EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

European Social Charter | Charte sociale européenne

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

DECISION ON THE MERITS

Adoption: 5 July 2022

Notification: 29 July 2022

Publicity: 30 November 2022

***Syndicat CFDT de la métallurgie de la Meuse* v. France**

Complaint No. 175/2019

The European Committee of Social Rights, committee of independent experts ("the Committee") established under Article 25 of the European Social Charter, during its 328th session in the following composition:

Karin LUKAS, President
Eliane CHEMLA, Vice-President
Aoife NOLAN, Vice-President
Giuseppe PALMISANO, General Rapporteur
Jozsef HAJDU
Barbara KRESAL
Kristine DUPATE
Karin Møhl LARSEN
Yusuf BALCI
Tatiana PUIU
Paul RIETJENS
George N. THEODOSIS
Mario VINKOVIĆ
Miriam KULLMANN

Assisted by Henrik KRISTENSEN, Deputy Executive Secretary

Having deliberated on 23 March, 17 May and 5 July 2022,

On the basis of the report presented by Karin Møhl LARSEN,

Delivers the following decision, adopted on the latter date:

PROCEDURE

1. The complaint lodged by *Syndicat CFDT de la métallurgie de la Meuse* (hereafter "CFDT Meuse Metallurgy") was registered on 31 January 2019.

2. CFDT Meuse Metallurgy alleges that the provisions of the Law of 13 July 1973 and Order No. 2017-1387 of 22 September 2017 on the predictability and increased security of employment relationships, as inserted in paragraphs 1 and 2 of Article L.1235-3 of the Labour Code, which amended the provisions relating to the financial compensation for dismissals without a valid reason, by setting mandatory compensation ranges, according to the worker's length of service and the size of the undertaking constitute a violation of Article 24 of the Revised European Social Charter ("the Charter") both on the issue of the adequate compensation in case of unfair dismissal and on the issue of the right to reinstatement.

3. On 28 January 2020, the Committee declared the complaint admissible.

4. In its decision on admissibility, the Committee invited the Government to make written submissions on the merits of the complaint by 28 April 2020.

5. Referring to Article 7§§1 and 2 of the 1995 Protocol providing for a system of collective complaints ("the Protocol"), the Committee invited the States Parties to the Protocol and the States having made a declaration in accordance with Article D§2 of the Charter, as well as the international organisations of employers or workers mentioned in Article 27§2 of the 1961 Charter, to notify any observations they may wish to make on the complaint by 28 April 2020.

6. On 25 March 2020, in the context of the health crisis and at the request of States Parties to the collective complaints procedure, the President of the Committee decided to suspend all the extant deadlines set for the respondent States and complainant organisations in the pending collective complaints until 15 May 2020. The deadline for the Government's submissions on the merits of the complaint was therefore extended to 19 June 2020.

7. The Government's submissions on the merits were registered on 19 June 2020.

8. Pursuant to Rule 31§2 of the Committee's Rules ("the Rules"), CFDT Meuse Metallurgy was invited to submit a response to the Government's submissions response by 4 September 2020.

9. CFDT Meuse Metallurgy submitted its response on 24 November 2020. The President of the Committee decided to disregard this response in view of its extremely

late submission and in the absence of any prior request for an extension of the deadline.

10. On 10 December 2020, the President of the Committee decided to close the written procedure in accordance with Article 7 of the Protocol and pursuant to Rule 31§4 of the Rules.

SUBMISSIONS OF THE PARTIES

A – The complainant organisation

11. CFDT Meuse Metallurgy requests that the Committee hold that the provisions of Order No. 2017-1387 of 22 September 2017 incorporated into paragraphs 1 and 2 of Article L.1235-3 of the Labour Code are in breach of Article 24 of the Charter, with regard both to appropriate compensation in the event of unfair dismissal and to the right to reinstatement.

B – The respondent Government

12. The Government considers that domestic legislation on compensation for workers for dismissal without real and serious cause is in conformity with Article 24 of the Charter and asks the Committee to find that the complaint is unfounded in all its aspects.

RELEVANT DOMESTIC LAW AND PRACTICE

A – Overview of the legislative framework concerning unjustified dismissal before Order No. 2017-1387 of 22 September 2017

13. The previous legal framework on the termination of employment contracts and the provisions relating to dismissal without real and serious cause did not establish any upper limit, only lower limits, which had to be no less than the last six months' wages (up to the Order of 22 September 2017). There were several attempts to introduce a compensations scale in 2015 and 2016 which were not successful (based on different Constitutional Court decisions No. 2015-715 DC of 5 August 2015 and No. 2016-582 QPC of 13 October 2016).

B – Domestic law currently in force (since the Order of 22 September 2017)

14. Article 2 of Order No. 2017-1387 of 22 September 2017 on the predictability and increased security of employment relationships, amended the provisions of Article L.1235-3 of the Labour Code relating to compensation for unlawful dismissal or dismissal without real and serious cause and introduced the compensation scale. These provisions were additionally amended by the Law No. 2018-217 of 29 March 2018.

Article L.1235-3 (and its subparagraphs) of the Labour Code as amended by Article 2 of Order No. 2017-1387 and Article 11 of the Law No 2018-217:

Article L.1235-3:

"If an employee is dismissed for a reason that is not real and serious, the court may propose that he or she be reinstated, with the retention of all of his/her accrued benefits.

If either of the parties objects to such reinstatement, the court shall award the employee compensation, to be covered by the employer, and whose amounts shall lie between the lower and upper limits set in the table below.

Employee's length of service with the company (in full years)	Minimum compensation (in months of gross salary)	Maximum compensation (in months of gross salary)
0	N/A	1
1	1	2
2	3	3.5
3	3	4
4	3	5
5	3	6
6	3	7
7	3	8
8	3	8
9	3	9
10	3	10
11	3	10.5
12	3	11
13	3	11.5
14	3	12
15	3	13
16	3	13.5
17	3	14

18	**3**	**14.5**
19	**3**	**15**
20	**3**	**15.5**
21	**3**	**16**
22	**3**	**16.5**
23	**3**	**17**
24	**3**	**17.5**
25	**3**	**18**
26	**3**	**18.5**
27	**3**	**19**
28	**3**	**19.5**
29	**3**	**20**
30 and over	**3**	**20**

In the event of a dismissal from a company ordinarily employing fewer than eleven employees, the minimum amounts below shall be applicable, by derogation from those set above:

Employee's length of service with the company (in full years)	Minimum compensation (in months of gross salary)
0	**N/A**
1	**0.5**
2	**0.5**
3	**1**
4	**1**
5	**1.5**
6	**1.5**
7	**2**
8	**2**

9	**2.5**
10	**2.5**

When determining the amount of compensation, the court may take account of any compensation awarded other than that referred to in Article L.1234-9.

This compensation shall be combined, where they apply, with the amounts provided for in Articles L.1235-12, L.1235-13 and L.1235-15, within the limits of the maximum amounts provided for in this article."

Article L.1235-3-1

"Article L.1235-3 shall not be applicable where the courts find that a dismissal is rendered null and void for one of the grounds set out in the second paragraph of this article. In such cases, where employees do not ask for their employment contract to continue or their reinstatement is impossible, the courts shall grant them compensation, payable by the employer, which must be no less than the last six months' wages.

The grounds referred to in the first paragraph above are as follows:

1° the breach of a fundamental freedom;
2° psychological or sexual harassment in the circumstances described in Articles L.1152-3 and L.1153-4;
3° discriminatory dismissal of the type described in Articles L.1132-4 and L.1134-4;
4° dismissal following the initiation of legal proceedings in relation to gender equality at work in the circumstances described in Article L.1144-3, or following the denunciation of crimes or offences;
5° dismissal of a protected employee, as described in Articles L.2411-1 and L.2412-1, as a result of the exercise of his or her office;
6° dismissal of an employee in breach of the protections referred to in Articles L.1225-71 and L.1226-13.

Compensation shall be payable without prejudice to the payment of the salary which would have been received during the period of invalidity, where it is owed pursuant to the provisions of Article L. 1225-71 and to the protected status granted to certain employees pursuant to Chapter I of Part I of Book IV of the second part of the Labour Code, and without prejudice to any compensation provided for by statute, collective agreement or contract."

Article L.1235-3-2

"When the termination of the employment contract is found by the court to be the fault of the employer or is further to a request submitted by the employee under the procedure set out in Article L.1451-1, the amount of compensation granted shall be determined in accordance with the rules laid down in Article L.1235-3, except where this termination produces the effects of an invalid dismissal corresponding to one of the cases referred to in points 1 to 6 of Article L.1235-3-1, for which the first sub-paragraph of the same Article L.1235-3-1 shall be applied."

