income scheme in the event of unfair dismissal: entitlement to unemployment benefit if the insurance period provided for is met

According to Articles 10 and 12 of ILO Convention 158, an employee who is dismissed, even if fairly, and whose dismissal is unlawful, is entitled to protection in respect of unemployment. This situation is protected by Spanish social security under Art. 267.1 a, 3º TRLGSS (Consolidated version of the General Law on Social Security). It is therefore contributory (insurance) of public benefit. Thus:

"In the case envisaged in Article 111.1.b) LRJS, during the appeal against the judgment declaring the worker's dismissal to be illegal they shall be deemed to be in a legal situation of involuntary unemployment, with entitlement to unemployment benefits, provided they comply with the requirements laid down under this Title for the corresponding duration, as provided for in Articles 269 or 277.2 of this Law, subject to the periods in respect of which contributions have been paid".

In accordance with Art. 269 TRLGSS, the duration of unemployment benefit will depend on the periods of employment in respect of which contributions have been paid in the six years prior to the legal situation of unemployment, or at the time the obligation to pay contributions ceased, in accordance with the following scale:

Contribution period (days)	Benefit period (days)
From 360 to 539	120
From 540 to 719	180
From 720 to 899	240
From 900 to 1 079	300
From 1 080 to 1 259	360
From 1 260 to 1 439	420
From 1 440 to 1 619	480
From 1 620 to 1 799	540
From 1 800 to 1 979	600
From 1 980 to 2 159	660
From 2 160	720

In short, a minimum of one year in respect of which contributions have been paid in the six years preceding the legal situation of unemployment is required for entitlement to a benefit of 120 days (4 months). Each six months of an additional period in respect of which contributions have been paid will result in a benefit of a further 60 days. In accordance with Art. 270 TRLGSS, the amount of the benefit will be determined by applying the following percentages to the basic amount (ruling out particular amounts of remuneration, such as overtime): **70% during the first 180 days and 50% from day 181.**

As can be seen, after six months' payment, the amount no longer bears any relationship to the principle of the adequacy of the benefit, i.e. 50% of the regulatory basis (something less than half of what the salary would be). It is clear that this does not in the least allow ordinary personal and family needs to be met. There is therefore great pressure on the unemployed person to seek employment and to maintain a strong contributory and insurance-based rationale, since the reduction in the amount is automatic, legally predetermined and detached from the real needs of the person who has been unfairly dismissed or the family unit they are responsible for.

As will be seen, the 2012 reform exerted downward pressure in this respect. Prior to the reform the benefit was around 60% after six months, and 50% thereafter.

3. On the admissibility of the collective complaint

3.1. State against which the collective complaint is directed: Spain has accepted the collective complaint procedure

The collective complaint is directed against Spain. Like other States against which a judgment on the non-conformity of their regulation has been brought in relation to a claim for damages for unjustified dismissal, such as Italy, Spain has ratified the Revised European Social Charter, with effect from 1 July 2021. This is provided for in the **Instrument of Ratification of the European Social Charter (Revised)**, done in Strasbourg on 3 May 1996, published in BOE no. 139 of 11 June 2021.[3] The Revised ESC came into force for Spain **on 1 July 2021,** in accordance with the provisions in its Part VI, Article K, paragraphs 2 and 3.

Likewise, the collective complaints procedure also came into force for Spain on 1 July 2021, when the respective declaration to that effect provided for in Article D of the revised ESC was issued. This declaration is set out in the ratification instrument filed on 17 May 2021 and published in the above-mentioned BOE.

3.2. The complaint is also admissible *ratione temporis* and *ratione materiae*

The regulatory framework of the Spanish State on dismissal without just cause or on artificial or bogus grounds complained of herein as clearly contrary to Article 24

[3] https://www.boe.es/diario_boe/txt.php?id=BOE-A-2021-9719

ESCR (described in section 2 above and compared as to the merits with the aforesaid Article 24 ESCR in section 4 below) was adopted prior to 1 July 2021 (date of effect of the ESCR and of the collective complaints procedure for Spain) and preceded ratification of the ESCR and acceptance of the collective complaint procedure. That legislation, however, was still in force when the complaint was submitted, and consequently establishes a regulatory framework that supports a legal and factual situation that continually and persistently infringes Article 24 ESCR (e.g. FMDH v. Greece, Complaint No 30/2005, decision on the merits of 6 December 2006, §193; COHRE v. Croatia, Complaint No 52/2008, decision on admissibility of 30 March 2009, §18, and FIDH v. Greece, Complaint No 72/2011, decision on the merits of 23 January 2013, §§46-48). In short, the Committee has jurisdiction ratione temporis to hear this complaint.

In that context, the complaint concerns the breach of Article 24 ESCR, a provision which is accepted by Spain. In its Instrument of Ratification Spain in fact accepted all the substantial provisions of the ESCR, making it the third country to have accepted its full content, the others being France and Portugal. The complaint is therefore also admissible *ratione materiae*.

3.3. The trade union presenting the collective complaint: Union General de Trabajadores (y trabajadoras) (UGT)

The Union General de Trabajadores (UGT) is one of the most representative trade unions in Spain. As a labour union it has had a long history of support for workers since its foundation in 1888. It is a constitutionally significant social body, according to Arts. 7 and 28 of the Spanish Constitution, in line with constitutional doctrine established for that purpose, which recognises not only its nature as a contracting party but also its social and institutional nature (STC 18/1984).

Since its legalisation in 1977 following the Franco dictatorship, the UGT has been structured internally as a trade union confederation made up of State federations which bring together working people from the various economic sectors. These structures are co-ordinated in the territorial administrative areas by Autonomous Community unions. The Confederal Committee is the senior decision-making body between congresses and meets ordinarily once per year. After the UGT's 43rd Confederal Congress (May 2021), approval was granted for it to change its name to "Union General de Trabajadoras y Trabajadores de España", thus retaining its acronym, UGT.

It is a member of the European Trade Union Confederation and is also affiliated to the International Trade Union Confederation.

For further information on the UGT, see (https://www.ugt.es/).

3.4. Standing of the UGT to lodge collective complaints before the ECSR as the most representative trade union at State level

The UGT has the standing to lodge collective complaints by virtue of Art. 1(c) of the Protocol. According to that rule, it is one of the organisations competent to submit complaints that challenge the unsatisfactory application of the revised ESC, as in this case in relation to Art. 24. The UGT is one of the:

"c) representative national organisations of employers and trade unions within the jurisdiction of the Contracting Party against which they have lodged a complaint".

