EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

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Case Document No. 6

***Confederación Sindical de Comisiones Obreras* (CCOO) v. Spain**
Complaint No. 218/2022

OBSERVATIONS BY THE EUROPEAN TRADE UNION CONFEDERATION (ETUC)

Registered at the Secretariat on 22 September 2023

SYNDICAT EUROPEÆN TRADE UNION CONFEDERATION

Collective Complaint

Confederación Sindical de Comisiones Obreras (CCOO)

v.

Spain

Complaint No. 218/2022

22/09/2023

Observations by the European Trade Union Confederation (ETUC)

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1 In availing itself of the opportunity provided in the Collective Complaints Procedure Protocol (CCPP - Article 7§2) the European Trade Union Confederation (ETUC) would like to submit the following observations.

2 The ETUC welcomes the fact that the respondent State has ratified not only the Revised European Social Charter (RESC) but also the Collective Complaints Procedure Protocol (CCPP).

3 These observations focus on the core allegation of the complaint, i.e. the available remedies in case of unlaw/invalid dismissal i.e. reinstatement and/or the upper limit put on compensation. Other elements raised in the complaint such as (im)possibility of the judges to assess the reasons of the termination and the compensation of workers in successive temporary contracts, will only be addressed in the margins of these observations where relevant and appropriate. Whereas the national legal framework (and practice) is in a detailed manner described in the complaint[1], these observations aim to clarify in particular the international and European legal framework applicable to the issue at stake.

4 These observations have been elaborated upon the request of CCOO, an affiliate to the ETUC, and have been based upon previous ETUC observations made in collective complaints in relation to Article 24 RESC, in particular No.106-107/2014 *Finnish Society of Social Rights v. Finland*, N° 158/2017 *CGIL v. Italy* and N°160/2018 *CGT-FO v. France*, and updated, complemented and adjusted where relevant and appropriate to the situation in Spain as alleged by CCOO.

I. General observations

5 The main content of the complaint is described in the Decision on admissibility of 4 July 2023 as follows:

> 1. CCOO alleges that the situation in Spain constitutes a violation of Article 24 of the Charter on the following grounds:
>
> a) that the courts are not allowed to order reinstatement as an appropriate remedy for unfair dismissal, regardless of the circumstances and conduct of the parties;
>
> b) that the courts are not allowed to order reinstatement as an appropriate remedy for unfair dismissal in situations in which it is established that the dismissal is a fraudulent act aimed at removing workers from their employment as a means of preventing the exercise of the rights to which they may be entitled under the Charter or its Protocols;

[1] Although proposed by CCOO to consider its complaint jointly with Unión General de Trabajadores (UGT) v. Spain, Complaint No. 207/2022, considering that the allegations and evidence presented in their complaint are similar to those presented in the UGT complaint, the ECSR, noting the difference in the substantive scope of the two complaints, decided not to join them (see paras. 3 and 20 of the Decision on the Admissibility) Although indeed different in substantive scope, the ETUC would nevertheless like to refer the ECSR to the extensive clarifying information provided by UGT in its Complaint 207/2022 and in particular on the regulatory framework on individual dismissals prior and after the labour reforms of 2012 which are also raised by CCOO and for ETUC thus provide important additional clarifications regarding the national regulatory framework. See in particular points 2.1 and 2.2 of Collective Complaint N° 207/2022 Union General de Trabajadores (UGT) v. Spain, registered at the Secretariat on 24 March 2022.

c) that, in cases of unfair dismissal, Spain fails to guarantee the reimbursement of financial losses suffered between the date of dismissal and the decision of the court declaring the dismissal unfair, including the costs arising from social security contributions;

d) that the mechanism for compensation in cases of unfair dismissal does not allow victims to claim additional compensation linked to the actual damage suffered;

e) that the mechanism for compensation in cases of unfair dismissal does not allow victims to obtain a minimum, accessible and effective compensation that would have a dissuasive effect for employers.

2. In addition, CCOO alleges that that the compensation is insufficient for the damage suffered as a result of successive temporary contracts concluded in fraud of law, especially in respect of workers under temporary contracts in public administrations, as they receive lower compensation than that provided for in cases of unfair dismissal.[2]

6 It is thereby to be noted that - as indicated in the complaint – the subsequent legislative changes since 2012 form further steps in a process to reform the regulation on dismissal in particular and also forms part of a larger process of reforming the Spanish legislation in the field of labour law and labour market policy in general whereby one of the objectives of the Spanish government was to mitigate the impact of the economic and financial crisis by which Spain was also hit.[3] Accordingly, in these observations the case law of authoritative bodies, like the ECSR, on the impact of the crisis and related (austerity) measures on fundamental (social) rights is referred to.

7 In substantive terms, this collective complaint concerning Article 24 RESC is the seventh collective complaint (following Collective Complaints No 74/2011 *FFFS v. Norway*, No.106-107/2014 *Finnish Society of Social Rights v. Finland,* N° 158/2017 *CGIL v. Italy,* N° 160/2018 *CGT-FO v. France and* N° 207/2022 *UGT v.Spain*)[4] dealing explicitly with the "right to protection in cases of termination of employment". Having provided in the past certain indications as to its general understanding (see in particular Conclusions 2012), the ECSR will therefore have (and probably will wish to use) also this opportunity to further develop its case-law on this important Charter provision on an issue which forms also a core and crucial element of labour law protection in all European states.

8 At an editorial level, it is indicated that all quotations will be governed by the following principles: they focus on the issues at stake (while still showing the relevant context) and will be ordered chronologically (beginning with the newest text). In principle, emphases in bold are added by the ETUC;[5] eventual footnotes are, in principle, omitted.

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[2] ECSR Decision on the Admissibility, Confederación Sindical de Comisiones Obreras (CCOO) v. Spain, Complaint No. 218/2022, 4 July 2023, paras. 1 and 2.

[3] See amongst others pages 44-45 and 56 of the Complaint.

[4] To be noted is that ETUC has also submitted observations in relation to all these complaints with the exception of Collective Complaint No 74/2011 *FFFS v. Norway* and N° 207/2022 *UGT v. Spain*. Although proposed by CCOO to consider its complaint jointly with Unión General de Trabajadores (UGT) v. Spain, Complaint No. 207/2022, considering that the allegations and evidence presented in their complaint are similar to those presented in the UGT complaint, the ECSR, noting the difference in the substantive scope of the two complaints, decided not to join them (see paras. 3 and 20 of the Decision on the Admissibility).

[5] Where the original text contains emphases they are highlighted in italics.

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II. International law and material

9 The ETUC would like to start by referring to pertinent international law and material.[6] From the outset, it should be noted that Spain has ratified all instruments (as far as they are open for ratification) mentioned below, unless otherwise mentioned.

A. International Covenant on Economic, Social and Cultural Rights (ICESCR)[7]

1. The Right to work (Article 6 ICESCR) and Right to just and favourable conditions at work (Article 7 ICESCR)

10 The International Covenant on Economic, Social and Cultural Rights (ICESCR) does not contain a specific provision on the protection against unfair dismissal. However, via its case law, its main monitoring body, the Committee on Economic, Social and Cultural Rights (CECSR), established a clear link between protection of workers in case of (unjustified) dismissal and Article 6 ICESCR on the right to work (see section II.A.2 below). Similarly, it did so with Article 7 ICESCR on the right to just and favourable conditions of work (see section II.A.3 below).

> **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."
>
> **Article 7**
>
> The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:
>
> (a) Remuneration which provides all workers, as a minimum, with:
>
> (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
>
> (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
>
> (b) Safe and healthy working conditions;

---

[6] As to legal impact of the 'Interpretation in harmony with other rules of international law' see the ETUC Observations in No. 85/2012 *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden* - Case Document no. 4, Observations by the European Trade Union Confederation (ETUC), paras. 32 and 33.

[7] Ratified by Spain in 1977.

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

2. General Comment No. 18 on the Right to Work (Article 6 ICESCR)

11 Concerning the right to work, the CESCR has elaborated a 'General Comment' on Article 6 ICESCR[8] which defines the content and legal obligations deriving from this provision. Several elements are to be highlighted:

12 In its description of the "Normative Content of the Right to Work" (II.) the CECSR i.a. refers to ILO Convention No. 158 (see below II.B.1.):

> 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.**

13 Concerning the possible violations of Article 6 ICESCR, the CESCR includes the necessity to protect workers against unlawful dismissals:

> "**Violations of the obligation to protect**
>
> 35. Violations of the obligation to protect follow from the failure of States parties to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to work by third parties. They include omissions such as the failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to work of others; **or the failure to protect workers against unlawful dismissal."**

3. General Comment No. 23 on the Right to just and favourable conditions of work (Article 7 ICESCR)

14 Concerning the right to just and favourable conditions of work, CESCR has elaborated a 'General Comment' on Article 7 ICESCR[9] which defines the content and legal obligations deriving from this provision.