C – Domestic case law on reform

1) Case law favourable to the applicability of Order No. 2017-1387

a) *Conseil d'État*

15. The *Conseil d'État*, in its interim order, No. 415243, of 7 December 2017 states:

"Article 2:

4. Article 2 of the contested order amends Article L.1235-3 of the Labour Code to provide that in the event of dismissal without real and serious cause, the court shall award the employee compensation, to be covered by the employer, and whose amounts shall lie between lower and upper limits set out in number of months' salary in accordance with the employee's length of service. With regard to the minimum amounts and up to ten years of service, the article also makes a distinction between undertakings according to whether they ordinarily employ fewer than eleven employees or at least eleven employees.
5. Firstly, the *Confédération Générale du Travail* maintains that these provisions are in breach of Article 10 of Convention No. 158 of the International Labour Organisation (ILO) and of Article 24 of the European Social Charter in that they deprive employees dismissed without real and serious cause of adequate compensation and appropriate relief for the loss suffered. It also states that these provisions disproportionately infringe the rights of victims of wrongful acts protected by Article 4 of the 1789 Declaration of the Rights of Man and of the Citizen, in that they provide that the courts may, in order to determine the amount of compensation due in the event of dismissal without real and serious cause, take account of the compensation payments awarded on termination of the contract.
6. On the one hand, it does not follow from the provisions relied on or, in any event, from the interpretation given to them by the European Committee of Social Rights in its decision of 8 September 2016, which the complainant relies on, that they prohibit the signatory States from laying down upper limits on compensation of less than 24 months' salary in the event of dismissal without real and serious cause. Furthermore, the scale set out in Article 2 of the contested order is not, as specified in Article L.1235-3-1 of the Labour Code, applicable where the courts find that a dismissal is rendered null and void on account of a violation of a fundamental freedom, acts of psychological or sexual harassment in the circumstances referred to in Articles L.1152-3 and L.1153-4, discriminatory dismissal within the meaning of Articles L.1134-4 and L.1132-4, following the initiation of legal proceedings in relation to gender equality at work as referred to in Article L.1144-3, in relation to the reporting of crimes and offences, the exercise of an elected office by a protected employee as referred to in Chapter I of Part I of Book IV of the second part of the Labour Code, and the protection afforded to certain employees pursuant to Articles L.1225-71 and L.1226-13".
7. On the other hand, although the new provisions of Article L.1235-3 of the Labour Code stipulate that the courts, when determining the amount of compensation, may "take into account" any compensation awarded on termination of the employment contract, this option does not in any way require them to deduct the amount of such pay from the amount finally awarded to the employee dismissed without real and serious cause, which cannot be lower than the minimum laid down. As is clear from the wording of the text itself, this option available to the courts concerns only compensation awarded on termination of the employment contract, which excludes other payments made in compensation for other rights.
8. Lastly, by laying down upper and lower limits for compensation for dismissal without real and serious cause based solely on the criteria of the employee's length of service in the undertaking and the number of employees working there, the authors of the order did not intend to prevent the court from determining, within these limits, the amount of compensation paid to each employee by taking into account other criteria linked to the employee's particular situation.
9. Second, the Confédération Générale du Travail argues that the new provisions of Article L.1235-3 of the Labour Code violate the principle of equality, since the only differentiation criteria used in the compensation scale are length of service in the undertaking and the number of employees working there, which means that no account can be taken of the age, qualifications, family situation and any disability of employees dismissed without real and serious cause. However, the principle of equality does not mean that the regulatory authority should treat people in different situations differently.

10. It follows from the above, and without the need to rule on the condition of urgency, that as the investigation stands, no evidence has been provided that could create serious doubt as to the lawfulness of the provisions of Article 2 of the contested order."

b) Constitutional Council

16. The Constitutional Council in its decision No. 2018-761 of 21 March 2018 ruled that the new Article L.1235-3 in the Labour Code establishing the compensation scale was compatible with the Constitution:

"With regard to certain provisions of Article L.1235-3 of the Labour Code as amended by the 7th subparagraph of paragraph I of Article 11 of the law under consideration:

83. Article L.1235-3 of the Labour Code provides that, in the event of dismissal without real and serious cause and where the employee has not been reinstated in the undertaking, the court shall award the latter compensation payable by the employer, the amount of which shall be within the lower and upper limits set by the same article. These minimum and maximum amounts will vary depending on the employee's length of service. Furthermore, the lower limits will vary depending on whether the undertaking employs eleven or more employees or fewer than eleven employees. In an undertaking with at least eleven employees the minimum compensation ranges from zero to three months' gross pay; in an undertaking with fewer than eleven employees it ranges from zero to two and a half months' gross pay. The maximum amount of compensation ranges from one to twenty months' gross pay. These compensation amounts may be combined with the compensation provided for in the event of procedural irregularities in the way the dismissal was effected or in the event of failure to honour the priority principle of reinstatement, within the limits of the above-mentioned maximum amounts.
84. The members of the National Assembly argue that points two to seven of Article L.1235-3 of the Labour Code, which lay down a compensation scale in the event of dismissal without real and serious cause, are contrary to the Constitution. They consider first of all that these provisions contravene the guarantee of rights insofar as the lower compensation limits provided for are insufficiently dissuasive and that, as a result, they enable an employer to dismiss an employee unjustifiably. They then argue that the principle of equality before the law has also been violated insofar as the scale set by the legislature takes into account, as far as the employee is concerned, solely the latter's length of service, to the exclusion of any other criteria such as age, sex or qualifications, which is therefore prejudicial to the employee. Lastly, it is claimed that these provisions disproportionately infringe the right to be compensated for damage, guaranteed by Article 4 of the 1789 Declaration. On the one hand, the upper limits laid down could, when the employee has only a short length of service, lead to derisory compensation in relation to the damage he or she has actually sustained. On the other, they are such that it is not possible to provide fair compensation for the damage suffered, since the compensation payable by the employer in the event of a procedural irregularity in the dismissal or in the event of failure to honour the priority principle of reinstatement can be combined, within the limits of these maximum amounts, with the compensation for dismissal without real and serious cause.
85. Firstly, under Article 4 of the 1789 Declaration: "Freedom consists in being able to do anything that does not harm others". It follows from these provisions that, in principle, if a person carries out an act which causes damage to others, he or she is obliged to make reparation. The right to sue for damages gives effect to this constitutional requirement. However, the latter does not prevent the legislature from adjusting, on the grounds of public interest, the conditions under which liability may be incurred. For such grounds of public interest, the legislature may make exclusions or limitations to this principle, provided that this does not disproportionately infringe the rights of victims of wrongful acts.
86. By laying down a mandatory reference table for damages awarded by the courts in the event of dismissal without real or serious cause, the legislature sought to increase the predictability of the consequences of the termination of employment contracts. Accordingly, it pursued a public interest goal.
87. The purpose of the compensation regulated in this way was to make good the damage caused by dismissal without real and serious cause and, where applicable, the damage caused by the failure to honour the priority principle of reinstatement, disregard for the procedures for

consulting staff representatives or notifying the administrative authority, or the obligation to set up a social and economic committee. The maximum amounts of this compensation laid down by the law vary, depending on the employee's length of service, between one and twenty months' gross salary. The preparatory documents show that these amounts were determined on the basis of "recorded average sums" of compensation awarded by the courts. Moreover, in accordance with the provisions of Article L.1235-1 of the Labour Code, these maximum amounts are not applicable when the dismissal is ruled to be invalid as a result of the violation of a fundamental freedom, psychological or sexual harassment, discriminatory dismissal or dismissal following legal proceedings, infringement of gender equality at work, the reporting of crimes and offences, the exercise of an elected office by a protected employee or the protected status afforded to certain employees.

88. It follows from the foregoing that the derogation from the ordinary law of liability for fault, resulting from the maximum amounts provided for in the provisions at issue, does not entail restrictions that are disproportionate to the public interest objective pursued.

89. Second, the legislature may, without violating the principle of equality, adjust the maximum compensation amount that is due to an employee who has been dismissed without real and serious cause, provided that for the purposes of such adjustment it uses criteria that are closely related to the damage suffered. This is the case for the criterion of length of service in the undertaking. Moreover, as the principle of equality does not oblige the legislature to treat people in different situations differently, it was not required to set out a scale taking into account all the criteria determining the prejudice suffered by the dismissed employee. By contrast, it is up to the courts, within the limits set out in the scale, to take account of all the factors determining the damage suffered by the dismissed employee when deciding on the amount of compensation due from the employer.