As the Committee can easily verify, in addition to its representative nature, the UGT is competent and particularly qualified to report violations of labour rights recognised in the European Social Charter (first in its original 1961 version and then in its 1988 Protocol, and now in its 1996 revised version), as it has shown not only through its experience in the domestic arena but also over many years in which it has submitted observations to the Committee regarding the reporting system (the only one binding on Spain until the recent acceptance of the collective complaints procedure with effect from 1 July 2021).

The UGT brings collective complaints through the body that has that power under its statutes. The position of Secretary General of the UGT is currently held by Mr José María Álvarez Suárez.

According to its Article 4, this complaint is submitted in writing and refers to a specific provision of the Charter, Art. 24 ESCR, which is accepted by the defendant Member State, Spain. The following section will specify to what extent that Party has not ensured satisfactory application of that provision (section 4 below).

In accordance with Art. 5 of the implementing Protocol, this complaint is addressed to the person who holds the position of Secretary-General and who is tasked with taking the most appropriate action, as provided for in this Article.

4. On the merits of the collective complaint: reasons for the inconsistency of Spanish law with the right to adequate compensation under Art. 24 ESCR

Article 5 of the collective complaints Protocol requires the entity entitled to complain to set out precisely and specifically why, in its view, the national law challenged, in this case Spanish law, does not fulfil, or conflicts with, the requirements laid down in the ESCR provision affected, in this case Article 24 (right to protection against dismissal). The following pages will seek to explain clearly the arguments on which the UGT bases its collective complaint and seeks a judgment not only on the admissibility but also on the assessment of the latter by the ECSR.

4.1. Art. 24 of the ESCR and the relevant ECSR case-law

4.1.1. Fundamental principles of settled ECSR case-law in relation to Article 24 ESCR

Art. 24 of the ESCR (right to protection in the event of dismissal) provides that, in order to ensure the effective exercise of the right of workers to protection in cases

of termination of employment, the States party (in this case Spain) undertake to recognise:

a) the right of all workers not to have their employment terminated without valid reasons for such termination connected with their capacity or conduct or based on the operational requirements of the undertaking, establishment or service;
b) the right of workers whose employment is terminated without a valid reason to "adequate compensation or other appropriate relief".

To that end, the States party (in this case Spain) are required to undertake to ensure that any working person who believes that they have been dismissed without a valid reason is entitled to appeal before an impartial body.

On the basis of this regulation, by means of a systematic, broad and developing interpretation in relation to other provisions of the system of multilevel protection against unjustified dismissal, particularly ILO Convention 158, and the stand taken by the Committee of Experts on the Application of Conventions and Recommendations (CEACR[4]), the European Committee on Social Rights (ECSR) has established various general criteria for the interpretation (principles) of Art. 24 ESCR, consolidated by virtue of abundant and consolidated case-law, i.e.:

a) Principle of the **adaptation/integrity** of compensation claims;
b) Principle of the **effectiveness** of protection by redress;
c) Principle of the **dissuasive effect** of the decision for future arbitrary or unjustified dismissals by employers.

The specific application of these principles involves various guarantees of protection for working people. On the one hand, adaptation and effectiveness should ensure sufficient compensation for pay which is no longer received from dismissal until the judgment declaring it to be unlawful.

On the other, recognition is given of the right to reintegration or reinstatement, when this is the most appropriate solution for the effective protection of an arbitrarily dismissed employee (although reinstatement is not expressly provided for in Art. 24 ESCR, the ECSR, taking inspiration from the interpretive body of doctrine of Art. 10 of ILO Convention 158, established by the CEACR, has included it in its range of guarantees of the effectiveness of the right to adequate redress), or adequate compensation for harm actually suffered as a result of unjustified dismissal decided by the undertaking. Finally, in relation to compensation, the ECSR, while it has no hesitation in recognising a certain discretion or freedom in establishing the model for calculating adequate compensation, has criticised the introduction of rigid assessed systems ("*plafonds*", or ceilings) since they are contrary to Art. 24 ESCR.

[4] https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--es/index.htm

This is because it would hinder national legal bodies in quantifying adequate redress in the event of unlawful dismissals, including in particular arbitrary dismissals which do, however, proceed in accordance with the rules and principles of both civil law (e.g.: in Spain, Arts. 1101 et seq.) and constitutional law (e.g.: in Spain, Art. 183 LRJS).

4.1.2. Individual assessment of the ECSR with respect to national legislation: Decision on the Merits of 11 September 2019, Complaint 158/2017 (Confederazione Generale Italiana del Lavoro - CGIL – v. Italy)

These interpretative guidelines and the system of guarantees arising out of Art. 24 ESCR have been painstakingly established by the ECSR in a copious body of case-law which is set out both in the Findings, established under the control system for National Reports, and in the Substantive Decisions, given in the presentation of collective complaints analogous to those presented herein. These have been scrupulously compiled in the relatively recent **Decision on the Merits of 11 September 2019, Complaint 158/2017**, brought against the Italian State by the applicant trade union, the CGIL. The CGIL claimed that Italian national law (analogous to Spanish law) on the protection applicable to persons employed in the private sector in the event of unlawful dismissal established a mechanism for calculating the legally predetermined compensation which is dissociated both from the actual damage suffered and from any dissuasive effect, in stark contrast with or in breach of Art. 24 of the ESCR. Once the complaint had been accepted it was upheld by the ECSR, which adopted a decision on the merits finding an infringement,[5] taking the view that the systems for the predetermined and automatic setting of damages for arbitrary dismissals or dismissals without just cause are contrary to the ESCR system. This conclusion is supported by previous decisions, such as the Findings of 2008 and 2012 in relation to Finland, and the decision on the merits relating to that same country in 2016.

The case-law is indeed laid down in section 96, according to which:

"**The Committee points out that any ceiling in compensation that may preclude damages from being commensurate with the loss suffered and sufficiently dissuasive is, in principle, contrary to the Charter** … If there is a ceiling on compensation for pecuniary damage, **the victim must be able to seek compensation for non-pecuniary damage through other legal avenues and the courts competent** for awarding compensation for pecuniary and non-pecuniary damage must decide within a reasonable time (Finnish Society of Social Rights v. Finland, Complaint No. 106/2014, decision on the admissibility and the merits of 8 September 2016, §46; Conclusions 2012, Slovenia and Finland)."