15 As Article 6, Article 7 ICESCR does not explicitly refer to the issue of (unlawful) dismissal. However, Article 7 is considered to be the "corollary of the right to work" and "the enjoyment of just and favourable conditions is a prerequisite for, and result of, the enjoyment of other Covenant rights.[10] Furthermore, Article 7 identifies a non-exhaustive list of fundamental

[8] CESCR, The Right to Work - General comment No. 18 - Adopted on 24 November 2005 - E/C.12/GC/18 (6.2.2006) - http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/403/13/PDF/G0640313.pdf?OpenElement.

[9] CECSR, General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights); Adopted on 27 April 2016. http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f23&Lang=en .

[10] CECSR General Comment No 23, para. 1.

elements to guarantee just and favourable conditions of work and the CECSR has over time identified and systematically underlined other factors and issues. In that sense, it also established a clear link between Article 7 and (unfair) dismissals (incl. pecuniary elements). See amongst others:

II. Normative Content

A. Article 7 (a): remuneration which provides all workers, as a minimum, with:
2. Fair wages

(…) Workers should not have to pay back part of their wages for work already performed and should **receive all wages and benefits legally due upon termination of a contract** or in the event of the bankruptcy or judicial liquidation of the employer. (…)[11]

C. Article 7 (c): equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence
(…) The reference to equal opportunity requires that hiring, promotion and termination not be discriminatory. (…)[12]

In the public sector, States parties should introduce objective standards for hiring, promotion and termination that are aimed at achieving equality, particularly between men and women. Public sector promotions should be subject to impartial review. For the private sector, States parties should adopt relevant legislation, such as comprehensive non discrimination legislation, to guarantee equal treatment in hiring, promotion and termination, and undertake surveys to monitor changes over time.[13]

D. Article 7 (d): rest, leisure, reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays
(…) **Upon termination of employment, workers should receive** the period of annual leave outstanding or **alternative compensation amounting to the same level of pay entitlement or holiday credit.**[14]

B. Specific legal obligations
For example, States should ensure that laws, policies and regulations governing the right to just and favourable conditions of work, (…), are adequate and effectively enforced. States parties should **impose sanctions and appropriate penalties on third parties, including adequate reparation**, criminal penalties, **pecuniary measures such as damages**, and administrative measures, in the event of violation of any of the elements of the right.[15]

IV. Violations and remedies
States parties must demonstrate that they have taken all steps necessary towards the realization of the right within their maximum available resources, **that the right is enjoyed without discrimination (…).[16]**
Violations of the right to just and favourable conditions of work can occur through acts of commission, which means direct actions of States parties. Adoption of labour migration policies that increase the vulnerability of migrant workers to exploitation, **failure to prevent unfair dismissal** from work of pregnant workers in public service, **and introduction of deliberately retrogressive measures** that are incompatible with core obligations **are all examples of such violations.[17]**

[11] CECSR General Comment No 23, para. 10.
[12] CECSR General Comment No 23, para. 31.
[13] CECSR General Comment No 23, para. 33.
[14] CECSR General Comment No 23, para. 43.
[15] CECSR General Comment No 23, para. 59.
[16] CECSR General Comment No 23, para. 77.
[17] CECSR General Comment No 23, para. 78.

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4. CECSR Concluding observations concerning Spain

16 In its Concluding observations on the sixth periodic report of Spain, adopted in 2018, the CECSR highlighted the following in relation to measures 'to increase the flexibility of the labour market' taken in Spain[18]:

> **Austerity measures**
>
> 13.The Committee takes notes of the fact that the State party is engaged in a process of economic growth recovery. It is concerned, however, that the extended application of certain austerity measures continues to affect disadvantaged and marginalized groups and individuals disproportionately with regard to the effective enjoyment of their economic, social and cultural rights, and has created further inequality. It is also concerned that five years after having introduced such measures, the State party has not carried out a full evaluation, in consultation with the persons affected, of the impact, proportionality, duration and possible withdrawal of those measures (art. 2 (1)).
>
> 14.**With reference to its previous recommendation (E/C.12/ESP/CO/5, para. 8) the Committee urges the State party to ensure that the austerity measures it adopts are temporary, necessary, proportionate and non-discriminatory, and are compatible with the core content of the rights recognized in the Covenant, with the aim of ensuring that such measures do not impinge, disproportionately, on the rights of the most disadvantaged and marginalized groups and individuals. In that regard, the Committee recommends that the State party conduct a full evaluation of the effects of such measures on the enjoyment of economic, social and cultural rights, especially by disadvantaged and marginalized groups and individuals, including women, children, persons with disabilities, *Gitanos* and Roma, as well as refugees, asylum seekers and migrants; and that, in consultation with the persons affected, it consider the possible withdrawal of those measures. The Committee also draws the State party's attention to the recommendations contained in its open letter of 16 May 2012 to States parties on economic, social and cultural rights in the context of the economic and financial crisis, with regard to the criteria for austerity measures, and to its 2016 statement on public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights.**
>
> **Conditions of work**
>
> 25.The Committee is concerned that, despite the decline in the overall incidence of precarious employment, the incidence of some forms of such work, especially temporary employment, remains high and particularly affects women. It is also concerned at the negative impact that these forms of employment and the wage freeze have on workers' enjoyment of their right to just and favourable conditions of work, as well as on their access to social security benefits, all of which affect women disproportionately (art. 7).
>
> **26.The Committee recommends that the State party:**

[18] CECSR (2018), Concluding observations on the sixth periodic report of Spain, adopted at its 28th meeting of 29 March 2018. (Available at: tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2FESP%2FCO%2F6&Lang=en)

> **(a) Take all appropriate measures to prevent abuse of the various forms of precarious employment, especially temporary employment, by, among other means, generating decent work opportunities that provide job security and adequate protection of labour rights;**
>
> **(b) Ensure that, both in law and in practice, the right to just and favourable conditions of work and to social security is fully guaranteed for persons engaged in part-time and temporary employment or in other forms of precarious work; (…)**
>
> **27.The Committee refers the State party to its general comment No. 23 (2016) on the right to just and favourable conditions of work.**

B. International Labour Organisation (ILO)

17 Whereas already in a resolution adopted in 1950, the ILO noted the absence of international standards on the termination of contracts of employment, it adopted in 1963 the 'Termination of Employment Recommendation (No 119). This was later then followed by ILO Convention No. 158 on Termination of Employment Convention, 1982 (No. 158)[19] and accompanied by another Recommendation on Termination of Employment Recommendation, 1982 (No. 166)[20] which replaced the Recommendation No 119.

18 ILO Convention No. 158 contains the core of international regulation of the protection against unfair dismissal. This is even more important since it has served as basis for Article 24 RESC.[21] Spain has ratified this important Convention on 26 April 1985.[22]

1. ILO Convention No. 158

19 In its "Part II. Standards of General Application" the Convention defines the substance of the requirements as far as this complaint is concerned.

20 As regards the **possibility for bodies empowered to examine the reasons given for the termination**, Article 9 of the Convention provides:

> 1. The bodies referred to in Article 8 of this Convention shall be empowered to examine the reasons given for the termination and the other circumstances relating to the case and to render a decision on whether the termination was justified.

[19] Convention concerning Termination of Employment at the Initiative of the Employer (Entry into force: 23 Nov 1985). http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312303:NO.

[20] Recommendation concerning Termination of Employment at the Initiative of the Employer http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312504:NO

[21] "86. The provision has been inspired by ILO Convention No. 158 (Termination of Employment) of 1982." http://conventions.coe.int/Treaty/en/Reports/Html/163.htm.

[22] See https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312303 .

2. **In order for the worker not to have to bear alone the burden of proving that the termination was not justified**, the methods of implementation referred to in Article 1 of this Convention shall provide for one or the other or both of the following possibilities:

(a) the burden of proving the existence of a valid reason for the termination as defined in Article 4 of this Convention shall rest on the employer;

(b) the bodies referred to in Article 8 of this Convention shall be empowered to reach a conclusion on the reason for the termination having regard to the evidence provided by the parties and according to procedures provided for by national law and practice**.**

21 As regards the **consequences of a dismissal** the Convention stipulates under the heading of "Division C. Procedure of Appeal Against Termination" the following in Article 10 of the Convention:

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.**[23]

22 Furthermore, "Division E. Severance Allowance and Other Income Protection" addresses the necessary **financial consequences in case of a dismissal**:

Article 12

1. A worker whose employment has been terminated shall be entitled, in accordance with national law and practice, to-

(a) a severance allowance or other separation benefits, the amount of which shall be based **inter alia** on length of service and the level of wages, and paid directly by the employer or by a fund constituted by employers' contributions; or

(b) benefits from unemployment insurance or assistance or other forms of social security, such as old-age or invalidity benefits, under the normal conditions to which such benefits are subject; or

(c) a combination of such allowance and benefits.

2. A worker who does not fulfil the qualifying conditions for unemployment insurance or assistance under a scheme of general scope need not be paid any allowance or benefit referred to in paragraph 1, subparagraph (a), of this Article solely because he is not receiving an unemployment benefit under paragraph 1, subparagraph (b).