90. Consequently, the difference in treatment brought about by the provisions at issue does not infringe the principle of equality before the law.

91. It follows from all of the above that points two to seven of Article L.1235-3 of the Labour Code, which do not violate the guarantee of rights or any other constitutional requirement, comply with the Constitution."

c) Court of Cassation

17. The Court of Cassation issued two advisory opinions (Opinions No. 15012 and No. 15013 of 17 July 2019, Request for opinion No. R 19-70.010) on the compatibility with international and European standards of the compensation scale for dismissal without real and serious cause:

Opinion No. 15012
"II – On the merits:

Pursuant to Article L.1235-3 of the Labour Code, as amended by Order No. 2017-1387 of 22 September 2017, the provisions of which are applicable to dismissals made subsequent to the publication of said Order, if an employee is dismissed for a reason that is not real and serious, the court shall award the employee compensation, to be covered by the employer, and whose amounts shall lie between specified lower and upper limits.

As a result, for an employee with a full year's service in an undertaking employing at least 11 employees, this compensation ranges from a minimum of one month's gross salary to a maximum of two months' gross salary.

1.- With regard to the compliance of this text with Article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, it is clear from the case-law of the European Court of Human Rights that a distinction must be made between what is procedural and what is substantive. This distinction will determine the applicability and, as appropriate, the scope of the guarantees of Article 6 of the Convention, which can, in principle, have no application to substantive limitations on a right existing under domestic law (ECtHR, 29 November 2016, *Lupeni Greek Catholic Parish and Others v. Romania*, No. 76943/11).

Accordingly, the provisions of Article L.1235-3 of the Labour Code, which limit the employees' substantive right to the amount of compensation that may be awarded to them in the event of dismissal without real and serious cause, do not constitute a procedural obstacle hindering their

access to justice, with the result that they do not therefore fall within the scope of Article 6.1, cited above.

Consequently,

THE COURT IS OF THE OPINION THAT:

The provisions of Article L.1235-3 of the Labour Code, as worded pursuant to Order No. 2017-1387 of 22 September 2017, which provide that an employee with a full year of service in an undertaking employing at least eleven employees shall be entitled to compensation for dismissal without real and serious cause, ranging from a minimum of one month's gross salary to a maximum of two months' gross salary, do not fall within the scope of Article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms.
The provisions of Article 24 of the revised European Social Charter do not have direct effect in domestic law in a dispute between individuals.
The aforementioned provisions of Article L.1235-3 of the Labour Code are compatible with Article 10 of International Labour Organisation Convention No. 158."

Opinion No. 15013

"II – On the merits:
Pursuant to Article L.1235-3 of the Labour Code, as in force following the adoption of Law No. 2018-217 of 29 March 2018, if an employee is dismissed for a reason that is not real and serious, the court shall award the employee compensation, to be covered by the employer, and whose amounts shall lie between specified lower and upper limits.
1. With regard to the compatibility of Article L.1235-3 of the Labour Code with Article 24 of the revised European Social Charter, under Part II of that text:
"The Parties undertake, as provided for in Part III, to consider themselves bound by the obligations laid down in the following articles and paragraphs:
[...]
Article 24 – The right to protection in cases of termination of employment
With a view to ensuring the effective exercise of the right of workers to protection in cases of termination of employment, the Parties undertake to recognise:
a) the right of all workers not to have their employment terminated without valid reasons for such termination connected with their capacity or conduct or based on the operational requirements of the undertaking, establishment or service;
b) the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief.
To this end the Parties undertake to ensure that a worker who considers that his employment has been terminated without a valid reason shall have the right to appeal to an impartial body."
In view of the importance of the margin of appreciation left to the contracting parties by the above-mentioned terms of the revised European Social Charter, read in conjunction with the provisions of Parts I and III of the same text, the provisions of Article 24 of the Charter do not have direct effect in domestic law in a dispute between individuals.
2. Under Article 10 of the International Labour Organisation (ILO) Convention No. 158 on Termination of Employment, which is directly applicable in domestic law:
"If the bodies referred to in Article 8 of this Convention find that termination is unjustified and if they are not empowered or do not find it practicable, in accordance with national law and practice, to declare the termination invalid and/or order or propose reinstatement of the worker, they shall be empowered to order payment of adequate compensation or such other relief as may be deemed appropriate."
The term "adequate" is to be understood as reserving a margin of appreciation to States Parties.
In French law, if an employee has been dismissed without real and serious cause, the court may propose that he or she be reinstated. Where reinstatement is refused by either party, the court shall award the employee compensation, to be covered by the employer, within the lower and upper limits laid down.

The scale provided for in Article L.1235-3 of the Labour Code is not applied in cases where the dismissal is deemed invalid, pursuant to the provisions of Article L.1235-3-1 of said Code.
It follows that the provisions of Article L.1235-3 of the Labour Code, which set a scale to be applied by the court in determining the amount of compensation to be awarded for dismissal without real and serious cause, are compatible with the provisions of Article 10 of ILO Convention No. 158.

Consequently,

THE COURT IS OF THE OPINION THAT:

The provisions of Article 24 of the revised European Social Charter do not have direct effect in domestic law in a dispute between individuals."

18. Court of Cassation, Social Division, judgment of 11 May 2022, Appeal No. H 21-15.247

"20. It follows from the above-mentioned provisions of the European Social Charter that the Contracting States intended to recognise principles and objectives pursued by all appropriate means, the application of which requires them to adopt additional implementing acts in accordance with the procedures referred to in paragraphs 13 and 17 of this judgment and the review of which they reserved exclusively for the system referred to in paragraph 18 (Plenary Assembly, opinion of the Court of Cassation, 17 July 20). 19, 19-70.010 and 19-70.011; 1st Civ., 21 November 2019, Appeal No. 19-15.890, published).

21. The Court of Appeal was therefore right to hold that, since the provisions of the European Social Charter did not have direct effect in domestic law in disputes between individuals, the reliance on Article 24 could not lead to the non-application of the provisions of Article L.1235-3 of the Labour Code and that consequently, the employee should be awarded compensation set at a sum between the minimum and maximum amounts determined therein."

2) Case law refusing to apply the scale set out in Order No. 2017-1387

a) Conseil de Prud'hommes

19. Troyes *Conseil de Prud'hommes*, decision No. 18/00418 of 13 December 2018:

"Insofar as Article L.1235-3 of the Labour Code introduces a capped upper limit on industrial tribunal awards, it means that tribunals are unable to assess the entirety of the individual situations of employees who have been unfairly dismissed and compensate them fairly for the damage they have suffered.
Moreover, these scales do not serve as a deterrent for employers who wish to dismiss an employee without real and serious cause. These scales give greater security to wrongdoers than to victims and are therefore unfair.
Consequently, the Tribunal considers that this scale violates the European Social Charter and ILO Convention No. 158.
The scales laid down by Article L.1235-3 of the Labour Code are in breach of the above instruments."

20. Amiens *Conseil de Prud'hommes*, decision No. 18/00040 of 19 December 2018:

"Whereas the provisions of Article L.1235-3 of the Labour Code grant Mr [...] compensation of half a month's salary. [...]

Whereas this indemnity cannot be considered to be appropriate and to provide redress for dismissal without real and serious cause, in accordance with ILO Convention 158, and also with French legislation and the applicable case-law in this area.
Whereas, as a result, it is necessary for the Tribunal to restore the provision of appropriate compensation for dismissal without real and serious cause […]."