In addition, the reasoning set out in the respective section 98 is very important for the purposes of the claim set out here. In the light of the pleading of

[5] https://hudoc.esc.coe.int/fre/#{%22sort%22:[%22ESCPublicationDate%20Descending%22],%22ESCDcIdentifier%22:[%22cc-158-2017-dmerits-fr%22]}

the Italian government that in theory and on formal grounds, if there were procedures in civil law to obtain more adequate protection, including in terms of reintegration or reinstatement, the ECSR clearly accepts the contradictory claim put forward by the CGIL in its observations in response to those of the Government. To that effect, the ESCR accepts the criticism of the CGIL to the effect that such a possibility would not only not relate to the unlawful nature of the dismissal in terms of legislative provisions, but would also be an unusual opinion that would always be connected to the decision that the dismissal is void. Accordingly, the ECSR affirms that the additional protection under civil law should also be real and genuine rather than merely hypothetical.

To that effect, in its section 99 the ECSR concludes that the government does not present relevant practical examples, let alone consolidated case-law that makes the possibility of full compensation (including reinstatement) workable and predictable, in order to make effective the right to adequate and dissuasive redress under Art. 24 ESCR. Therefore:

"99... **the Government has not provided any examples of cases in which compensation has been granted for unlawful dismissal on the basis of the rule on civil liability** or under Article 1418 of the Civil Code. The Committee notes that this provision has been used to recognise that unlawful dismissals were null and void in some cases … but considers that [there] is **nothing to demonstrate that these examples, taken from the lower courts, are indicative of stable and consolidated case-law and that they can apply to all the different situations.**".

The ECSR concludes finally, in line with its case-law, that in the light of the lack of compelling evidence as to the existence of remedies that effectively make it possible to secure generalised supplementary or additional compensation, in accordance both with full reparation of damages and with its dissuasive role:

"104… neither the alternative legal remedies offering victims of unlawful dismissal the possibility of compensation exceeding the upper limit set by the law in force … make it possible in all cases of dismissal without valid reason to obtain appropriate redress proportionate to the damage suffered and apt to discourage employers from resorting to unlawful dismissal ".

In short, as the Committee of Ministers of the Council of Europe (Resolution CM/ResChS (2020) 2)[6] had reflected, in the light of this decision of the ECSR:

"…in all cases of dismissal without valid reason to obtain appropriate redress proportionate to the damage suffered and apt to discourage […] resort to unlawful dismissal… represents a breach of Article 24 of the Charter".

It should be noted, lastly, that in ECSR case-law, the Italian Constitutional Court found a solid basis for concluding that the system of legally assessed compensation, predetermined according to objective and automatic criteria, regardless of the actual

[6] https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016809ce4dc

damage and the dissuasive function of all compensation of this kind, is also unconstitutional. Italian Constitutional Court Ruling 194/2018 took into consideration both the relevant provisions of the Charter and the doctrine of the ECSR as useful interpretative guidelines.

4.2. Analysis of national legislation with reference to the provisions and objectives laid down in Art. 24 ESCR

4.2.1. On the certainty of the compensation, predetermined by law purely on the basis of salary and length of service

In the light of the foregoing, firstly of the Spanish system of reparation in response to unjustified dismissals and secondly of the system of rules of the ESCR and the judicial interpretation of Art. 24 ESCR, there is a striking contradiction between the former and the latter. Art. 56 ET (and Art. 110 LRJS) establishes compensation for all unfair dismissals (unjustified, fraudulent, without just cause or on bogus or arbitrary grounds) purely in accordance with an objective and automatically effective parameter: length of service. The resulting amount is thus equivalent to multiplying certain days of salary by years of service provided (formerly it would be 45 days, now only 33), with a maximum ceiling (originally there were 42 monthly payments, now only 24). The compensation, therefore, as in the Italian case, is fixed other than by any specific reference to the actual harm suffered, the gravity of the business conduct or the dissuasive effect on future cases.

The judicial authority moreover lacks not only a real capacity to modulate the resulting amount of damages according to these legally predetermined parameters, which have been revised downwards after successive reforms, but also the possibility of establishing reinstatement as an adequate measure of redress, since this is only possible when legal provision is made for invalidity. While in theory the application of general standards (such as Article 6.3 and 6.4 of the Spanish Civil Code[7]) could lead to arbitrary dismissal being declared void, consolidated social case-law excludes such action, classifying it in all cases as wrongful. In any event, the invalidity of dismissal in Spain, which presupposes mandatory reinstatement as well as post-dismissal remuneration during proceedings (for loss of earnings while unemployed) does not entail compensation for damage either, except for breach of fundamental rights.

[7] Art. 6.3 establishes that: Acts contrary to mandatory and prohibitive rules are null and void under domestic law, save in so far as they make separate provision for cases of breach. Art. 6.4 provides that: Acts carried out on the basis of the text of a rule which pursue a result that is prohibited by or contrary to law shall be deemed to be evading a legal provision and shall not impede due application of the rule it was sought to avoid. Available in the Diario Oficial [Official Gazette]:
https://www.boe.es/buscar/act.php?id=BOE-A-1889-4763

The Spanish compensation system, moreover, by departing completely from the actual damage suffered, whether material or personal (non-pecuniary), to the point of excluding post-dismissal remuneration during proceedings (damage for loss of earnings during the dismissal period until the judgment) if the employer does not opt for reinstatement, and also lacking any reference whatsoever to deterrence, maintains a legislative system ensuring compensation for unjustified dismissal that directly conflicts with socio-legal principles of adaptation-integrity, effectiveness and dissuasion. According to Art. 24 ESCR and settled ECSR case-law, these three principles must be followed in any national system of legal guarantees envisaged to protect employed persons against unjustified, unlawful and/or arbitrary dismissal. In the Spanish case - and the Italian case - judicial bodies are not capable either of establishing reinstatement when they regard it as the most appropriate remedial measure under Art. 24 ESCR in conjunction with Article 10 of ILO Convention 158, or of modulating the statutory or assessed compensation to make it proportionate to the full damage suffered and to ensure its dissuasive effect.