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[23] This Article is clearly inspired by paragraph 6 of the ILO Recommendation N° 119 which stated in section II. Standards of General Application that "6. The bodies referred to in Paragraph 4 should be empowered, **if they find that the termination of employment was unjustified, to order that the worker concerned, unless reinstated, where appropriate with payment of unpaid wages, should be paid adequate compensation, or afforded such other relief as may be determined under the methods of implementation set out in Paragraph 1, or granted such compensation and other relief as may be so determined.** (…)"

3. Provision may be made by the methods of implementation referred to in Article 1 of this Convention for loss of entitlement to the allowance or benefits referred to in paragraph 1, subparagraph (a), of this Article in the event of termination for serious misconduct.

2. ILO Recommendation No. 166

23 ILO Convention No. 158 has - as mentioned above - been accompanied by the Termination of Employment Recommendation, 1982 (No. 166).

24 Under the heading “II. Standards of General Application” this Recommendations states the following in relation to **income protection**:

SEVERANCE ALLOWANCE AND OTHER INCOME PROTECTION

18.

(1) A worker whose employment has been terminated should be entitled, in accordance with national law and practice, to-

(a) a severance allowance or other separation benefits, the amount of which should be based, inter alia, on length of service and the level of wages, and paid directly by the employer or by a fund constituted by employers' contributions; or

(b) benefits from unemployment insurance or assistance or other forms of social security, such as old-age or invalidity benefits, under the normal conditions to which such benefits are subject; or

(c) a combination of such allowance and benefits.

(2) A worker who does not fulfil the qualifying conditions for unemployment insurance or assistance under a scheme of general scope need not be paid any allowance or benefit referred to in subparagraph (1) (a) of this Paragraph solely because he is not receiving an unemployment benefit under subparagraph (1) (b).

(3) Provision may be made by the methods of implementation referred to in Paragraph 1 of this Recommendation for loss of entitlement to the allowance or benefits referred to in subparagraph (1) (a) of this Paragraph in the event of termination for serious misconduct.

25 To be noted is that as for **protection of precarious employment contracts**, the Recommendation also provides that:

3.

(1) Adequate safeguards should be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from the Termination of Employment Convention, 1982, and this Recommendation.

(2) To this end, for example, provision may be made for one or more of the following:

(a) limiting recourse to contracts for a specified period of time to cases in which, owing either to the nature of the work to be effected or to the circumstances under which it is to be effected or to the interests of the worker, the employment relationship cannot be of indeterminate duration;

(b) deeming contracts for a specified period of time, other than in the cases referred to in clause (a) of this subparagraph, to be contracts of employment of indeterminate duration;

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(c) deeming contracts for a specified period of time, when renewed on one or more occasions, other than in the cases mentioned in clause (a) of this subparagraph, to be contracts of employment of indeterminate duration.

3. Other relevant ILO instruments

26 Whereas ILO Convention No. 158 focusses specifically on termination of employment, a number of other ILO instruments (both Conventions and accompanying Recommendations), and in particular the basic instruments on the protection of human rights, provide protection in the area of employment security, for example in relation to protection against acts of anti-union discrimination, or against discrimination in employment and occupation, maternity protection, the protection of workers' claims in the event of the insolvency of their employer, or part-time work.[24]

27 Furthermore, the ILO adopted unanimously in 2009 the "Recovering from the crisis: A Global Jobs Pact".[25] This global policy instrument addresses the social and employment impact of the international financial and economic crisis and "its fundamental objective is to provide an internationally agreed basis for policy-making designed to reduce the time lag between economic recovery and a recovery with decent work opportunities". In its section III. Decent Work Responses, subsection on "Strengthening respect for International Labour Standards", the Pact makes a reference to importance of protection against dismissal in this regard:

> 14. **International labour standards create a basis for and support rights at work and contribute to building a culture of social dialogue particularly useful in times of crisis. In order to prevent a downward spiral in labour conditions and build the recovery, it is especially important to recognize that**:
>
> (1) **Respect for fundamental principles and rights at work is critical for human dignity**. It is also critical for recovery and development. Consequently, it is necessary to increase:
>
> > (i) vigilance to achieve the elimination and prevention of an increase in forms of forced labour, child labour and discrimination at work; and
> >
> > (ii) respect for freedom of association, the right to organize and the effective recognition of the right to collective bargaining as enabling mechanisms to productive social dialogue in times of increased social tension, in both the formal and informal economies.
>
> (2) **A number of international labour Conventions and Recommendations, in addition to the fundamental Conventions, are relevant**. **These include ILO instruments concerning** employment policy, wages, social security, the employment relationship, **the termination of employment**, labour administration and inspection, migrant workers, labour conditions on

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[24] See amongst others The Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Workers' Representatives Convention, 1971 (No. 135), the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), the Workers with Family Responsibilities Convention, 1981 (No156), the Maternity Protection Convention (Revised), 1952 (No. 103), the Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173) and the Part-Time Work Convention, 1994 (No. 175).

[25] ILO (2009) "Recovering from the crisis: A Global Jobs Pact", adopted by the International Labour Conference at its Ninety-eighth Session, Geneva, 19 June 2009. (available at http://www.ilo.org/gender/Informationresources/Publications/WCMS_115521/lang--en/index.htm)

public contracts, occupational safety and health, working hours and social dialogue mechanisms. (…)

4. ILO supervisory bodies' case-law

28 The relevant case-law of the Committee of Experts on the Application of Conventions and Recommendation (CEACR) is contained in its General Survey 1995.[26]

29 In interpreting Article 9 of the Convention (examination of the reasons for termination by an impartial body), the CEACR clarifies the following:

> Examination of the reasons for termination of employment — Burden of proof
>
> 196. Article 9, paragraph 1, of the Convention provides that the bodies referred to in Article 8 "shall be empowered to examine the reasons given for the termination and the other circumstances relating to the case and to render a decision on whether the termination was justified".
>
> 197. This provision establishes the essential principle of the right to appeal, under which **it must be possible for the reasons and the other circumstances relating to the case to be examined by an impartial body, enabling it to decide on the justification of the termination**. This paragraph, in a slightly different wording, was supported by the very large majority of governments from the beginning of the preparatory work.
>
> 198. As regards the burden of proof Article 9, paragraph 2, provides that "in order for the worker not to have to bear alone the burden of proving that the termination was not justified, the methods of implementation referred to in Article 1 of this Convention shall provide for one or the other or both of the following possibilities: (a) the burden of proving the existence of a valid reason for the termination as defined in Article 4 of this Convention shall rest on the employer; (b) the bodies referred to in Article 8 of this Convention shall be empowered to reach a conclusion on the reason for the termination having regard to the evidence provided by the parties and according to procedures provided for by national law and practice".
>
> **199. The success of an appeal against unjustified termination of employment depends to a large extent on the ability of the worker/complainant to convince the competent impartial body of the justification of his complaint, which in turn will depend mainly on the evidence submitted. In cases of termination of employment, the application of the general rule applicable in contract law, whereby the burden of proof rests on the complainant, could make it practically impossible for the worker to show that the termination was unjustified, particularly since proof of the real reasons is generally in the possession of the employer. This is all the more true if there is no clear statement of the reasons by the employer, which may well be the case when the employer is not required to provide written reasons for the termination of employment.** In an employment relationship, it is the employer who has the upper hand, particularly because he controls the sources of information.
>
> 200. The Convention therefore lays down the principle in Article 9, paragraph 2, that the worker must not "have to bear alone the burden of proving that the termination was not justified" 77 and proposes several possible methods of achieving this. Under the first of these (Article 9, paragraph 2(a)), the burden of proving the existence of a valid reason rests on the employer. This text clearly

[26] ILO, Protection against unjustified dismissal, 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.

indicates that the employer is required to present evidence showing that there is a valid reason, as defined by Article 4 of the Convention. It is the responsibility of the impartial body to decide, in the light of the evidence presented, whether the termination is justified.

201. The second possibility (Article 9, paragraph 2(b)) consists of not placing the burden of proof on either the employer or the worker, but allowing the impartial body to reach a conclusion in the light of the evidence provided by the two parties. This implies that each party, in his own interest, will submit to the body the evidence at his disposal and which he considers as establishing his case, and that the body will use, where appropriate, any power of investigation accorded to it by national law and practice.

202. Finally, the third option is to provide for both of the above possibilities. The methods of implementation referred to in Article 1 must therefore include one or the other or both of these two possibilities.