21. Lyon *Conseil de Prud'hommes*, decision No. 18/01238 of 21 December 2018 (refusal to apply the scale, justified as follows):

"Whereas the employee's compensation is assessed in line with the damage incurred.
Whereas under the terms of Article 24 of the European Social Charter of 3 May 1996, ratified by France on 7 May 1999, the following principle is stipulated: "*With a view to ensuring the effective exercise of the right of workers to protection in cases of termination of employment, the Parties undertake to recognise (…) the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief."*

22. Lyon *Conseil de Prud'hommes*, decision No. 15/01398 of 7 January 2019:

"Having regard to Article 10 of International Labour Organisation Convention No. 158 on Termination of Employment [...];
Having regard to Article 24 of the European Social Charter of 3 May 1996 [...];
Whereas the compensation awarded must be commensurate with the damage suffered and sufficiently dissuasive to comply with the European Social Charter of 3 May 1996;
Whereas the European Social Charter is a treaty of the Council of Europe adopted in Turin in 1961 which guarantees fundamental social and economic rights and must therefore be considered as the social Constitution of Europe;
Whereas the binding nature of the said Social Charter is no longer in doubt and the principles it contains are directly applicable before the French courts;
Whereas the Court of Cassation recognised its direct applicability in a judgment of 14 May 2010 (No. 09-6 426) with particular reference to Articles 5 and 6;
Whereas, as a result, the European Social Charter of 3 May 1996 and its interpretation by the European Committee of Social Rights are directly applicable in French domestic law and must lead the Tribunal to assert the need for full compensation of the damages suffered by the employee;
Whereas a short length of service does not preclude the need to compensate the employee based on:

- his/her personal situation following the loss of employment (age, family situation, disability, etc.)
- and/or a work situation making it more difficult to find a new job (geographical distance, rare specialisations, etc.).
- and/or genuine occupational damage, having a greater impact than mere length of service."

b) Courts of Appeal

23. Reims Court of Appeal, judgment No. 19/00003 of 25 September 2019. First, it confirmed the *in abstracto* conformity of the compensation scale laid down in Article L.1235-3 with ILO Convention No. 158 and the European Social Charter (which it accepted had direct effect, contrary to the position of the Court of Cassation in its advisory opinion of July 2019). It therefore stated that the French scale complied, in an objective and abstract manner, with international and European standards. It made the point that adequate compensation or appropriate relief did not in itself entail full compensation for the damage suffered by wrongful dismissal and could therefore be consistent with a maximum limit on compensation. Nevertheless, the Court of Appeal held that it was also necessary to carry out a review of compliance *in concreto* in order to verify the application of the legal norm to the circumstances of the case. It added that this *in concreto* review could entail disregarding the rule of law deemed to be

compliant *in abstracto* if it disproportionately affected the employee's rights. This line of reasoning opened the way for other appeal courts to disregard the application of the scale. However, the Reims Court of Appeal decided in this case not to disregard the stipulated scale, on the ground that the employee had not explicitly requested an *in concreto* compliance review; the Court of Appeal was therefore able only to carry out an *in abstracto* review leading to a finding of compliance.

24. Bourges Court of Appeal, judgment No. 19/00585 of 6 November 2020 (first appeal court to award a compensation amount higher than the maximum amount laid down in order to compensate entirely for the damage suffered by the employee):

> "The compensation due for dismissal
>
> The provisions of Article L.1235-3 of the Labour Code stipulate that in the event of dismissal without real and serious cause and if the employee is not reinstated, the court shall award the employee compensation payable by the employer, the amount of which shall range from three to six months' gross salary for employees with five years' length of service and employed in an undertaking that usually employs more than eleven employees.
>
> In awarding Mr B €30 000 in damages, the lower court implicitly disregarded the application of these legal provisions.
>
> On appeal, Mr B raised the issue of the non-conformity of these provisions in that they were contrary to Articles 4 and 10 of ILO Convention No. 158 and Article 24 of the revised European Social Charter of 3 May 1996, in addition to the fact that they infringed the right to a fair trial enshrined in Article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms. He concluded that the application of the national provisions disproportionately infringed his rights and deprived him of the possibility of receiving full compensation for the damage he had suffered.
>
> It will be recalled, however, that the above-mentioned provisions of Article L.1235-3, which limit the employees' substantive right to the amount of compensation that may be awarded to them in the event of dismissal without real and serious cause, do not constitute a procedural obstacle hindering their access to justice, with the result that they do not fall within the scope of the above-mentioned Article 6.1.
>
> Moreover, insofar as the provisions of Article 24 of the revised European Social Charter leave too much room for discretion to the contracting parties to enable private individuals to rely on them in a dispute brought before the domestic courts, they are not directly applicable in domestic law.
>
> This is not the case, however, with Article 10 of ILO Convention No. 158 on termination of employment.
>
> This states that where the courts "find that termination is unjustified and if they are not empowered or do not find it practicable, in accordance with national law and practice, to declare the termination invalid and/or order or propose reinstatement of the worker, they shall be empowered to order payment of adequate compensation or such other relief as may be deemed appropriate."
>
> Compensation is deemed to be "adequate" if its amount is sufficiently dissuasive to prevent wrongful dismissal. It must be of a reasonable level so as to achieve the aim of compensating for the unjustified loss of employment.
>
> In French law, Article L.1235-3 of the Labour Code authorises compensation for damage suffered as a result of an employee's dismissal without real and serious cause to be adjusted according to length of service, which is an objective criterion of the damage suffered, and to be

tailored, within the legal limits, to the situation of each employee according to criteria that are specific to that employee. In addition, the possibility of alternative means of redress is available in cases where a dismissal is ruled to be invalid or to enable the employee to claim compensation for damage other than the loss of employment.

The upper limit laid down in the aforementioned provisions of Article L.1235-3 provides sufficient guarantees that, in the light of the objective pursued, the breach of fundamental rights that has been deemed to be necessary does not, in itself, appear disproportionate.

The compliance review, carried out objectively and abstractly on all the provisions, taken as a whole, therefore leads to the conclusion, regardless of Mr B's situation, that they are compliant.

However, when a dismissal is unjustified, the review of compliance does not obviate the need, where a provision has been deemed compliant, to assess whether or not it disproportionately affects the rights of the employee concerned by imposing on him or her obligations that are disproportionate to the result sought, in this case full compensation for the damage he or she has suffered.

In this case, Mr B was 59 years old on the day he was made redundant and had been with the company for five years. He had submitted applications for an impressive number of jobs, all of which had been unsuccessful, and he could not be accused of looking only in his own field of expertise, logistics. Given his age and the French employment market, it was in his interest to extend his search far beyond his main area of expertise. Nor can he be accused of having left his search to the last minute since, over the period between October 2019 and July 2020, he had applied for at least 177 positions.

In view of his age, 59, and the resulting difficulty he has had in finding a job in a tight labour market, the application of the above-mentioned provisions of Article L.1235-3 of the Labour Code in this case disproportionately affected his rights in that it did not allow for full compensation for his loss. For this reason, it contravened the aforementioned provisions of Article 10 of ILO Convention 158.

It is therefore justified that the lower court disregarded the application of the provisions of Article L.1235-3 in this case."

25. Paris Appeal Court, judgment No. 19/08721 of 16 March 2021 in which the Paris Appeal Court disregarded the scale laid down by Article L.1235-3 basing this approach on Article 10 of ILO Convention No. 158 and taking into account the "specific and particular" situation of the unjustly dismissed employee; it held that the scale laid down by the Labour Code in this case represented "barely half of the damage suffered in terms of reduced financial resources since the dismissal". In this judgment of 16 March 2021, the Paris Appeal Court carried out a so-called *"in concreto"* compliance review which resulted in the scale being disregarded: it should be noted, however, that in two previous judgments (judgment No. 17/06676 of 18 September 2019 and judgment No. 16/05602 of 30 October 2019), the Appeal Court had acted in line with the advisory opinion of the Court of Cassation and had ruled that the scales were in conformity with the relevant treaties.

A – Domestic case law on possible alternative legal remedies

26. According to the established case law of the Court of Cassation, it is possible for unfairly dismissed employees to obtain additional compensation but only for specific types of damage sustained.

27. Court of Cassation, Social Division, judgment of 26 October 2017, Appeal No. 15-25976: the rules of civil liability are effective only to provide redress for damage sustained that is distinct from the damage incurred as a result of the loss of employment.

> **"SECOND GROUND OF APPEAL**
>
> The judgment under appeal is complained of for having ordered the company TTR GUY FRANCOIS to pay Mr X... the sum of €5 000 as compensation for the non-pecuniary damage suffered as a result of the vexatious circumstances of his dismissal;
>
> WHEREAS "Mr. X..., who joined the company at the age of 18, was abruptly dismissed at an age at which it will be difficult for him to find a position as a deliveryman in another company; he has therefore suffered non-pecuniary damage which should be compensated for by ordering the employing company to pay him the sum of €5 000 in damages in view of the vexatious nature of his dismissal";
>
> WHEREAS the court may award the employee damages distinct from those for dismissal without real and serious cause only on condition that it establishes a fault on the part of the employer in the circumstances of the dismissal and identifies the damage sustained that is distinct from that caused by his loss of employment; whereas by merely stating that Mr X... who, given his age, will have difficulty finding a position as a deliveryman in another company, is entitled to seek compensation for the separate non-pecuniary loss he suffered as a result of the vexatious nature of his dismissal, without showing how his dismissal was vexatious or abrupt, or identifying damage distinct from that resulting from the loss of his job, the Court of Appeal failed to provide a legal basis for its decision in the light of Article 1147 of the Civil Code."