The remedial measures established by law, except in the case of invalid dismissals for breach of fundamental rights (which are therefore exceptional or in any event very limited situations with respect to the huge number of unjustified dismissals in Spain), are not only inadequate in holding back the intensive use of dismissal in Spain, but also ultimately encourage terminations. This is because (1) **not only is the amount in the assessed legal system increasingly lower**, so that the "cost of unlawful termination" is highly affordable rather than dissuasive, incentivising purely economic calculations, but also (2) **the payment of certain components of the compensation** - loss of earnings (called post-dismissal remuneration during proceedings) - **is left to the discretion of the undertaking that engages in the arbitrary conduct.** Now why is this the case?

Firstly, if the employer does not reinstate but in fact terminates with payment of the (reduced) amount, the cost of post-dismissal remuneration during proceedings, often involving an amount far higher than that deriving from the compensation, will be saved. Therefore, and for strictly commercial reasons, to promote the efficiency of the labour market (although it has not functioned adequately, since Spain continues to be one of the EU and European countries with the highest unemployment rate - almost twice the European average), termination rather than reinstatement would be incentivised.

In addition, the very certainty and reduced nature of the compensation makes the respective cost of unjustified or arbitrary dismissal - which can be offset in the undertaking's accounts - rather predictable and thus economically calculable. Therefore, if because of its sudden, immediate and arbitrary nature it may often surprise employee good faith, making it unforeseeable, for businesses on the other hand it is highly predictable, lower in cost and tending to diminish, thus facilitating unjustified dismissal as a standardised technique of corporate restructuring, given that not all the actual damage caused by dismissal is accepted and that the Spanish legal system pays no attention to its dissuasive effect, which is unknown in Spain and

in its legal practice. In reality, while this objective system is claimed to be advantageous to employees since it provides them with certainty with respect to compensation and does not require them to provide any evidence (it is presumed to be irrefutable by law, though obviously downwards), the real advantage lies with the undertaking, because a provision can be made in the accounts for the cost involved in a dismissal, even if it is unjustified and beyond the scope of redress for damage.

The approach of automatic calculation conforms to a single criterion (length of service), according to the salary in each case (which will most benefit employees with the highest salaries to the detriment of those with lower salaries or those who are in more insecure situations), while the maximum ceiling (24 monthly payments) exacerbates the contrast with the provisions of Art. 24 ESCR.

4.2.2. Inadequacy of compensation with respect to criteria for a sufficiently compensatory and deterrent sanction

The clear inadequacy of severance payment for dismissals which are unjustified (without proven cause), arbitrary (without actual cause) or fraudulent (on fabricated, bogus or artificial grounds) arises not only out of the objectively predetermined low amount in legal terms, particularly in a very insecure labour market such as that of Spain (highly seasonal, increasingly specialised), but also out of the particular automatic way in which it operates, so that it is excluded by definition from being proportional in terms of actual damage and dissuasive of sometimes very arbitrary unlawful conduct in relation to dismissal. As has been said, the court has no power of variation according to actual damage and circumstances, since the settled case-law has excluded it while the incipient legal doctrine which accepts it in theory, by application of Art. 10 of ILO Convention 158 and Art. 24 ESCR, then relegates it to exceptional situations alone: **so exceptional that not a single case is known in which it would be successful in a regional or autonomous higher court, such decisions at first instance being set aside.**

Neither the legislation nor the case-law accepts the application of the principle of proportionality of compensation in such cases of the law on damages, although it is a principle of law, and neither does the legislative system or judicial practice have the experience to exercise any right to ensure the dissuasive effect of compensation. Still less can the courts or tribunals issue decisions on reinstatement in certain cases if there are no specific legal provisions to that effect. As a result, the possibility not only recognised but also incentivised by the Spanish legislative system of making prior, unresearched or preventive calculations on the cost of unjustified dismissals (irrespective of how arbitrary and damaging they may be for particular employed persons, even assuming that the grounds presented in the letter of dismissal are false, artificial or fabricated, without even trying to prove the cause at issue), allows employers to decide on terminations purely in the light of their cost-benefit economic and commercial rationale, with no focus at all on social adaptation or damage reparation. **This regulatory system not only reduces but also excludes the dissuasive effect of unjustified dismissal** because **the law itself recognises that it**

wishes to encourage dismissals, so that the costs of dismissal without just cause are significantly reduced, leaving the costs of dismissals with cause unchanged to ensure that they gradually align.

4.2.3. Inadequacy of compensation for damage sustained by the worker before and after confirmation of the illegality of dismissal in the courts

Given that legally predetermined compensation covers both the time following the effective date of dismissal until the judgment recognising it as illegal and the subsequent period, after definitive termination - which is the standardised solution in Spain's regulatory system and experience - the inadequacy of the severance payment for unjustified dismissal (without sufficiently substantiated grounds) and/or arbitrary dismissal (without cause or on fabricated or hypothetical grounds) has a dual profile. On the one hand, the reduced compensatory protection must be established for the time elapsing from the dismissal effected by the employer until the judgment that declares it unlawful. As stated above, the 2012 labour reform left it to employers who had failed to comply with their obligations to justify the valid grounds of a dismissal and to decide whether or not to pay post-dismissal remuneration while proceedings were ongoing (compensation for loss of earnings during dismissal proceedings). The employer is required to decide this, for which purpose they may opt for termination (standardised solution), which means that they save payment of such salaries, or for reinstatement (exceptional or very infrequent solution), in which case they must pay those salaries. Clearly, the system fosters or incentivises the unjustified termination option (when it should discourage it in order to conform to Art. 24 ESCR), since the saving is very substantial.

It should be noted that dismissal proceedings in Spain do not take precedence and are not regarded as urgent, while other issues are. Although it is not initially possible to foresee the duration of the dismissal procedure, experience shows that it ranges from a minimum of four to a maximum of 12 months. Prior conciliation is not normally very effective in expediting an agreed solution.

According to official statistics, the average length of the dismissal procedure at first instance only (social security court) is 6.2 months.[8] To this must be added an average of 5.8 months[9] for appeals for reversal/motions to set aside (appeals before the higher courts of each region or autonomous region). In sum, an average of one year is taken to determine whether the dismissal is classified as fair or unfair. For the ECSR, any legal solution that takes longer than six months here, leaving the employee without pay, is clearly inadequate (Findings for Bulgaria, 2003).