203. The Convention therefore distances itself from the traditional concept of contract law, whereby the burden of proof is placed on the complainant. It is based in particular on the tradition of common law countries in which the employer was required to provide proof of the justification of termination of employment without notice for serious misconduct and on the concepts now current in other countries in civil proceedings in which the judge decides in the light of the evidence before him, mainly the evidence presented by the parties, thereby participating in the search for the truth, often with real powers of investigation**. It is also linked to the principle whereby in labour disputes legal provisions must be interpreted in favour of the worker.**

211. **A problem may arise if the judge cannot reach a conclusion on the basis of the evidence, or following an inquiry, and if a doubt remains.** In a number of countries, it is considered that where a doubt subsists the burden of proof should rest on the employer. **In fact, as termination of employment is unjustified unless there is a valid reason, if it is impossible for the judge to ascertain that there is such a reason then the logical conclusion is to recognize that the conditions for such justification, and therefore the right to termination of employment, do not exist.**87

30 In interpreting Article 10 of the Convention (see above para. 21), the CEACR clarifies that in principle reinstatement has preference over other remedies:

> 219 "The wording of Article 10 **gives preference** to declaring termination invalid and **reinstating the worker** as remedies in the case of unjustified termination of employment. (…) **The text specifies, moreover, that when compensation is paid it should be "adequate"**."[27]
>
> 221. **While financial compensation compensates for the unjustified loss of employment, annulment of the termination and reinstatement guarantee job security by allowing the worker to take up his job again, and offering him the possibility of retaining the rights he has acquired during his years of service, such as entitlement to old-age benefits; they often also entail the payment of outstanding wages**. Reinstatement can also involve the implementation of special protection for certain groups of workers, such as workers' representatives, workers who are members of trade unions, and workers whose employment has been terminated for discriminatory reasons.93 **During times of unemployment, reinstatement can also play a decisive role, in particular for groups who are disadvantaged on the labour market such as women, old workers and persons with disabilities**. **The effectiveness of the protection afforded by reinstating the worker depends in particular on the length of proceedings (too long a period between**

[27] Ibd., para. 219.

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termination of employment and the final decision is not favourable for reinstatement); on the specific nature of the employment relationship (reinstatement is more feasible in a larger undertaking than in a smaller one where personal ties are closer between employer and worker); on the effectiveness of the machinery to enforce reinstatement decisions, which could consist for example of penalty clauses making employers liable for damages if they fail to comply with the decision of the impartial body.

222. **When reinstatement is ordered, the worker generally also has the right to the remuneration that he would have received between the date of termination of employment and the date of the decision, or of the actual reinstatement**. Sometimes a deduction is made from this amount of a sum corresponding to any wages the worker may have received in the meantime if he has been able to find alternative employment. The competent bodies may frequently also provide that the employment relationship shall be considered to be uninterrupted, enabling the worker to retain his acquired rights, such as pension entitlements and qualifying periods for various purposes. For example, in countries where protective legislation against unjustified termination of employment requires a qualifying period, if a new qualifying period commenced from the date of reinstatement, the worker would not be protected against unjustified termination of employment immediately following his reinstatement, thus rendering the protective provisions illusory.

31 However, if reinstatement is not possible, desired or wanted, the CEACR states the following:

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.** (…)[28]

230. **Some countries also award damages, as distinct from compensation, in the event of unjustified termination of employment, when an employer is found to have acted in a wanton, reckless, malicious or sufficiently outrageous manner**.

32 As for **specific case law in relation to Spain**, reference should be made to the CEACR Direct Requests and Observations and in particular:

Observation (CEACR) - adopted 2011, published 101st ILC session (2012) *Justification of dismissal. Reforms of termination benefits.* The Government indicates in its report that Act No. 35 of 2010 adopting urgent labour market reform measures changed the wording of the reasons for dismissal on economic, technical or production-related grounds, as a result of certain shortcomings in the operation of the termination procedures set out in sections 51 and 52(c) of the Workers' Charter. These shortcomings had given rise to a shift from the termination of indefinite contracts for economical or production-related reasons towards more cases of wrongful dismissal for disciplinary reasons. The Committee notes the detailed wording of the

[28] Ibd., para 232.

justified reasons required for dismissal on economic, technical, organizational or production-related grounds set out in section 54(1) of the Workers' Charter. The Committee observes that this is intended to reinforce the giving of reasons for the termination of employment contracts. ***The Committee invites the Government to provide with its next report the main decisions by courts of law giving effect to the reasons justifying the termination of the employment relationship based on the operational requirements of the enterprise (Article 4).*** The Government adds that Act No. 35 of 2010 contains other amendments to the Workers' Charter and the Labour Procedures Act specifically related to notice periods and the calculation of termination benefits. The Committee understands that the principal purpose of these measures is to maintain and create employment. ***The Committee invites the Government to include in its report an evaluation of the impact of the reduction in the level of termination benefits by the legislative reforms of 2010 and 2011 in terms of maintaining and creating employment. In this respect, the Committee invites the Government to include with its report updated information on the intervention of the labour authorities in cases of collective dismissal, the outcome of appeals against unjustified termination, the average time taken for an appeal to be decided and the role played by mediation and arbitration in resolving issues related to the Convention (Part V of the report form).***

Observation (CEACR) - adopted 2015, published 105th ILC session (2016)
Follow-up to the recommendations of the tripartite committee (representation made under article 24 of the Constitution of the ILO)

At its 321st Session (June 2014), the Governing Body entrusted the Committee of Experts with following up the questions raised in the report of the tripartite committee which examined the representation made by the CCOO and the UGT alleging non-observance by Spain of Convention No. 158 (GB.321/INS/9/4). In the same way as the tripartite committee (paragraph 226 of the report), the Committee of Experts requested the Government to increase its efforts to reinforce social dialogue and, in consultation with the social partners, to find solutions to the economic difficulties that are in conformity with the Convention. The CCOO states that the Government has not organized meetings with the social partners to listen to and take into consideration the proposals made by trade unions concerning the Convention and concerning the need to make substantive amendments to the current legislation respecting termination of employment. ***The Committee once again requests the Government to take measures to reinforce social dialogue and, in consultation with the social partners, to find solutions to the economic difficulties that are in conformity with the Convention. (…)***

Article 10. Abolition of compensation wages in cases where the employer opts for the termination of employment despite a court ruling of unfair dismissal (paragraphs 267–280 of the report). With reference to the compensation granted by the courts in cases of unfair dismissal, the Government indicates that when the courts find that a dismissal is unlawful, the employer is required by the ruling to opt, within five days of notification of the ruling, between the reinstatement of the worker or the payment of compensation equivalent to 33 days' wages for each year of service, with a pro rata amount per month for periods of under one year, up to a maximum of 24 monthly payments. Opting for compensation results in the termination of the employment contract, as from the date of the effective end of work. If the employer opts for reinstatement, the worker is entitled to compensation wages for the elapsed period. The wages are equivalent to an amount equal to the sum of the wages that the worker did not receive from the date of dismissal until the notification of the ruling finding the dismissal to be unlawful, or until the worker has found another job. ***The Committee requests the Government to continue providing information on the nature of the compensation awarded, including examples of court rulings in cases where termination of employment is found to be unjustified.***

Observation (CEACR) - adopted 2016, published 106th ILC session (2017)

Follow-up to the recommendations of the tripartite committee (representation made under article 24 of the ILO Constitution)

Article 10. Abolition of compensation wages in cases where the employer opts for termination of employment despite a court ruling of unfair dismissal. The Committee notes the information provided by the Government on the fifth transitional provision of Act No. 3/2012 of 6 July 2012 establishing urgent measures for reform of the labour market, relating to the calculation of compensation for unfair dismissal with respect to contracts formalized before and after 12 February 2012, equivalent to 45 and 33 days' wages, respectively, for each completed year of service, with a pro rata amount per month for periods of less than a year in both cases, up to a maximum of 720 days' wages. If, in calculating the compensation for the period before 12 February 2012, the number of days exceeds 720, the latter figure will be regarded as the maximum applicable to the amount of compensation, up to a maximum of 42 monthly payments. The CEOE and IOE consider that the abolition of compensation wages, together with the reduction of compensation to 33 days' wages, has helped to reduce the costs of dismissal and is conducive to overcoming labour market duality and competitive disadvantages. ***The Committee requests the Government to continue providing information on the number and nature of compensation granted, including examples of court decisions that found that the termination of employment was unjustified.***

5. Specific material on austerity measures

33 In addition to the large corpus of standards and case law mentioned above on the issues at stake in this collective complaint, the ILO has also widely addressed and examined the consequences of austerity measures.

34 Without being exhaustive, reference can be made in particular to the ILO report 'World Employment and Social Outlook 2015: The Changing nature of jobs', which analysed data from 63 countries, over the last 20 years, suggesting that lowering protection for workers does not stimulate job growth[29] as well as the 2015 Working Paper "The decade of adjustment. A review of austerity trends 2010-2020 in 187 countries"[30] the ILO considered that Labour reforms aiming at flexibilization such as those implemented in Spain between 2010 and 2012 will not generate decent jobs; on the contrary, in a context of economic contraction, they are likely to generate labour market -precarization, depress domestic incomes and ultimately hinder recovery efforts.[31]

C. Council of Europe

35 The Council of Europe (CoE) is characterised by two main human rights instruments, the European Convention on Human Rights (ECHR, see below 1)) and the European Social Charter (ESC, see below 2)) which is at the very core of this complaint. However, there are also other relevant documents (see below 3)).