28. Court of Cassation, Social Division, judgment of 14 September 2017, Appeal No. 16-11563: the Court of Cassation overturned the judgment handed down by a Court of Appeal which had ordered the employer to pay the employees damages for the loss resulting from a failure to implement the measures of an employment safeguard plan, whereas it had already ordered the employer to pay each employee compensation for the lack of real and serious cause, which must be the only compensation awarded for the unlawful nature of the dismissal.

> "But on the second ground of the employer's main appeal:
>
> Having regard to Articles L.1235-10 and L.1235-1 of the Labour Code as they apply to the case at hand, together with the principle of full compensation for the damage sustained;
>
> Whereas, to order the employer to pay the employees damages for the loss resulting from the failure to implement the measures of the employment protection plan, the judgment maintains that the advantages linked to the adoption of this plan are not negligible, since they include steps to redeploy employees internally, new jobs created by the undertaking, measures to promote redeployment outside the undertaking, initiatives to support the creation of new activities or the resumption of existing activities by employees, training initiatives, validation of experience or retraining to facilitate the internal or external redeployment of employees in equivalent jobs, along with measures to reduce or adjust working hours and that the failure by the employer to implement these advantages justifies the award of specific compensation;
>
> Whereas in so ruling, when it had already ordered the employer to pay to each employee compensation as redress for the full damage suffered resulting from the unlawful nature of the dismissal, the Court of Appeal violated the above-mentioned texts and principle;"

29. Court of Cassation, Social Division, judgment of 2 March 2011, Appeal No. 08-44977: in cases of dismissal on the ground of the employee's unsuitability, an employer

may be sentenced both to pay compensation for dismissal without real or serious cause and to remedy the damage arising from a deterioration in the employee's health if it can be attributed to the employer.

> "On the third ground of appeal:
>
> Whereas the company complains that the judgment ordered it to pay Mr X... a sum of money by way of damages for a separate loss, while, on the basis of the ground of appeal:
>
> 1°/ the setting aside of the judgment on the basis of the first ground of appeal or, in any event, of the second ground of appeal, will have the effect, in application of the provisions of Article 624 of the Code of Civil Procedure, of censuring the section of the operative part of the judgment that is being challenged here;
>
> 2°/ whereas the Court of Appeal ordered the company to pay Mr X... compensation for dismissal without real and serious cause, taking the view that it had been responsible for the employee's unsuitability, the reason for his dismissal, due to his refusal to accept the offers of redeployment made by the plaintiff; consequently, the Court of Appeal does not legally justify its decision in the light of Article 1147 of the Civil Code when it considers that the employee has suffered a distinct prejudice resulting from the behaviour of the employer who, in the view of the Court, clearly wished, on the one hand, to proceed by force, and on the other, impose unfair changes on the employee. This led to a deterioration in the employee's state of health and ultimately to his unsuitability, without specifying how this damage was distinct from the compensation for the loss of employment considered to be unjustified, even though this allegedly distinct damage resulted from the same fault and from the employee's unsuitability, on the basis of which the compensation for dismissal without real and serious cause was awarded;
>
> But whereas, having noted that the employer's wrongful conduct was the cause of the deterioration in the employee's state of health and physical unsuitability, the Court of Appeal, which concluded from this that the employee had suffered a prejudice distinct from the damage for which compensation was paid in respect of dismissal without real and serious cause, has, on these grounds alone, legally justified its decision;"

30. Court of Cassation, Social Division, judgment of 25 February 2003, Appeal No. 00-42031: it is possible to make good non-pecuniary damage to the employee if it is not the sole result of the unjustified nature of the dismissal. In this case, it was the undermining of the employee's dignity that was at issue.

> "But on the second ground of appeal:
>
> Having regard to Articles 9 and 1147 of the Civil Code and L. 120-2 of the Labour Code;
>
> Whereas in order to dismiss the employee's claim for damages as compensation for the harm caused to her by the dissemination, during departmental meetings, of the reasons for which the employer was initiating disciplinary proceedings against her, the Court of Appeal held that since the acts committed by the employee were not unrelated to her professional activity, it was not inappropriate for the employer to make them known;
>
> Whereas in so ruling, bearing in mind that informing the staff, without a legitimate reason, of the actions of a named employee constitutes an infringement of the latter's dignity such as to cause her a prejudice distinct from that resulting from the loss of her job, the Court of Appeal was in breach of the aforementioned texts;"

31. Court of Cassation, Social Division, judgment of 31 May 2011, Appeal No. 09-71350: the employee may obtain compensation outside the scale on the ground of loss of opportunity. In this case, it was loss of the opportunity to be given the retirement benefits available within the company

"FIRST GROUND OF APPEAL
[…]
WHEREAS, FINALLY and AS A SUBSIDIARY ARGUMENT, an employee who cannot, as a result of his or her termination of employment without real and serious cause, benefit from the retirement scheme applicable in the company, necessarily suffers a prejudice which must be compensated; in rejecting the request of Mr X... for payment of damages for loss of the opportunity to benefit from the retirement scheme on the unjustified grounds that "the employee must still be working for the company at the time of his retirement and that, having less than two years' length of service, (he) cannot claim to have lost, as a result of his termination of employment, the opportunity to benefit from this deferred advantage", when it had explicitly held that "the dismissal of Mr X.. ... was without real and serious cause", which meant that this loss of opportunity was sufficiently serious to give rise to compensation, the Paris Court of Appeal, which did not draw the legal consequences from its own findings, violated Articles 1134 and 1147 of the Civil Code in addition to Article L.1235-3 of the Labour Code. "

RELEVANT INTERNATIONAL MATERIALS

A – United Nations

32. International Covenant on Economic, Social and Cultural Rights adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976

Article 6

"1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual."

33. UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 18: The Right to Work (Article 6 of the ICESCR), adopted on 24 November 2005

"4. The right to work, as guaranteed in the ICESCR, affirms the obligation of States parties to assure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly. (…)

"11. ILO Convention No. 158 concerning Termination of Employment (1982) defines the lawfulness of dismissal in its article 4 and in particular imposes the requirement to provide valid grounds for dismissal as well as the right to legal and other redress in the case of unjustified dismissal."

34. CESCR, Concluding observations on the fourth periodic report of France, adopted on 24 June 2016

“The right to just and favourable working conditions

24. The Committee is concerned by the fact that derogations from acquired rights regarding working conditions, including derogations intended to increase the flexibility of the labour market, are being proposed in the current labour bill (draft legislation aimed at introducing new freedoms and new safeguards for businesses and workers) without it having been demonstrated that the State party has considered all other possible solutions (arts. 6 and 7).

25. The Committee urges the State party to make certain that the mechanisms for increasing the flexibility of the labour market that it is proposing do not have the effect of rendering employment less stable or reducing the social protection available to workers. It calls upon the Committee to ensure that any and all retrogressive measures relating to working conditions:
(a) Are unavoidable and fully justified in relation to the totality of the rights under the Covenant in the light of the State party’s obligation to pursue the full realization of those rights to the maximum of its available resources;
(b) Are necessary and proportionate to the situation, i.e., that the adoption of any other measure, or the failure to adopt any measures, would have an even more adverse impact on Covenant rights;
(c) Are not discriminatory and do not have a disproportionate impact on disadvantaged or marginalized groups.

26. The Committee draws the State party’s attention to its general comment No. 23 (2016) on the right to just and favourable conditions of work.”

B – International Labour Organisation (ILO)

35. Convention No. 158 on Termination of Employment, 1982, entry into force 24 November 1985

“Part II. Standards of general application

Division A. Justification for termination

Article 4

The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.
…

Division C. Procedure of Appeal Against Termination:

Article 10

If the bodies referred to in Article 8 of this Convention find that termination is unjustified and if they are not empowered or do not find it practicable, in accordance with national law and practice, to declare the termination invalid and/or order or propose reinstatement of the worker, they shall be empowered to order payment of adequate compensation or such other relief as may be deemed appropriate.”

36. CEACR General Survey on the Termination of Employment Convention (No. 158) and Recommendation (No. 166), 1982, International Labour Conference, 82nd session 1995, Report III (Part 4B), Geneva 1995

“218. Under Article 10 of the Convention, "if the bodies referred to in Article 8 ... find that termination is unjustified and if they are not empowered or do not find it practicable, in accordance with national law and practice, to declare the termination invalid and/or order or

propose reinstatement of the worker, they shall be empowered to order payment of adequate compensation or such other relief as may be deemed appropriate".