[8] https://www.poderjudicial.es/cgpj/es/Temas/Transparencia/ch.Estimacion-de-los-tiempos-medios-de-duracion-de-los-procedimientos-judiciales.formato1/?idOrg=25&anio=2019&territorio=Espa%C3%B1a&proc=ASUNTOS%20SOCIALES

[9] https://www.poderjudicial.es/cgpj/es/Temas/Transparencia/ch.Estimacion-de-los-tiempos-medios-de-duracion-de-los-procedimientos-judiciales.formato1/?idOrg=17&anio=2019&territorio=Espa%C3%B1a&proc=ASUNTOS

Accordingly, the certain and legally predetermined nature of the compensation, associated both with the immediate enforceability of dismissal from the time the undertaking decides to terminate (Arts. 53 and 55 ET) and with the free availability for the undertaking of post-dismissal remuneration during proceedings (for loss of earnings), means that in fact, though not in law, termination in Spain becomes "free", but (scarcely) "paid for". Accordingly, the incentive effect on the regulatory system of a dismissal decision, even without cause, based purely on the economic cost benefits for the undertaking, is intensified. There is a purely economic-commercial logic for the decision, although it seriously affects a constitutional social right such as the right to stability at work and the dignity of the person, which in Spain is further aggravated because post-dismissal remuneration during proceedings (compensation for loss of earnings because of unjustified dismissal) is often much greater than the severance payment for unjustified dismissal. Once again, the statistical evidence will be crucial for verifying this conclusion, bearing witness to the notable unsuitability of compensatory protection and its clear non-compliance with Art. 24 ESCR.

It has been seen that the average duration of the dismissal procedure in Spain is around one year. This would mean that, bearing in mind that the annual average salary of a working person in the country (in 2019, prior to the pandemic) was €20 351.02 (around €1 400 a month, when divided into 14 monthly payments) and that the most frequent salary earned that year was €18 489.74 (**some €1 300/month**), according to the annual survey of the salary structure published by the Instituto Nacional de Estadística (INE) [National Statistics Institute], an unjustly dismissed worker would be entitled to an average compensation for loss of earnings (post-dismissal remuneration during proceedings) of around €7 800 (€1 300 x 6 months) if there is no appeal, and twice that, **€15 600**, if there is an appeal (€1 300 x 12). The most frequent salary level rather than the average salary has been used because of the extreme disparity of salaries in Spain, and in order to make calculations with the most limited assumptions, so as to consistently keep our observations within the threshold of what is evident in law and in fact while adopting a cautious approach.

If the average compensation for dismissal received in Spain is compared in the light of the official statistics referred to above, it can be seen that the **average is €9 642, though in the most common sectors in Spain, such as catering, trade, construction, etc., the amount is considerably lower, standing at around €6 000.** These sums are even lower **in catering and construction: €2 472 and €3 970 average compensation respectively.** Other factors, such as age and nationality, also come into play, bringing downward pressure to bear on compensation**: young people may receive an amount which is 10 times lower, while for non-EU nationals it can be up to three times lower: €9 940 (nationals) compared to €3 258 (foreign nationals).**[10] This further reflects the greater employment insecurity of young people and

[10] https://www.publico.es/economia/coste-despido-radiografia-despido-espana-facil-barato-desigual.html

immigrants and the lack of correspondence of the method for calculating compensation with actual loss, given that it is based purely on length of service.

This data is useful not only for showing how hugely insufficient compensation is in Spain (majority rule), leading to a profound protective duality (a minority of working people with good protection against unjustified dismissal, the majority employed with very insufficient protection), but also how the regulatory system encourages undertakings to opt for non-reinstatement. As has been shown, the amount due in respect of loss of earnings for post-dismissal remuneration during proceedings would be greater than the compensation, and therefore undertakings opt (it should be remembered that there has been an average of over 430 000 dismissals in Spain, even in years of growth rather than economic crisis) to pay compensation rather than re-employ, although they are aware that they fabricated or concocted the grounds (abusive or fraudulent dismissal). At best, bearing in mind the average compensation of some €9 400 and the average salary of around €1 700, it is clear that in Spain **the average compensation does not involve any dissuasion or compensatory proportionality, merely a continued and raised incentive to dismiss, even if unfairly.**

The 2012 reform, therefore, significantly increased the gravity of the logic of the so-called "firing cost", according to which alleged high dismissal costs were to blame for the poor functioning of the Spanish labour market.[11] This was the assumption underlying the 2012 reform laws, as referred to above. In the case of the elimination of post-dismissal remuneration during proceedings, unless there is an express business decision, it was also argued that such costs for loss of earnings created as damages for unfair dismissal should not be shifted on to society, since they are met by the State after two months in Spain. However, apart from the fact that these assertions are not consistent with the empirical evidence (**in Spain the statistical data highlight the fact that dismissal is cheap, easy to carry out and subject to enormous inequalities, which encourages its adoption**, and also bear witness to the lack of actual cause), **they are completely at odds with Art. 24 ESCR, because it requires the contrary principle**.

In effect, in accordance with Art. 24 ESCR and the approach consistently adopted by the ECSR, dismissal must meet the requirements of a real and genuine logical causal chain, such that an undertaking must strive to substantiate a valid cause which avoids the disapplication of the dismissal decision adopted. Otherwise, if it does not obtain the correct result in terms of that obligation to provide reasonable evidence, the undertaking must be subject to a sanction or appropriate penalty which is not only proportionate to the actual damage caused by the illegitimate or arbitrary act, but is also an incentive for observing such an obligation since it discourages non-compliance. Consequently, the Spanish rule, its generalised legal interpretation and business practice in the area clearly defeat the purpose of the guarantees set out in Art. 24 ESCR.

[11] https://www.crei.cat/wp-content/uploads/opuscles/100701140512_ENG_Opuscle26_CREI_ANGL.pdf

This represents a protective deprivation or disequilibrium which is maintained and will intensify subsequent to termination precisely because, as a general rule, in addition to non-payment of post-dismissal remuneration during proceedings (compensation for loss of earnings during the dismissal procedure), the amount received for loss of employment, **in a labour market such as Spain's, where it will subsequently be very difficult to find another job**, particularly for older people and women, will clearly be insufficient to adequately compensate for the range of pecuniary and personal damage arising out of the undertaking's unjustified decision. Reinstatement as a preferable safeguard (under Art. 24 ESCR in conjunction with Article 10 of ILO Convention 158) is inconceivable, since it is exceptional in Spain because the courts do not have sufficient latitude to adopt it under specific provisions of law (this reminder is from STSJ Madrid 277/2021, 17 March 2021, and reflects many decades of case-law in this area), as is compensation for proportionate and dissuasive damage and losses, in terms typical of contemporary civil law. By remaining constrained by assignable parameters which are predetermined by law and aligned only with salary and length of service, there is a complete mismatch between the actual damage and the relevant socio-economic, personal, family, etc., circumstances.