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29 https://www.ilo.org/global/about-the-ilo/newsroom/comment-analysis/WCMS_383849/lang--en/index.htm

30 ESS Paper Series (SECSOC) - ESS 53: The decade of adjustment. A review of austerity trends 2010-2020 in 187 countries (2015).

31 *Ibid* ESS Paper Series. Page 41.

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1. European Convention on Human Rights (ECHR)

36 In recent times, the European Court of Human Rights (ECtHR) has developed its jurisprudence on in particular Article 8 ECHR (right to respect of private life) as containing more and more the protection against unfair dismissals. In part, it refers to Article 24 RESC (as well as to ILO-Convention No. 158).[32]

37 It is thereby interesting to highlight that the Court stresses in its case law the dramatic consequences that usually result from a dismissal, not only in financial terms but also regarding the capacity to develop a 'social private life" [33]:

> "With regard to Article 8, the Court has already held in a number of cases that **the dismissal** from office of a civil servant **constituted an interference with the right to private life** (see *Özpınar v. Turkey*, no. 20999/04, §§ 43-48, 19 October 2010; and *Oleksandr Volkov v. Ukraine*, no. 21722/11, §§ 165-167, 9 January 2013)."[34]

38 Personal consequences of dismissals are described in a way that

> "the applicant's dismissal had an impact on her "inner circle" as the loss of her job must have had tangible consequences for the material well-being of her and her family (see *Oleksandr Volkov*, cited above, § 166). The applicant must also have suffered distress and anxiety on account of the loss of her post. What is more, the applicant's dismissal affected a wide range of her relationships with other people, including those of a professional nature and her ability to practise a profession which corresponded to her qualifications (see *Sidabras and Džiautas*, cited above, § 48; *Oleksandr Volkov*, cited above, § 166; and *İhsan Ay,* cited above, § 31). Thus, the Court considers that Article 8 is applicable to the applicant's complaint."[35]

39 The ECtHR has also interpreted Article 6 ECHR (the right to a fair trial), stressing the importance of being able to meaningfully challenge a dismissal in court, and thus guaranteeing procedural protection from unfair dismissal.[36]

2. European Social Charter (ESC)

a) Text

40 The European Social Charter provides in Article 24 the following

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[32] However, from a substantive point of view, the ECtHR has also assessed termination of employment from the perspective of Article 9 (freedom to hold religious beliefs), Article 10 (freedom of expression) and Article 11 (freedom of association). From a procedural point of view, but which forms not the primary focus of the complaint (and these ETUC observations), there is of course also the link with Article 6§1 ECHR (right to a fair trial). On the applicability of Article 6§1 to cases of (unjustified) termination of employment, see European Court of Human Rights (2017), Guide on Article 6 of the European Convention on Human Rights Right to a fair trial (civil limb), Strasbourg, updated to 31 December 2017, in particular paras. 21, 29, 34 and 35.. (available at: https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf)

[33] ECtHR 2.12.2014 – Nr. 61960/08 - *Emel Boyraz / Turkey.*

[34] Ibd. § 43.

[35] Ibd. § 44.

[36] KMC v. Hungary, app. no. 19554/11, judgment of 10 July 2012

“**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.”

41 The Appendix (Part II) to Article 24 stipulates i.a.:

> “1) It is understood that for the purposes of this article the terms "termination of employment" and "terminated" mean termination of employment at the initiative of the employer. …
>
> 4) It is understood that compensation or other appropriate relief in case of termination of employment without valid reasons shall be determined by national laws or regulations, collective agreements or other means appropriate to national conditions.”

42 Article 24 was explicitly inspired by the ILO Convention No 158 (see above section II.B.1), some provisions of which are reproduced verbatim.[37] As a consequence, when interpreting Article 24 due regard must be taken of this Convention and the related ILO Recommendation No 166 (see above section II.B.2) as well as the case law of the CEACR.[38]

43 Article 24 is also closely related to other articles of the Charter, in particular Article 1 (Right to Work). This direct link is not only established by international bodies such as the UN CESCR and the ILO CEACR, but also the ECSR has established this direct link between the right to work and the employment termination, especially as regards the obligation “to protect effectively the right of the worker to earn his living in an occupation freely entered upon”.[39]

b) Compilation of case law (Digest June 2022)

44 The ‘Digest of the Case Law of the European Committee of Social Rights’ (Digest 2022) compiles the main principles deriving from the ECSR’s case law based on Statements of Interpretation, Conclusions or Decisions[40].

45 Concerning the protection offered by Article 24 ESC, in particular in relation to relief in case of unfair dismissal, the Digest 2022 states the following:

[37] Council of Europe (1996) Explanatory Report to the European Social Charter (Revised), Strasbourg, 03.05.1996, § 86.
[38] For a recent academic analysis of Article 24 ESC, see Schmitt, M. (2016) Article 24 – The Right to Protection in Cases of Termination of Employment, in Bruun, N., Lörcher, K., Schömann, I. and Clauwaert, S. (2016) The European Social Charter and the Employment Relation, London: Hart Publishing, pp. 412-438.
[39] See, e.g. Conclusions XVI(2002), Austria; Conclusions (2008), Azerbaijan.
[40] Available at: https://www.coe.int/en/web/turin-european-social-charter/case-law

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Adequate compensation
(…) Damages
Employees dismissed without valid reason must be granted adequate compensation or other appropriate relief. Compensation systems are considered appropriate if they include the following provisions:

- reimbursement of financial losses incurred between the date of dismissal and the decision of the appeal body;
- the possibility of reinstatement;
- and/or compensation of a high enough level to dissuade the employer and make good the damage suffered by the employee.

c) Specific appreciation of the ECSR of other national legislations

46 As also mentioned in the Complaint[41], in relation to Article 24, the ECSR has expressed itself on the particular issue of relief in case of unfair dismissal (reinstatement and/or compensation) when evaluating other national legislations and this in the framework of the reporting system and the collective complaints procedure.

47 As for the remedy of reinstatement, the ECSR has at several occasions stated thatreference could be made in particular to:

> The Committee considers that other appropriate relief should include reinstatement as one of the remedies available to nationals 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 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. (ECSR Decision on the Merits Collective Complaint 106/2014, §55; ECSR Decision on the Merits Collective Complaints 160/2018 and 171/2018, § 156)
>
> **Conclusions 2020 (Albania)**
>
> **Remedies and sanctions**
>
> As regards reinstatement, the Committee has previously considered that **the legislation did not provide for reinstatement in the private sector.** The Committee notes that the report does not provide any new information in this regard. Therefore, the Committee also reiterates its previous finding of non-conformity on this ground.
>
> The Committee recalls that under Article 24 of the Charter the law must provide for a shift of the burden of proof between employee and employer in proceedings relating to dismissal. The Committee refers to its Conclusion on Article 20, where it notes from the report that Law No. 136/2015 of 5 December 2015 made amendments to the Labour Code. As a result, where there has been a breach of Article 9 of the Labour Code (Prohibition of Discrimination), the burden of proof has now been shifted to the employer where the plaintiff is able to provide evidence enabling the court to presume that the employer has engaged in discriminatory conduct. The

[41] See in particular pages 13-21, section II.2 and II.3 of the complaint.

Committee asks whether Article 146(2) also provides for the shift in the burden of proof in unlawful dismissal proceedings, not related to discrimination.

48 As for the upper-limits of financial compensation, the ECSR has on numerous occasions observed that ceilings are in most cases not in conformity with Article 24. Reference can be amongst others made to:

Conclusions 2008 concerning (amongst others) Finland, the ECSR has observed that:

The Committee holds that Article 24 of the Revised Charter requires that courts or other competent bodies are able to order adequate compensation, reinstatement or other appropriate relief. In order to be considered appropriate, compensation should include reimbursement of financial losses incurred between the date of dismissal and the decision of the appeal body ruling on the lawfulness of the dismissal, the possibility of reinstatement and/or compensation sufficient both to deter the employer and proportionate to the damage suffered by the victim. The Committee finds the situation in Finland not to be in conformity with Article 24 of the Revised Charter in this respect.[42]

Conclusions 2012 concerning (amongst others) Finland, the ECSR observed that although ceilings are not prohibited as such, the following should be taken into account:

Remedies and sanctions

In its previous conclusion the Committee held that the situation in Finland was not in conformity with Article 24 of the Charter on the ground that the compensation for unlawful termination of employment was subject to an upper limit. (…) ***In this connection, the Committee recalls that compensation for unlawful dismissal must be both proportionate to the loss suffered by the victim and sufficiently dissuasive for employers****. Any ceiling on compensation that may preclude damages from being commensurate with the loss suffered and sufficiently dissuasive are proscribed. 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 (e.g. anti-discrimination legislation), and the courts competent for awarding compensation for pecuniary and non-pecuniary damage must decide within a reasonable time.*[43]