219. The wording of Article 10 gives preference to declaring the termination invalid and reinstating the worker as remedies in the case of unjustified termination of employment. However, it is flexible in that it offers other possible remedies, depending on the powers of the impartial body and the practicability of a decision to nullify the termination and reinstate the worker. "The text specifies, moreover, that when compensation is paid it should be "adequate". (…)

232. In the light of the above, the Committee considers that compensation, in the case of termination of employment impairing a basic right, should be aimed at compensating fully, both in financial and in occupational terms, the prejudice suffered by the worker, the best solution generally being reinstatement of the worker in his job with payment of unpaid wages and maintenance of acquired rights. In order to do this, the impartial bodies should have all the necessary powers to decide quickly, completely and in full independence, and in particular to decide on the most appropriate form of redress in the light of the circumstances, including the possibility of reinstatement. When reinstatement is not provided as a form of redress, when it is not possible or not desired by the worker, it would be desirable for the compensation awarded for termination of employment for a reason which impairs a fundamental human right to be commensurate with the prejudice suffered, and higher than for other kinds of termination. (…)"

C – European Union

1. Primary Law

37. Charter of Fundamental Rights of the European Union:

Article 30 Protection in the event of unjustified dismissal

"Every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices."

2. European Pillar of Social Rights

38. The European Pillar of Social Rights was proclaimed and signed in November 2017 by the Council of the European Union, the European Parliament and the European Commission during the Göteborg Social Summit for fair jobs and growth.

39. Principle No. 7 of the Pillar refers to:

Principle 7:
(…)
"Workers have the right to be informed in writing at the start of employment about their rights and obligations resulting from the employment relationship, including on probation period. Prior to any dismissal, workers have the right to be informed of the reasons and be granted a reasonable period of notice. They have the right to access to effective and impartial dispute resolution and, in case of unjustified dismissal, a right to redress, including adequate compensation."

THE LAW

ALLEGED VIOLATION OF ARTICLE 24 OF THE CHARTER

40. Article 24 of the Charter reads:

> **Article 24 – The right to protection in cases of termination of employment**
>
> Part I: "All workers have the right to protection in cases of termination of employment".
>
> Part II: "With a view to ensuring the effective exercise of the right of workers to protection in cases of termination of employment, the Parties undertake to recognise:
>
> a. the right of all workers not to have their employment terminated without valid reasons for such termination connected with their capacity or conduct or based on the operational requirements of the undertaking, establishment or service;
>
> b. the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief.
>
> To this end the Parties undertake to ensure that a worker who considers that his employment has been terminated without a valid reason shall have the right to appeal to an impartial body."

A – Arguments of the parties

1. The complainant organisation

41. CFDT Meuse Metallurgy requests that the Committee find that the French Labour Code, as amended by the Order of 22 September 2017 is in breach of Article 24 of the Charter. The allegations of the complainant organisation concern two specific issues in relation to unfair dismissal: reinstatement in case of unfair dismissal and adequate compensation.

42. As regards *reinstatement,* CFDT Meuse Metallurgy refers to the decision of 8 September 2016 on the admissibility and merits in Finnish Society of Social Rights v. Finland, Complaint No. 106/2014, in which the Committee held that that the Finnish legislation was incompatible with Article 24 of the Charter on the ground that it made no provision for reinstatement in cases of unfair dismissal.

43. CFDT Meuse Metallurgy claims that the situation in France is exactly the same. According to Article L.1235-3, paragraph 1 of the Labour Code, deriving from the Law of 13 July 1973 on the rules governing dismissal, the French courts may, in the absence of a real and serious cause for dismissal, only propose that a worker be reinstated by the undertaking concerned. Thus, according to paragraph 2 of this Article, the decision lies solely with the person who has unfairly dismissed one of their workers i.e. the employer. In this context, the complainant organisation believes the right to reinstatement in the event of unfair dismissal does not exist in France.

44. As regards *adequate compensation* to which workers are entitled in the event of termination of the employment contract by the employer without a valid reason,

CFDT Meuse Metallurgy argues that for the first time in the history of French social law, since the Order of 22 September 2017, as incorporated into the provisions of Article L.1235-3, paragraph 2 of the Labour Code, French courts cannot fulfil their role in ensuring the adequate compensation provided for by the European Social Charter, in that the compensation that they may award is limited to an amount between one and 20 months' pay depending on the employee's length of service in the company. According to the complainant organisation, the law is even less generous than the above-mentioned Finnish law in so far as the maximum compensation is 20 months but only if the worker's length of service is at least 29 years. The complainant organisation claims that here again and even more so than in Finland, it appears that the courts may find themselves in a situation where the maximum compensation that they may award does not even cover the damage incurred in strictly material terms.

45. CFDT Meuse Metallurgy refers to the decisions of courts where the latter found that the Order of 22 September 2017 is in breach both of Article 24 of the Social Charter and Article 10 of ILO Convention No. 158 (Troyes *Conseil de Prud'hommes*, joint configuration, 13 December 2018, *France Event*; Amiens *Conseil de Prud'hommes*, 19 December 2018, *SARL JAMLAH* and Lyon Labour Court, 21 December 2018, *Rhone ADAPEI*). Incidentally, the Government expressly condemned this decision, through its Ministry of Labour, even questioning the competence of the Labour Court judges. This attitude, according to the complainant organisation amounts to unacceptable interference by the executive in the functioning of the Labour Courts, completely at odds with the doctrine of the separation of powers. It also prompted a strong reaction from the Troyes *Conseil de Prud'hommes*, whose presidents and vice-presidents objected to what they considered to be an attack on their independence, pointing out that as judges, setting aside an adopted law because it was in breach of the Charter was not an act of ignorance but, quite on the contrary, a manifestation of the full and free exercise of their legal powers.

46. The *Conseil de Prud'hommes* also considered it essential to point out that justice in France derives from a democratic State, and is rendered not in the name of the President of the Republic or his Minister of Labour, but in the name of the people.

47. Consequently, CFDT Meuse Metallurgy requests that the Committee hold that the provisions of the Law of 13 July 1973 and the Order of 22 September 2017 incorporated into paragraphs 1 and 2 of Article L.1235-3 of the Labour Code are in breach of Article 24 of the Social Charter, with regard both to appropriate compensation in the event of unfair dismissal and the right to reinstatement.

2. The respondent Government

48. The Government argues that the reform, which in its view has parallels in several European states (in particular Germany, Belgium, Denmark, Spain, Finland and Switzerland), aims at strengthening predictability and securing the employment relationship or the consequences of its termination for employers and workers. According to the Government, this is not a question of depriving the worker of fair

compensation, but of controlling the amount that may result from a termination of the employment relationship, sometimes after many years of legal proceedings. By harmonising judicial practices, the objective is to create greater legal certainty and greater predictability for the parties to the contract when the employment relationship is terminated. As indicated in the report to the President of the Republic relating to Order No. 2017-1387 of 22 September 2017 on the predictability and security of labour relations which was published in the Official Journal on 23 September 2017, companies, and particularly very small and medium-sized enterprises, do not recruit workers with the intention of firing them. However, the uncertainty about the cost of a potential termination may dissuade them from hiring workers on an open-ended contract. According to the Government, the scale, through the predictability it provides, will make it possible to remove this uncertainty and free up job creation in small and medium-sized enterprises. It will also guarantee greater fairness for workers, who, for equivalent damage, now benefit from compensation ranging from simple to triple, or even quadruple amounts, depending on the labour tribunals seized.

49. The aforementioned Order No. 2017-1387 was ratified by the Parliament on 29 March 2018 (Law No. 2018-217), which gives it legislative value. This law was submitted to the Constitutional Council, which declared Article L.1235-3 of the Labour Code to be in conformity with the Constitution.

50. The Government also refers to the opinions delivered on 17 July 2019 in plenary session, in which the Court of Cassation considered that the provisions of Article 24 of the Charter do not have direct effect in domestic law in a dispute between individuals. In contrast, it recognised the direct applicability in domestic law of Article 10 of ILO Convention No. 158 which provides that if the bodies mentioned in Article 8 of this Convention arrive at the conclusion that the dismissal is unjustified, and if, having regard to national law and practice, they do not have the power or do not consider it possible in the circumstances to cancel the dismissal and / or to order or propose the reinstatement of the worker, they must be empowered to order the payment of adequate compensation or any other form of compensation considered appropriate/adequate.