The outcome is a very notable average reduction in protection and also very unequal effects, placing insecure workers at a particular disadvantage and thereby incentivising their dismissal, even if unjustified, as a standardised cost-benefit management technique. Again, according to official statistics (SPEE - public State employment service), Spanish citizens wait an average of **11.6 months to find a job.**[12] While this figure is less than the average of 15 months recorded in Spain in 2015, it is greater than that recorded in 2020 (10 months). What is more, the average is greater for stable employment (12.4 months), compared to temporary employment, with an average of 10.9 months. Age is also relevant in this context. While young people require less time to find another job (9.8 months for the under 30s), people of over 55 years of age take virtually twice that time (18.1 months). In all these age brackets the duration of unemployment has increased in comparison with the third quarter of 2020, and women have greater difficulties.

In short, the rigid system of compensation penalises both younger employees (with extremely low average amounts, as the statistics testify) and older staff (because it is far more difficult for them to find a new job, making them more socially and occupationally vulnerable, and they may have difficulties in adapting to new requirements). Lastly, salaries for new jobs also tend to be lower than those earned in the past, particularly with respect to earnings of average level or greater.

All these aspects (age, gender, market circumstances, loss of revenue, damage arising, etc.) play a part in establishing the actual damage arising out of dismissal (pecuniary and personal – non-pecuniary, undermining life plans disrupted by unexpected and unjustified dismissal, etc.; loss of earnings and consequential

[12] https://www.antena3.com/noticias/sociedad/espanoles-tardan-116-meses-media-encontrar-trabajo_2021122761c9a85dbda5150001b6221e.html

damage). It should also be noted that countries such as Spain (and also Italy) have significant differences in their various regional labour markets, i.e., the possibilities of finding a stable decently paid job are very different in Andalucía, the Basque Country or Catalonia, to cite just some examples. However, the extremely rigid legal predetermination of compensation, with no real possibility of judicial modulation with respect either to actual damage or the dissuasive function, **makes it difficult under Art. 24 ESCR to adequately address this requirement** of the social right to effective protection against unjustified dismissal.

4.3. Additional restrictive effect of the 2012 unemployment benefit reforms

Although it might be thought that this inadequacy of compensation could be offset to some extent by social security coverage (unemployment benefit), the contrary is true, in that the framework of protective non-conformity with Art. 24 ESCR deteriorates in terms of social protection. This is because benefits were also restrictively reformed in 2012. In this respect it can be seen how, from the sixth month (it will be remembered that the average waiting time in Spain for the outcome of a dismissal procedure is much greater: an average of 12 months between the application and frequent appeals or petitions), **coverage falls to 50%** of the assessment base (an amount fixed according to salary, excluding certain aspects such as overtime, which logically reduce that basis). **This level is well below the requirements for a decent income** (which the ECSR classifies as at least 60% of the average salary).

In addition, the maturity requirements for (contributory) social security periods have been strengthened (see the reference regulatory framework in section 2) by reducing the coverage periods, which are also fixed. The greater rigidity that has accompanied these reforms (only very partially corrected in the most recent cases, 2019 for those over 52 years of age and 2021) is then added to the labour reforms, which means that the resulting regulatory and practical framework is clearly inadequate, since the automated, predetermined calculation system rigidly based on length of employment does not allow compensation to be adjusted to total actual damages.

4.4. Marginal nature of protection: ex lege limits of the power of the courts to declare reinstatement against abusive, false or fraudulent dismissals

The ECSR has repeatedly claimed in its case-law that real protection, i.e., reinstatement, compared to mandatory protection (compensation), forms part of the right to adequate redress against unjustified dismissal (more if it is arbitrary, as often happens in Spain and is recognised by the courts, though they only apply the sanction of illegality). The ESCR is clear in this respect:

"…while Article 24 does not explicitly refer to reinstatement, it does refer to compensation or *other appropriate relief*. **The Committee considers that other appropriate relief should include reinstatement** as one of the remedies available to

national courts or tribunals (see Conclusions 2003, Bulgaria). The possibility of awarding the remedy recognises the importance of placing the employee back into an employment situation no less favourable than he/she previously enjoyed. **Whether reinstatement is appropriate in a particular case is a matter for the domestic courts to decide**. The Committee recalls [that] it has consistently held that reinstatement should be available as a remedy under many other provisions of the Charter as interpreted by the Committee, for example under Article 8§2 and 27§3." (section or paragraph 54, **Decision on the Merits, Finnish Society of Social Rights v. Finland, published on 1 January 2017** - adopted on 8 September 2016 and notified on 30 September 2016)[13]

By way of confirmation of that requirement, in that particular case:

"The Committee recalls that in Conclusions 2012 it found the situation not to be in conformity with Article 24 of the Charter on the grounds that **legislation makes no provision for reinstatement in cases of unlawful dismissal**. There has been no change to this situation (Conclusions 2012, Finland)" (section or paragraph 55).

In Spain, according to settled case-law since the 1994 labour reform and as reinforced by the Supreme Court and by most of the case-law of the Supreme Courts of Justice of the Kingdom of Spain's regions or autonomous communities (as a State with Autonomous Regions - Art. 2 of the Spanish Constitution), **the court is not allowed to adopt the measure of reinstatement in the event of wrongful**, fraudulent or arbitrary dismissal (artificial, bogus or fabricated grounds). Invalid dismissal for abuse of rights, established by case-law since 1988, **has no longer applied from the SCS of 2 November 1993, rec. 3669/1992,** having been removed from the 1990 Ley de Procedimiento Laboral [Law on Employment Procedure]. Since then, case-law has limited the effects of judicial invalidity to the cases explicitly set out in the law (STS 5 May 2015, rec. 2659/2014).

As a result, reinstatement (model of actual protection of the right to work of Art. 35 of the Spanish Constitution and of the European Social Charter (Revised), and of Art. 30 of the Charter of Fundamental Rights of the European Union) is residual or marginal in the Spanish system of protection against dismissal without just or valid cause. It is in fact limited to dismissals involving infringements of fundamental rights, discriminatory dismissals per se, and collective dismissals which fail to respect the legal procedure or are contrary to the good faith of labour representation - also in the case of Art. 124.11 LRJS. In all cases, however, there must be a specific legislative provision, except in the case of collective or fraudulent dismissal. In the light of settled case-law, individual fraudulent dismissals cannot be declared null, though they can be declared inadmissible.