Decision on the merits on Collective Complaint No 106 Finnish Society of Social Rights v. Finland, the ECSR observed that an upper limit of 24 months' pay may not constitute an adequate compensation:

i) Adequate compensation

45. The Committee recalls that under the Charter, employees dismissed without valid reason must be granted adequate compensation or other appropriate relief. ***Compensation systems are considered appropriate, if they include for the following:***

- *reimbursement of financial losses incurred between the date of dismissal and the decision of the appeal body;*
- *possibility of reinstatement;*
- *compensation at a level high enough to dissuade the employer and make good the damage suffered by the employee.*

46. ***Any upper limit on compensation that may preclude damages from being commensurate with the loss suffered and sufficiently dissuasive is in principle, contrary***

[42] Conclusions (2008), Finland.
[43] Conclusions (2012), Finland.

to the Charter. *However, 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 (e.g. anti-discrimination legislation) (Conclusions 2012, Slovenia).*

47. As regards the allegation that Finland is in breach of Article 24 of the Charter on the grounds that the Employment Contracts Act provides for a limit on the amount of compensation that may be awarded in the event of an unlawful dismissal the Committee recalls that in Conclusions 2008 it found that the situation in Finland was not in conformity with that provision of the Charter on the ground that compensation for unlawful dismissal was subject to an upper limit of no more than 24 months pay. (…)

48. The Government states that employees may in addition to the Employment Contracts Act seek compensation for unlawful dismissal under the Non-Discrimination Act and the Act on Equality between Women and Men. However, the Committee notes that only persons who were dismissed on discriminatory grounds may seek compensation under these pieces of legislation. In a case of unfair dismissal, not having a discriminatory element, it is not possible to claim compensation under them.

49. The Committee considers that in some cases of unfair dismissal an award of compensation of 24 months as provided for under the Employment Contracts Act may not be sufficient to make good the loss and damage suffered. (…)

53. The Committee considers that the upper limit to compensation provided for by the Employment Contracts Act may result in situations where compensation awarded is not commensurate with the loss suffered. In addition, it cannot conclude that adequate alternative other legal avenues are available to provide a remedy in such cases.[44]

In respectively the **ECSR Conclusions 2012 concerning Albania and Conclusions 2016 concerning Bulgaria**, the ECSR also observed that lower limits such as one year or 6 months are not inconformity with Article 24:

<u>*Conclusions 2012, Albania*</u>

Remedies and sanctions

*(…) In its previous conclusion the Committee noted that pursuant to Article 146§3 of the Labour Code when the termination of an employment contract is considered to be invalid, the employer shall be under an obligation to pay the employee a compensation of up to maximum one year's salary****. The Committee held that this situation was contrary to the Charter as the compensation for unlawful dismissal was subject to a maximum of one year's wages****.*

In this regard the Committee notes from the report of the Governmental Committee of the Social Charter to the Committee of Ministers of the Council of Europe (T-SG (2010) 6, §243) that the Government considered amending Article 146 to take into account the conclusion of non-conformity of the Committee. It was planned to intervene during 2010 in order to promulgate a specific regulation on this issue. A working group had been established with a view to preparing amendments to Article 146 of the Labour Code.

Since the report does not provide any further information on this issue, the Committee considers that the situation which it has previously found not to be in conformity on this ground has not changed. ***Therefore, it reiterates its previous conclusion of non-conformity.***[45]

[44] ECSR Decision on the merits, Collective Complaint No 106 *Finnish Society of Social Rights*, 8 September 2016.
[45] Conclusions 2012, Albania.

Conclusions 2016, Bulgaria

Remedies and sanctions

(…) The Committee recalls that Article 24 of the Charter requires that courts or other competent bodies are able to order adequate compensation, reinstatement or other appropriate relief. In order to be considered appropriate, compensation should include reimbursement of financial losses incurred between the date of dismissal and the decision of the appeal body ruling on the lawfulness of the dismissal, the possibility of reinstatement and/or compensation sufficient both to deter the employer and proportionate to the damage suffered by the victim.

Article 225, para 1, of the Labour Code, provides for compensation in cases of unlawful dismissal** from the employer of an amount equal to the worker's pay for the period of unemployment caused by reason of the said dismissal, **but not more than six months**. This provision covers not only the cases of award of compensation, in case of unlawful dismissal due to discriminatory reasons, but also applies to all grounds for termination of employment stipulated in the Labour Code, 'raking into account the conclusions of the European Committee of Social Rights, in 2009 the Ministry of Labour and Social Policy initiated legislative amendments and prepared a draft Law amending and supplementing the Labour Code to repeal this 6 months restriction regulated by Article 225, para. 1., but due to objections by the Ministry of Finance and the Ministry of Defence the proposal was not accepted. **The Committee therefore notes from the report that there has been no follow up to these developments and the compensation for unlawful dismissal is still limited to 6 months' wage.

*The Committee notes that the interpretative judgement adopted by the Supreme Court of Cassation (which is binding on judicial and executive bodies, on local government bodies, as well as on all bodies issuing administrative acts) at the beginning of 2013 enacts that in cases of non performance of an obligation resulting from a contract, **the Court may award compensation for non-material damages which are a direct and immediate consequence of the tort. That type of compensation has no upper limit** (Obligations and Contracts Act, Code of Civil Procedure). On the ground that the labour relationships are also contract relationships it means that in eases of unlawful dismissal the employee disposes of another essential tool for civil protection the claim under the Obligations and Contracts Act. The Committee asks under which specific circumstances alternative legal avenue are provided. The Committee asks whether the law provides for a possibility of reinstatement.*[46]

The obligation to provide adequate compensation for workers dismissed without a valid reason seems thus to be strictly interpreted by the ECSR. And it even seems that compensation is required in addition to reinstatement and that only a possibility of being reinstated is not sufficient. See in this sense **Conclusions 2003 concerning Bulgaria**:

> *The Committee considers with regard to Article 24 of the Revised Charter that when a dismissal is ruled to be null and void and an employee's reinstatement is ordered, or the employment relationship is held to have been uninterrupted, such decisions must at a minimum be accompanied by an entitlement to receive the wage that would have been payable between the date of the dismissal and that of the court decision or effective reinstatement. The Committee therefore considers that in Bulgaria, the maximum compensatory payment of six months' wages cannot be considered as adequate with respect to Article 24.*

[46] Conclusions 2016, Bulgaria.

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In Conclusions 2016 (Italy) the ECSR has expressed itself on the particular issue of relief in case of unfair dismissal (reinstatement and/or compensation):

*The Committee recalls that **any ceiling in compensation that may preclude damages from being commensurate with the loss suffered and sufficiently dissuasive are prohibited**. 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 (e.g. anti-discrimination legislation) and the courts competent for awarding compensation for pecuniary and non-pecuniary damage must decide within a reasonable time (Conclusions 2012, Slovenia and Finland). **The Committee asks whether in case there is a ceiling, it is possible to seek compensation through other legal avenues**. In the meantime the Committee reserves its position.*

It is to be noted amongst others **following these Conclusions, the CGIL lodged a complaint against Italy (N° 158/2017)** and in which the ETUC has also submitted observations.[47] In its assessment in the Decision on the Merits, the ECSR states amongst others the following:

87. The Committee points out that, under the Charter, workers dismissed without valid reason must be granted adequate compensation or other appropriate relief. Compensation systems are considered to comply with the Charter when they provide for: - reimbursement of financial losses incurred between the date of dismissal and the decision of the appeal body; - the possibility of reinstatement of the worker and/or - 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, decision on admissibility and the merits of 8 September 2016, §45; Conclusions 2016, Bulgaria).

88. The Committee notes that the compensation mechanisms currently provided for by the contested provisions vary according to the type of unlawful dismissal and the size of the company (production unit with up to 15 or more workers).

89. If the dismissal constitutes discrimination (on the grounds of trade union membership, political or religious affiliation, race, language, sex, disability, age, sexual orientation or personal beliefs), is void (i.e. where it has been ordered during the protected period following marriage, a birth or an illness) or if it has not been notified in writing, the worker can request reinstatement (or a lump-sum compensation corresponding to 15 times the reference monthly remuneration) and obtain an additional compensation of an amount not less than five times the reference monthly remuneration – not subject to any maximum – corresponding to the period between dismissal and actual reinstatement (Article 2 of Legislative Decree No. 23/2015).

90. Under Article 3(2) of Legislative Decree No. 23/2015, the same redress as above applies if the procedure shows that there is no evidence of the material fact imputed to the worker (and also where the fact did take place but was not punishable by dismissal, as interpreted by the Court of Cassation in its judgment No. 12174 of 8 May 2019) in relation to production units with more than 15 workers.