51. According to the Government, Article L.1235-3 of the Labour Code, which uses the concepts of "adequate compensation" and "reparation considered to be appropriate" is therefore close to Article 24 of the Charter. In its opinions of 17 July 2019, the Court of Cassation considered that the term “adequate” used in Article 10 of ILO Convention No. 158 must be understood as leaving States parties a margin of appreciation.

52. The Court also noted that the law allows the judge to propose the reinstatement of a worker dismissed without real and serious cause and, when such reinstatement is refused by one of the parties, to grant compensation payable by the employer in the limits of minimum and maximum amounts. The Court further noted that the compensation scale is waived in the event of the dismissal being null and void. The Court of Cassation deduced from this that “the provisions of Article L.1235-3 of the Labour Code, which set a scale applicable to the determination by the judge of the amount of compensation for dismissal without real and serious cause, are compatible with the stipulations of Article 10 of ILO Convention No. 158”.

53. According to the Government, this interpretation was confirmed by the Committee in *Confederazione Generale Italiana del Lavoro* (CGIL) v. Italy, Complaint No. 158/2017, decision on the merits of 11 September 2019. In order to determine whether the compensation mechanisms provided for in the event of dismissal without valid reason comply with Article 24 of the Charter, the Committee carries out an overall assessment of the domestic legislation in this area.

54. The Government refers to the decision of the Committee in Finnish Society of Social Rights v. Finland, Complaint No. 106/2014, where the latter concluded that the Finnish Government had not provided any example of cases in which compensation had been awarded for unfair dismissal, in addition to what was provided in the Law on Employment contracts. Therefore, the Committee considered that the ceiling on compensation provided for in the Finnish law on employment contracts could result in situations in which the compensation granted would not cover the damage suffered. Similarly, in CGIL v. Italy, op. cit., the Committee found a violation by Italy of Article 24 of the Charter on the grounds that reinstatement was not provided for in Italian law for dismissals without valid reason and it had not been established that compensation could be obtained through other legal avenues, beyond the ceiling provided for by the law in force.

55. The Government asserts that the comparison of the French situation with the Finnish situation is however not appropriate in the present case since the two situations differ on essential points in the assessment of conformity with Article 24 of the Charter, namely (1) the possibility of reinstatement of the worker provided for by French law and (2) the alternative legal remedies available.

On the possibility of reinstatement of an employee dismissed without valid reason

56. According to the Government, contrary to the Finnish and Italian legislation, French legislation provides for the possibility of reinstatement of the worker in all cases of dismissal without valid reason.

57. The Government maintains that in cases where the dismissal is null and void, that is to say for the most serious infringements, reinstatement is a right which the employer cannot oppose, unless it is materially impossible (Article L.1235-3-1 of the Labour Code). Moreover, the possibility of reinstatement is also provided for in other cases of dismissal without valid reason, namely cases where the dismissal is judged without real and serious cause. In these situations, the French judge, unlike the Italian judge, can propose the reinstatement of the worker with maintenance of the acquired benefits, if the latter requests it and provided that the employer does not oppose it (Article L.1235-3, paragraph 1, of the Labour Code). This possibility of reinstatement in the event of dismissal judged without real and serious cause has not been modified by the aforementioned Order No. 2017-1387 of 22 September 2017. Thus, compensation is paid only if the worker does not request reinstatement or if the employer objects to reinstatement.

58. The Government points out that the possibility of reinstatement is rarely used in practice, because few workers apply for it. Nevertheless, by way of example, the Court of Cassation does apply the principle of reinstatement of the worker when neither of

the two parties contests it and supervises the conditions of the reinstatement, which must be done with the preservation of acquired benefits (Court of Cassation, Social Division, judgment of 31 March 1977, Appeal No. 75-40393).

59. Thus, according to the Government, the reinstatement of the worker to his/her post is one of the means of redress available for the domestic courts, in accordance with the requirements of Article 24 of the Charter as interpreted by the Committee and in contrast to the situations in Finland and Italy.

On the existence of alternative legal remedies

60. The Government claims that in contrast with the Finnish and Italian situations, a worker dismissed without a valid reason in France has several legal avenues for claiming damages.

a) In the case of damages for dismissal other than for lack of real and serious cause

61. The Government points out that the scale alone is not intended to cover all of the losses associated with unfair dismissal. Article L.1235-3 of the Labour Code concerns only the prejudice resulting from the unjustified loss of employment (dismissal without real and serious cause). It therefore does not cover compensation for losses that are distinct from this lack of real and serious cause for the dismissal, nor those arising from the employer's distinct faults. If the worker is able to demonstrate the existence of such a distinct prejudice, he or she may obtain separate compensation on the basis of the general law of civil liability.

62. In contrast to the Italian situation, the French courts regularly compensate damages that are distinct from the absence of real and serious cause, as illustrated by the consistent case law concerning prejudices linked to different circumstances.

63. The Government specifies that since the entry into force of the provision challenged in the present claim, the courts continue to compensate the prejudices distinct from the absence of real and serious cause for the dismissal, such as the prejudice resulting from the unfair performance of the employment contract (Paris Court of Appeal, judgment No. 16/05602 of 30 October 2019).

b) In the event of a dismissal that is null and void (Article L.1235-3-1 of the French Labour Code)

64. The Government recalls that under Article L.1235-3-1 of the Labour Code, when the judge finds that the dismissal is vitiated by a nullity resulting from the violation of a fundamental freedom, acts of harassment moral or sexual, a dismissal that is discriminatory or following a legal action, an infringement of professional equality between women and men, the denunciation of crimes and offenses, the exercise of a mandate by a protected worker or protections from which certain workers benefit (maternity and employees victims of an accident or an occupational disease), the minimum and maximum amounts set by Article L.1235-3 of the Labour Code are not applicable.

65. In these cases, when the worker does not request the continuation of the performance of his/her employment contract or his/her reinstatement is impossible, the judge grants him/her compensation, payable by the employer, which cannot be less than salaries for the last six months, regardless of the worker's seniority and the size of the company, and which is not subject to any ceiling (Article L.1235-3-1 of the Labour Code).

66. The Government stresses that this guarantee was not only theoretical but that it was effectively implemented by the courts, the latter indeed fixing the amounts of compensation to repair dismissals marred by a particular gravity without taking into account the scale provided for in Article L.1235-3 of the Labour Code, in accordance with the will of the legislator when the latter presented and then ratified Order No. 2017-1387 of 22 September 2017.

c) On the unemployment insurance mechanism

67. Moreover, the Government specifies that the financial aspect of the loss of employment (the deprivation of wages) is partly offset by the unemployment insurance mechanism, partially financed by an employer's contribution and which aims precisely to guarantee the worker against the risk of involuntary loss of employment.

68. In this regard, the Government points out that, contrary to the Finnish legislation, French legislation does not provide for deducting the amount of this unemployment benefit or any remuneration received by the worker from the compensation awarded by the judge, on the basis of the scale.

69. The Government thus asserts that the French system of compensation for dismissal without just cause offers alternative and effective legal remedies to compensate for losses that are distinct from the absence of just cause and that would not be covered by the scale, and precludes the application of the scale in the most serious cases of dismissal that are invalid. These guarantees accompanying the scale established in Article L.1235-3 of the Labour Code are in line with the requirements set out by the Committee in its interpretation of Article 24 of the Charter.

70. The Government also comments on the decisions of the domestic courts concerning the conventionality and constitutionality of Article L.1235-3 of the Labour Code.

71. In this respect, the Government points out that firstly, several *Conseil de Prud'hommes* have explicitly rejected the complaints that the scale is not in conformity with Article 10 of ILO Convention No. 158 and Article 24 of the Charter, and have applied the scale to their particular case. This is the case, for example, of the Le Mans *Conseil de Prud'hommes* (judgment of 26 September 2018), the Caen *Conseil de Prud'hommes* (judgment of 18 December 2018) and the Le Havre *Conseil de Prud'hommes* (judgment of 15 January 2019), not to mention all the cases in which the question of conventionality was not discussed and Article L.1235-3 was effectively applied.

72. Secondly, the Government points out that the Chambéry Court of Appeal, although it did not recognise the direct effect of Article 24 of the Charter, was the first

court of second instance to rule that the scale was not contrary to Article 10 of the ILO Convention No. 158, drafted in similar terms to Article 24 of the Charter. It therefore applied the scale to the case before it and awarded the worker compensation within the thresholds set by the scale (judgment of 27 June 2019).