In effect, the law and its consistent interpretation precludes the courts from adopting the restitutionary or mandatory reinstatement measure to protect individuals in cases of unjustified dismissal, even if the grounds for proving the legitimacy of the dismissal are manifestly inappropriate. Therefore, the fact that the

[13]https://hudoc.esc.coe.int/fre/#{%22sort%22:[%22ESCPublicationDate%20Descending%22],%22ESCDcIdentifier%22:[%22cc-106-2014-dadmissandmerits-fr%22]}

courts are really or effectively prohibited from adopting the mandatory reinstatement measure for abusive, arbitrary or fraudulent (individual) dismissals contrasts starkly with the system of Art. 24 ESCR, in that it completely deprives the legislative response of any deterrent effect - yet another aspect of the huge gap between the Spanish system and Art. 24 ESCR.

4.5. Lack of grounds of public policy that may justify restrictions on the right enshrined in Article 24 in accordance with Article G of the ESCR

To justify this clear contradiction or non-compliance, it is not reasonably possible to rely on the content of Art. G of the ESCR, according to which:

"1. The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.

2. The restrictions permitted under this Charter to the rights and obligations set forth herein shall not be applied for any purpose other than that for which they have been prescribed".

In its instrument of ratification Spain has admittedly shown, as interpretative declarations included in the Annex to the ESCR, that it legally retains the possibility of establishing different means of protection under Art. 24 ESCR for groups of employed persons (Art. 24.2). It specifies at the same time that "compensation or other appropriate relief in the event of dismissal without a valid reason will have to be established by national laws or regulations, by conventions… or by any other procedure appropriate to national circumstances" (Art. 24.4).

However, in accordance with the ESC system and ESCR settled case-law, it is clear that such restrictions can be applied only insofar as is strictly necessary for their intended purpose, and provided they do not undermine the guarantees of effectiveness provided for in Art. 24 ESCR. ECSR case-law in this respect is clearly set out in decisions such as Findings III-1 Holland, Decision on the Merits of 2 December 2013, and collective complaint 83/2012, paragraphs 207 et seq., among others, in which it expresses the need for a democratic society via the concept of "*pressing social need*", i.e., cyclical circumstances. Therefore, they cannot develop into exceptions over a continuous period of time until they become structural, as has been the case in Spain.

What is more, according to the ECSR, including at times of economic crisis, states cannot disproportionately restrict social rights protected by the ESC (ECSR *Greek General Confederation of Labour - GSEE) v. Greece, Complaint 111/2014, Decision on the merits of 23 March 2017*; ECSR, Conclusions XIX-II, 2009, General Introduction; ECSR Federation of employed pensioners of Greece (IKA-ETAM) v. Greece, Decision

on the merits, 20 December 2012,[14] paragraph 75). Attention must be paid at all times to social aspects that balance the regulation, which in the case of Spain did not occur with respect to reforms of unjustified dismissal along merely economic and commercial lines, sacrificing the level of adequate protection to labour market efficiency.

In short, labour reforms in Spain have always been a pathway along which the lowering of protection against unjustified dismissal has been constant, and while they are usually introduced when employment is in crisis, they tend to remain in structural form. Therefore, including in the last reform, which was geared towards recovering certain labour rights that were lost in the 2012 reform, there was no desire to address this issue, which meant that the inadequacy of protection was maintained. There is therefore no reason, beyond the empirically unproven belief that curbing the cost of dismissal would encourage the creation of employment, because companies will be confident that they will be able to dismiss, even without just cause, a large number of people (over 430 000 a year), at a cost well below the actual damage suffered.

4.6. Growing judicial support for this judgment of insufficiency, despite the fact that it is exceptional and not very viable before the TS

As yet, the Spanish Supreme Court (TS) has not amended its favoured case-law in relation to the compensation calculation system based on automatic parameters (length of service) which are extraneous to actual damage and the dissuasive effect, in response to abusive or arbitrary dismissals. Therefore the state-of-the-art in terms of the interpretation of Spanish law exacerbates the inability of the Spanish legislative system to adapt to Art. 24 ESCR. It was noticed, however, that a small number of cases are in the appeal stage (regional or autonomous region Supreme Courts, which act as appeal courts in their territorial jurisdiction, it being difficult, in law and in fact, to gain access to the appeal courts through the unification of case-law), where it is considered necessary to correct this case-law, paving the way for additional compensation. While initially this case-law was based on ILO Convention 158, there is an awareness in all cases of the greater need to correct the

[14]https://hudoc.esc.coe.int/eng/#{%22sort%22:[%22ESCPublicationDate%20Descending%22],%22ESCDcIdentifier%22:[%22cc-76-2012-dmerits-en%22]}. Thus:
Accordingly, "the economic crisis should not have as a consequence the reduction of the protection of the rights recognised by the Charter. Hence, the governments are bound to take all necessary steps to ensure that the rights of the Charter are effectively guaranteed at a period of time when beneficiaries need protection the most" (General introduction to Conclusions XIX-2, 2009). The Committee has recently readopted this analysis and clarified that "doing away with such guarantees would not only force employees to shoulder an excessively large share of the consequences of the crisis but also accept pro-cyclical effects liable to make the crisis worse and to increase the burden on welfare systems, particularly social assistance, unless it was decided at the same time to stop fulfilling the obligations of the Charter in the area of social protection" (General Federation of employees of the national electric power corporation (GENOP-DEI) / Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece, Complaint No. 65/2011, decision on the merits of 23 May 2012, § 18).

legal situation and case-law in Spain with the entry into force of ESCR ratification for Spain (from 1 July 2021). This would be the case of SSTSJ Cataluña of 23 April 2021, rec. 5233/2020; 20 May 2021, rec. 5234/2020; and 14 July 2021, rec. 1811/2021), and STSJ Navarra, 24 June 2021 (rec. 198/2021); and Castilla-León/Valladolid of 1 March 2021 (rec. 103/2021).

However, as has also been shown, this very recent and absolutely settled case-law is not sufficient to change the failure of the Spanish system to comply with Art. 24 ESCR, for several reasons:

1) **It maintains that such opening up to supplementary compensation would only be "exceptional"**, and therefore does not fulfil the requirements of Art. 24 ESCR and the ECSR case-law which requires such protection to be generalised.