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[47] See for all case documents on this complaint: https://www.coe.int/en/web/turin-european-social-charter/pending-complaints/-/asset_publisher/lf8ufoBY2Thr/content/no-158-2017-confederazione-generale-italiana-del-lavoro-cgil-v-italy?inheritRedirect=false&redirect=https%3A%2F%2Fwww.coe.int%2Fen%2Fweb%2Fturin-european-social-charter%2Fpending-complaints%3Fp_p_id%3D101_INSTANCE_lf8ufoBY2Thr%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-4%26p_p_col_count%3D1

91. The Committee notes that in the cases described above, the victims of dismissal without valid reason may claim compensation with no upper limit covering the financial losses incurred from the time of their dismissal, along with reinstatement in their previous job except if they prefer to be paid a flat-rate compensation instead (as an exception, if the employer is a small undertaking, reinstatement is excluded in the cases mentioned in §90 above, but it remains possible in cases of discriminatory dismissals and other cases mentioned in §89 above). Insofar as the abovementioned situations do not concern the core issue raised in this complaint, namely the existence of predetermined limits to compensation in case of unlawful dismissal, the Committee will not address these situations separately.

92. With regard to other types of dismissal without valid reason, the Committee notes that not only do the contested measures not allow for reinstatement, but they also provide for a compensation which does not cover the reimbursement of financial losses actually incurred, as its amount is subject to an upper limit of 6, 12, 24 or 36 times the reference monthly remuneration, as the case may be.

93. Accordingly, if a worker recruited after 7 March 2015 on a permanent contract in the private sector has been unfairly dismissed without any valid reason, whether objective (in particular, economic dismissal) or subjective (disciplinary reasons with notice), or dismissed without just cause (immediate disciplinary dismissal), Legislative Decree No. 23/2015 (Articles 3§1 and 9) provides for compensation with a ceiling of: - Six times the reference monthly remuneration for workers of small companies (fewer than 16 workers), - 24 or 36 times the reference monthly remuneration in the case of production units with more than 15 workers, depending on the date of recruitment and dismissal, before or after 14 July 2018.

94. If the wrongful nature of the dismissal is due to formal (for example, if the reason for the dismissal is not specified) or procedural defects (for example, if the employee was unable to defend him/herself in disciplinary proceedings), the compensation amounts are reduced by half for small companies and capped at 12 times the reference monthly remuneration for others, pursuant to Articles 4 and 9 of Legislative Decree No. 23/2015.

95. Finally, in the event of collective redundancies that are unlawful as they were carried out in violation of the procedures or selection criteria, Article 10 of Legislative Decree No. 23/2015 provides only for compensation capped at 24 or 36 times the reference monthly remuneration in the case of production units with more than 15 workers, depending on the date of dismissal, whether before or after 14 July 2018.

96. 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, as the Constitutional Court has also, to some extent, acknowledged in its decision No. 194/2018. 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).

97. As to potential legal remedies through which to claim supplementary compensation, the Government mentions the possibility of workers claiming additional compensation on the basis of the general rules of civil liability (for example, in the event of damage to their health or injurious dismissal). It also states that the relevant courts may order the reinstatement of workers in cases other than those covered by the contested provisions, pursuant to Article 1418 of the Civil Code on the annulment of contracts.

98. The CGIL disputes these arguments and points out that the compensation provided for by the rules on civil liability is not linked to the unlawful nature of the dismissal, but to the terms of the dismissal and their impact on the victim's psychological and physical integrity (Court of Cassation, Judgment No. 23686 of 19 November 2015), or on his/her private life or reputation. As to the possibility of reinstatement under Article 1418 of the Civil Code, the CGIL argues that it is applied only in the very rare cases of dismissals being declared null and void.

99. The Committee notes that 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 (Judgment No. 4517/2016 of the Rome Labour Court recognising the retaliatory nature of the dismissal of a worker who had contested disciplinary measures taken against him; Judgment No. 687/2016 of the Vicenza Labour Court recognising the unlawful nature of a dismissal supposedly carried out for economic reasons whereas the employer actually wished to take advantage of new hiring incentives), 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.

100. It also notes that it is expressly stated that the aim of the conciliation mechanism provided for by Article 6 of Legislative Decree No. 23/2015 is to "avoid judicial proceedings". While the aim of relieving congestion in national courts through extrajudicial solutions is not incompatible with the Charter per se, the Committee considers that this should not be done at the expense of the subjective rights guaranteed by the Charter.

101. Yet, it notes that in the event of unlawful dismissal (other than when it is discriminatory, null and void, notified verbally or substantially unfounded, see §§89-91 above), victims may choose between two options to compensate for their pecuniary damage – a judicial remedy and a non-judicial one – which are subject to a ceiling and do not cover the financial losses actually incurred since the dismissal date. The Committee considers that the conditions attaching to each of these options are, however, of a nature to encourage, or at least not inhibit, recourse to unlawful dismissal. 102. In the event of dismissal, the conciliation measures provided for in Italy enable employers to avoid judicial proceedings and curb the costs of dismissal (which are limited to 27 times the reference monthly remuneration and 6 times the reference monthly remuneration for small undertakings) whereas victims undertake to waive their right to initiate any subsequent proceedings, their sole benefit being that they are certain to receive compensation within a short time span.

103. Nor do judicial remedies necessarily have any deterrent effect on unlawful dismissal given that firstly, the net amount of compensation for pecuniary damage is not significantly higher than that provided for in the event of conciliation and secondly, the length of proceedings are to the advantage of employers, since the compensation payment in question may not exceed the predetermined amounts (capped at 12, 24 or 36 times the reference monthly remuneration as the case may be, and 6 times the reference monthly remuneration for small undertakings) and hence the compensation becomes inadequate over time to the damage suffered. As to the other remedies referred to by the Government, the Committee notes the lack of any conclusive evidence that they generally make it possible in practice to obtain additional compensation. 104. In the light of the foregoing, the Committee considers that neither the alternative legal remedies offering victims of unlawful dismissal the possibility of compensation exceeding the upper limit set by the law in force nor the conciliation mechanism, as laid down in the provisions at stake, 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.

49 As for the most recent Conclusions (2020) on Article 24 in particular on Albania and Turkiye, the ECSR stated the following:

Conclusions 2020 (Albania)

Remedies and sanctions

In its previous conclusions (Conclusions 2008 and 2012) the Committee noted that pursuant to Article 146(3) of the Labour Code when the termination of an employment contract is considered to be unlawful, the employer shall be under an obligation to pay the employee a compensation of up to maximum one year's salary. The Committee considered that the situation was contrary to the Charter as the compensation for unlawful dismissal was subject to a maximum of one year's wages. The Committee notes in this respect from the report that according to Article 146 (3) as amended, the employer who has terminated the contract for unlawful causes is obliged to pay the employee damages that may amount up to the salary of one year, which is added to the salary he/she shall receive during the notice. As concerns the employers of the Public Administration, where there is an irrevocable court decision on returning to the same workplace, the employer is obliged to execute this decision.

The Committee recalls that under the Charter, workers dismissed without valid reason must be granted adequate compensation or other appropriate relief. Compensation systems are considered to comply with the Charter when they provide for:

reimbursement of financial losses incurred between the date of dismissal and the decision of the appeal body;

the possibility of reinstatement of the worker and/or

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, decision on admissibility and the merits of 8 September 2016, §45; Conclusions 2016, Bulgaria).

The Committee further recalls that (Statement of interpretation on Article 8§2 and 27§3, Conclusions 2011) compensation for unlawful dismissal must be both proportionate to the loss suffered by the victim and sufficiently dissuasive for employers. Any ceiling on compensation that may preclude damages from being commensurate with the loss suffered and sufficiently dissuasive are proscribed. 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.

The Committee asks the next report to indicate whether non-pecuniary damages can be sought through other legal avenue. In the meantime the Committee reserves its position regarding compensation in case of unlawful dismissal.

Conclusions Turkiye

Remedies and sanctions

In its previous conclusion (Conclusions 2012), the Committee considered that the situation was not in conformity with the Charter, as the maximum amount of compensation in case of unlawful

dismissal is inadequate. More specifically, the Committee noted that, according to Article 21 of the Labour Law, if the court or the arbitrator concludes that the termination is unjustified because no valid reason has been given or the alleged reason is invalid, the employer must re-engage the employee in work within one month. If, upon the application of the employee, the employer does not re-engage him/her in work, compensation should be paid in the amount not less than the employee's four months' wages and not more than his/her eight months' wages.

The Committee notes from the report that Article 20 of the Labour Law No. 4857 was amended in 2017 and provides that the worker whose employment contract is terminated, is required to apply to the mediator pursuant to the provisions of Labour Courts Law with the claim of reinstatement, within one month following the date of notification of the termination, asserting that no reason was shown in the notice of termination or that the reason shown was not a valid reason. In case that no agreement is reached as a result of mediation activity, a lawsuit could be opened before the labour court within two weeks following the date of issuance of the final minutes. If the parties agree, the dispute could be referred to a special adjudicator rather than the labour court. The burden of proof that the termination is based on a valid reason is to be borne by the employer.