73. Thirdly, the Government recalls that, in two opinions issued on 17 July 2019, the Court of Cassation concluded that "the provisions of Article L.1235-3 of the Labour Code, which establish a scale applicable to the determination by the judge of the amount of compensation for dismissal without real and serious cause, are compatible with the stipulations of Article 10 of ILO Convention No. 158.

74. The Government also states that in the context of its review of constitutionality, the Constitutional Council has considered that the plenipotentiary law is compatible with the provisions of Article 10 of ILO Convention No. 158 and that the capping of compensation for dismissal without real and serious cause "did not introduce disproportionate restrictions" on the rights of victims of wrongful acts in relation to the general interest objective of reinforcing the foreseeability of the consequences of the termination of an employment contract.

75. In view of the above, the Government states that the complainant organisation cannot rely on the judgments of the Troyes and Amiens *Conseil de Prud'hommes* of December 2018 to argue that the scale instituted in Article L.1235-3 of the Labour Code is contrary to Article 24 of the Charter.

76. Moreover, the Government maintains that the drafters of the Charter did not wish to recognise the right to "full reparation" in the event of dismissal without just cause, but to "adequate compensation" or "other appropriate reparation", concepts which leave the State a certain margin of appreciation. Moreover, it is clear from the Committee's interpretation of Article 24 of the Charter that the assessment of the adequacy of such compensation must be part of an overall approach to the legislative framework in force in the State concerned.

77. Consequently, according to the Government, a mere comparison between the amounts fixed by the French and Finnish scales does not appear relevant and, on the contrary, all the guarantees offered by the French legal framework should be taken into consideration in order to assess the adequacy of the compensation provided for in the event of dismissal without real and serious cause.

78. In this respect, the Government asserts that the French legislation differs from the Finnish legislation (and the Italian legislation) in that:

- it provides for the possibility of reinstatement of the employee in his or her position for all types of unfair dismissal ;
- it allows for compensation for damages distinct from the absence of a valid reason on the basis of the general law of civil liability.

79. In conclusion, the Government maintains that because of these specific features and because of all the other provisions relating to compensation for dismissal without just cause (in particular those relating to dismissals vitiated by nullity), French legislation offers workers dismissed without just cause appropriate compensation in

accordance with the criteria identified by the Committee in its interpretation of Article 24 of the Charter. According to the Government, this is also the conclusion reached by the highest French courts, which have taken into account the margin of appreciation enjoyed by the State in the choice of the mechanism enabling these workers dismissed without just cause to obtain adequate compensation or other appropriate redress.

80. In view of all the foregoing, the Government considers that French legislation on compensation for workers dismissed without just cause complies with Article 24 of the Charter.

B – Assessment of the Committee

81. In its submissions, CFDT Meuse Metallurgy states that the reform introduced by Order No. 2017-1387 of 22 September 2017 to Article L.1235-3 of the Labour Code, as well as its implementation, is contrary to Article 24 of the Charter.

82. The Committee recalls that under Article 24.b of the Charter the States Parties must recognise the right to of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief.

83. Compensation systems are considered to comply with the Charter when they meet the following conditions:

a. Provide for reimbursement of financial losses incurred between the date of dismissal and the decision of the appeal body;

b. Provide for the possibility of reinstatement of the worker; and/or

c. Provide for the compensation of a high enough level to dissuade the employer and make good the damage suffered by the victim (Finnish Society of Social Rights v. Finland, Complaint No. 106/2014, op.cit, §45; *Confederazione Generale Italiana del Lavoro* CGIL v, Italy, Complaint No. 158/2017, op.cit, §87). Compensation for unlawful dismissal must be both proportionate to the loss suffered by the victim and sufficiently dissuasive for employers (Conclusions 2016, North Macedonia, Article 24). Any ceiling on compensation that may preclude damages from being commensurate with the loss suffered and sufficiently dissuasive are in principle contrary to Article 24 of the Charter (Finnish Society of Social Rights v. Finland, Complaint No.106/2014, op.cit.). If there is such 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 (Conclusions 2012, Slovenia; Conclusions 2012, Finland).

84. In its assessment of the present complaint, the Committee will focus on ascertaining whether French law satisfies the requirements relating to reinstatement and adequate compensation as laid out in points (b) and (c) above.

Reinstatement

85. As regards the issue of reinstatement, the Committee observes that in French law reinstatement is optional for dismissals without real and serious cause. According to Article L.1235-3 of the Labour Code, if a worker is dismissed for a reason that is not real and serious, the court may propose that he or she be reinstated, with the retention of all of his/her accrued benefits. If either of the parties objects to such reinstatement, the court shall award the worker compensation instead. With respect to reinstatement in cases of the most serious unlawful dismissals, which are null and void, Article L.1235-3-1 of the Labour Code stipulates that in cases, where workers do not ask for reinstatement or their reinstatement is impossible, the court shall grant them compensation.

86. In this connection, the Committee refers to its decision in Finnish Society of Social Rights v. Finland, Complaint No. 106/2014, op.cit., §55: "…while Article 24 does not explicitly refer to reinstatement, it refers to compensation or *other appropriate relief.* The Committee considers that *other appropriate relief* should include reinstatement as one of the remedies available to nationals courts or tribunals. […] Whether reinstatement is appropriate in a particular case is a matter for the domestic courts to decide."

87. The Committee has also emphasised 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" (Finnish Society of Social Rights v. Finland, Complaint No. 106/2014, op.cit., §55). As regards the instant case, the Committee observes that reinstatement is one of the possible remedies provided for in French law. The Committee considers that as long as the possibility exists for the workers dismissed without a real and serious cause to be reinstated in the same or a similar post, the situation is compatible with Article 24.b of the Charter in this respect.

Adequate compensation

88. As regards the issue of compensation, the Committee refers to *Confédération Générale du Travail Force Ouvrière* (CGT-FO) v. France, Complaint No. 160/2018 and *Confédération Générale du Travail* (CGT) v. France, Complaint No. 171/2018, decision on the merits of 23 March 2022, where it held that there was a violation of Article 24 of the Charter on the ground that the right to adequate compensation or other appropriate relief within the meaning of Article 24.b of the Charter was not guaranteed.

89. The Committee held in particular that the ceilings set by Article L.1235-3 of the Labour Code are not sufficiently high to make good the damage suffered by the victim and to be dissuasive for the employer. Moreover, the courts have a narrow margin of manoeuvre in deciding the case on its merits by considering individual circumstances of unjustified dismissals. For this reason, the real damage suffered by the worker concerned, linked to the individual characteristics of the case, may be inadequately considered and therefore, not be made good.

90. In this respect, the Committee is aware of the recent decision of the Court of Cassation (Social Division, Judgment of 11 May 2022, Appeal Nos. 21-14.490 and 21-15.247) which in rejecting the applicant's claim relating to the ceilings set by the Labour Code considered that the Charter is based on a "programmatic logic" and that its Article 24 has no direct effect in French law. Moreover, it considered that the decisions of the Committee are not of a judicial nature and thus not binding on the States Parties. All this leads the Court of Cassation to conclude that Article 24 of the Charter cannot be relied upon by workers or employers in disputes before the court.

91. The Committee takes note the approach taken by the Court of Cassation. It recalls that the Charter sets out international law obligations which are legally binding on the States Parties and that the Committee as a treaty body is vested with the responsibility of making legal assessments of whether the Charter's provisions have been satisfactorily applied. The Committee considers that it is for the national jurisdictions to rule on the issue at stake (*in casu*, adequate compensation) in the light of the principles it has laid down in this regard or, as the case may be, it is for the French legislator to provide the national jurisdictions with the means to draw the appropriate consequences as regards the conformity with the Charter of the domestic provisions in question (see *mutatis mutandis*, Confederation of Swedish Enterprise v. Sweden, Complaint No. 12/2002, decision on the merits of 22 May 2003, §43).

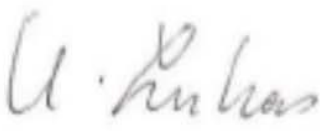
92. The Committee considers in light of all of the above elements that due to the fact that in the French domestic legal order, Article 24 cannot be directly applied by national courts to guarantee adequate compensation to workers dismissed without valid reasons, the right to adequate compensation within the meaning of Article 24.b of the Charter is not guaranteed because of the ceilings set by Article L.1235-3 of the Labour Code.

93. The Committee holds that there is a violation of Article 24.b of the Charter in this respect.

CONCLUSION

For these reasons, the Committee concludes unanimously that there is a violation of Article 24.b of the Charter in respect of adequate compensation.

Karin Møhl LARSEN
Rapporteur



Karin LUKAS
President

Henrik KRISTENSEN
Deputy Executive Secretary