2) The conditions required for that theoretical possibility to be accepted are so rigid that **there has yet to be a single case** in which it has been confirmed by the higher court (though there are already over 10 situations in which the court did apply additional compensation under Art. 10 of ILO Convention 158). Therefore, **at this time there is not a single confirmed practical occurrence.**

3) While it is true that, in the light of the glaring contradiction of legal doctrines - the vast majority of Supreme Courts of Justice deny additional compensation on the basis of well-established case-law to date - the way remains open to unify case-law before the Supreme Court, [though] **a correction by the SC of its case-law is not to be expected**. Thus far, the SC has been very reluctant to apply, as interpretive let alone binding case-law, that of the ECSR, concluding that it did not constitute case-law in the terms of the European Court of Human Rights or the Convention on Human Rights. Both the SC and the Spanish TC understand, regrettably circumventing or disregarding the standards of the European Social Charter, that our model is in accordance with the entire system of international standards on protection against dismissal.

The UGT believes that in these circumstances the conformity of the Spanish system with the ESCR system with respect to Art. 24 ESCR can only come from a regulatory "adaptation" to adjust to Spain's commitment to the ESCR in this area. Otherwise, in addition to its being highly unlikely, because of the insecurity and lack of protection it offers working people, that it will introduce compliance by means of the particular (case-by-case) review of compatibility under Art. 96 SC (STC 140/2018), the outcome would be affected by a clear difference in legal interpretation. This would mean that legal certainty would also be compromised. An adjustment by means of a correction of SC case-law that excluded proportional and dissuasive case-

law which is not purely assessed and automatic is unlikely, since an interpretive approach would be maintained which is completely alien to the approach of the ECSR, which it considers to be neither a binding nor an adequate basis for reinterpreting Articles 56 ET and 110 LRJS. The decision of the ECSR, therefore, bearing witness to the clear inadequacy of the Spanish compensation system for unjustified and/or abusive dismissal, is not only necessary for the prevalence of the ESCR system but is in fact of great benefit for legal certainty, including for businesses.

5. Findings and claim

As a result, the regulatory and case-law situation in Spain in terms of the right to adequate redress for wrongful dismissal clearly does not conform to the system of Art. 24 ESCR. This inconsistency has persisted over time and has worsened with each successive labour reform, and even the most recent version (2021) - which has expressly declined to correct this state of affairs so as not to disturb the peace and the working climate with employers – has not resolved the breach of Art. 24 ESCR, which thus consolidates and perpetuates itself over time. While a very small area of legal doctrine has recently become aware of this non-conformity, albeit in relation to ILO Convention 158, in response to a failure to ratify the ESCR until 2021, its position continues to be highly restrictive and out of step with settled ESCR case-law in interpreting the principles and rules of Art. 24 ESCR. The SC is not expected to adopt this case-law - even if it did it would continue to be highly incompatible because of its exceptional nature, when Art. 24 ESCR requires it to be general (rectifying). It is therefore not only appropriate but also necessary for the ECSR to issue a ruling highlighting the non-conformity of our system with Art. 24 ESCR and promoting the measures necessary for the Spanish State to adapt to the demands of the ESCR regulatory system, which it has just ratified.

For the reasons stated throughout this collective complaint, the compensation system for wrongful dismissal is completely disconnected from the actual damage and dissuasive function which the adequate compensation under Art. 24 ESCR should have. It is based on a model of legislative predetermination according to length of service, which the ECSR has repeatedly considered to be out of step with Art. 24 ESCR (Finland, Italy and probably also France following the resolution of Complaint No. 171/2018). There are no real alternatives, only hypothetical ones, to obtain this full protection, as demonstrated by the fact that not a single case has been confirmed in which that has occurred.

The Spanish regulatory framework is substantially analogous to its Italian and French counterparts, and its non-conformity with Art. 24 ESCR is therefore also obvious and apparent. It had thus far not been possible to lodge a complaint because of the failure to ratify the protocol on collective complaints in Spain, a situation that has been corrected since 1 July 2021; hence the submission of this collective complaint. Spanish law (like Italian and French law) prioritises the certainty of the undertaking with respect to the total and dissuasive function of the compensation,

with no trade-off other than releasing the employee from the burden of proving the actual damage. As a result, priority is given to the undertaking's decision to terminate, even if it is unjustified, and the employee's renouncing having the damage arising out of dismissal without just cause or on bogus grounds compensated for, although sometimes it is greater than the (low) amount they will receive.

In addition, the successive reforms have been reducing the amount of the relevant amount (33 days' salary per year of service), so that neither for the duration of the dismissal procedure (post-dismissal remuneration during proceedings for loss of earnings has moreover been eliminated, unless the employer decides to reinstate, which is hardly ever the case, since the system gives them incentives to opt for termination) nor for the subsequent period does it minimally satisfy the dual imperative of proportionality to the actual damage and a dissuasive effect.

Reintegrative protection is marginal in the Spanish system. It is only envisaged for limited cases in which it is expressly provided for by law. And, unless the invalidity arises out of the breach of fundamental rights, neither is compensation payable for any damage arising in such cases. In Spain, the judiciary does not have the possibility of establishing mandatory reinstatement for the most serious cases of unjustified dismissal, such as fraudulent, unjust or arbitrary dismissals.

For these reasons, the UGT calls on the ECSR:

1) To accept this collective complaint and declare it admissible so that it may be processed in accordance with the procedure laid down in the Protocol of 1995.

2) To declare that Spanish legislation on individual dismissals without just cause (Art. 56 ET and Art. 110 LRJS and the respective legislation) infringes Art. 24 ESCR on account of the provision of a legally predetermined system of calculation which is both dissociated from the real damage suffered by the workers concerned as a result of dismissal decisions that are abusive, arbitrary or without cause and also has no dissuasive effect.

3) To take such action as is provided for in the ESCR system to ensure that the Spanish State corrects this breach of the right recognised therein to adequate protection against (unjustified, wrongful) dismissal.

Please use the Spanish language in this procedure, particularly for all written documents.

Madrid-Strasbourg 21 March 2021

Comisión Ejecutiva Confederal

José María Álvarez Suárez - Mariano Hoya Callosa
UGT Secretary-General UGT - Vice-Secretary General Trade Union Policy

Fernando Luján de Frías
Col. 43294 ICAM
UGT Confederal Secretary