The Committee observes that, according to Article 21 (Consequences of termination for invalid reasons) of Labour Law No. 4857, when it is ruled that the termination is invalid after being determined by the court or a special judge that the employer failed to demonstrate a valid reason or that the reason is invalid, the employer is obliged to reinstate the worker within one month. In case it fails to reinstate the worker to his/her position upon his/her demand within one month, it shall be obliged to pay a compensation that is equal to minimum four-months' and maximum eight-months' salary of the worker. The Committee understands that, in both cases, the worker receives a compensation amounting to four months of wages for the financial losses incurred. In addition, in case the worker is not reinstated, he/she also receives a compensation (between four and eight months of wages).

The Committee recalls that, under the Charter, workers dismissed without valid reason must be granted adequate compensation or other appropriate relief. Compensation systems are considered to comply with the Charter when they provide for:

reimbursement of financial losses incurred between the date of dismissal and the decision of the appeal body;

the possibility of reinstatement of the worker; and/or

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, decision on admissibility and the merits of 8 September 2016, §45; Conclusions 2016, Bulgaria).

The Committee further recalls that (Statement of interpretation on Article 8§2 and 27§3, Conclusions 2011) compensation for unlawful dismissal must be both proportionate to the loss suffered by the victim and sufficiently dissuasive for employers. Any ceiling on compensation that may preclude damages from being commensurate with the loss suffered and sufficiently dissuasive are proscribed. 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.

> The Committee considers that the legislation sets a ceiling to the maximum compensation that a worker may receive in case he/she is not reinstated. There is no information about non-pecuniary damage that can be sought through other legal avenues. Therefore, the Committee considers that the amount of compensation is not adequate nor dissuasive.

d) Specific appreciation of the ECSR of the Spanish legislation

50 As Spain only ratified the Revised European Social Charter on 17 May 2021, the ECSR has so far no opportunity yet to express itself on the conformity of the Spanish law and practice with the Revised European Social Charter in general nor Article 24 in particular.

e) ECSR case law on the impact of austerity measures on fundamental social rights

51 As mentioned above in the complaint referred Spanish laws form a further phase in a process to reform the regulation on dismissal after earlier attempts were made but which were overturned by the Spanish Constitutional Court. However, it also forms part of a larger process of reforming the Spanish legislation in the field of labour law and labour market policy.

52 At several occasions, the ECSR (like other international human rights monitoring bodies, see example Section II.A.3) expressed itself on the fact that such austerity measures should not infringe on the protection of workers' rights under in this particular case the ESC.

53 In its Decision on the merits on collective complaint 65/2011 *GENOP-DEI / ADEDY v. Greece*, the ECSR considered that

> 16. However the Committee said, in the general introduction to Conclusions XIX-2 (2009) on the repercussions of the economic crisis on social rights, (…) Accordingly, it concluded that "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 the protection most.".
>
> 17. The Committee considers that what applies to the right to health and social protection should apply equally to labour law and that while it may be reasonable for the crisis to prompt changes in current legislation and practices in one or other of these areas to restrict certain items of public spending or relieve constraints on businesses, these changes should not excessively destabilise the situation of those who enjoy the rights enshrined in the Charter.
>
> 18. The Committee considers that a greater employment flexibility in order to combat unemployment and encourage employers to take on staff, should not result in depriving broad categories of employees, particularly those who have not had a stable job for long, of their fundamental rights in the field of labour law, protecting them from arbitrary decisions by their employers or from economic fluctuations. The establishment and maintenance of such rights in the two fields cited above is indeed one of the aims the Charter. In addition, 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."[48]

54 Similarly, in its Decision on the merits on collective complaint 66/2011 *GENOP-DEI / ADEDY v. Greece*, the ECSR observed that:

> 12.With respect to this context of economic crisis which forms the background to this complaint, the Committee has commented , in the general introduction to Conclusions XIX-2 (2009) on the repercussions of the economic crisis on social rights, that while the "increasing level of unemployment is presenting a challenge to social security and social assistance systems as the number of beneficiaries increase while tax and social security contribution revenues decline", by acceding to the 1961 Charter, the Parties "have accepted to pursue by all appropriate means the attainment of conditions in which inter alia the right to health, the right to social security, the right to social and medical assistance and the right to benefit from social welfare services may be effectively realised." Accordingly, it concluded that "the economic crisis should not have as a consequence the reduction of the protection of the rights recognised by the Charter. Hence, 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 most need the protection.
>
> 13.The Committee considers that what applies to the right to health and social protection should apply equally to labour law. While it may be reasonable for state parties to respond to the crisis by changing current legislation and practice to limit public expenditure or relieve constraints on business activity, such measures should not excessively destabilise the situation of those who enjoy the rights enshrined in the Charter.
>
> 14.In particular, the Committee considers that measures taken to encourage greater employment flexibility with a view to combating unemployment should not deprive broad categories of employees of their fundamental rights in the field of labour law, which protect them against arbitrary decisions by their employers or the worst effects of economic fluctuations. The establishment and maintenance of these basic rights is a core objective of the Charter."[49]

55 In its Decision on the merits on collective complaint 111/2014 also versus Greece, the ECSR furthermore observed that:

> *Having regard to the context of economic crisis, the Committee recalls that ensuring the effective enjoyment of equal, inalienable and universal human rights cannot be subordinated to changes in the political, economic or fiscal environment. The Committee has previously stated that "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 the protection most." (General introduction to Conclusions XIX-2, (2009)). The Committee subsequently reiterated this analysis and stated 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*

[48] ECSR Decision on the merits, Collective Complaints 65/2011 GENOP-DEI and ADEDY v. Greece, 12 June 2012, paras. 16-18.
[49] ECSR Decision on the merits, Collective Complaints 66/2011 GENOP-DEI and ADEDY v. Greece, 12 June 2012, paras. 12-14.

to increase the burden on welfare systems […]." (GENOP-DEI and ADEDY v. Greece, Complaint No. 65/2011, op.cit., §18).[50]

D. European Union

1. Primary law

56 Based on the **Treaty of the Functioning of the European Union (TFEU),** the EU has the competence to regulate on the issues of (individual/collective) dismissals, Article 153 TFEU stipulates that:

> 1. With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields:
>
> (d) **protection of workers where their employment contract is terminated**;
>
> 2. To this end, the European Parliament and the Council:
>
> (a) may adopt measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States;
>
> (b) may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.
>
> The European Parliament and the Council shall act in accordance with the ordinary legislative procedure after consulting the Economic and Social Committee and the Committee of the Regions. In the fields referred to in paragraph 1(c), (d), (f) and (g), the Council shall act unanimously, in accordance with a special legislative procedure, after consulting the European Parliament and the said Committees.
>
> The Council, acting unanimously on a proposal from the Commission, after consulting the European Parliament, may decide to render the ordinary legislative procedure applicable to paragraph 1(d), (f) and (g).

57 So far however, the EU only developed particular legislation in relation to collective dismissals, but no specific legislation regarding individual dismissals (see also II.D.3)[51].

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[50] ECSR Decision on the merits, Collective Complaints 111/2014 GSEE v. Greece, 23 March 2017, Para. 88.

[51] However, it should be noted that in order to overcome the unanimity voting rule applicable to adopting EU legislation in the specific area of individual dismissal, Commission President Juncker's State of the Union 2018, and in particular its Letter of intent to President Antonio Tajani and to Chancellor Sebastian Kurz announced he wanted to make, also in the social field, better use of what he called the "lost treasures of the EU Treaties", i.e. the so-called passerelle clauses which allow to move by Council decision from unanimity to qualified majority voting. He indeed wants "more efficient law-making in social policy" and in that sense wants an identification of areas for an enhanced use of qualified majority voting, which would/could include the **protection of workers where their employment contract is**

58 Secondly, there is of course also the **Charter of Fundamental Rights of the European Union (CFREU)** which provides in its Article 30 on "Protection in the event of unjustified dismissal" that[52]:

> CHAPTER IV SOLIDARITY
>
> 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.

59 Article 30 CFREU thereby forms the first EU law provision that explicitly establishes the fundamental nature of the right to protection against unjustified dismissal, thus recognising this protection as a core element of solidarity.[53] [54]

60 The 'Explanations' on Article 30 CFREU show that this article is clearly based on and inspired by Article 24 ESC (and its case law) and should thus be interpreted in light of the ECSR requirements and case law.[55]

> Explanation on Article 30 — Protection in the event of unjustified dismissal
>
> This Article draws on **Article 24 of the revised Social Charter**. See also Directive 2001/23/EC on the safeguarding of employees' rights in the event of transfers of undertakings, and Directive 80/987/EEC on the protection of employees in the event of the insolvency of their employer, as amended by Directive 2002/74/EC.

2. Fundamental rights texts

61 Over the course of time, the European Community/European Union has developed several mainly politically binding catalogues of fundamental social rights.

62 Whereas the **Community Charter of Fundamental Social Rights of Workers (1989**) only explicitly refers to the need for regulations in relation to collective dismissals, the recently

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terminated as stipulated in article 153(1)d. A Communication by the Commission is scheduled for January/February 2019.

[52] From a substantive point of view the violation alleged by CGIL in this complaint, relates of course directly to Article 30. However, from a procedural point of view, it is relevant to mention that the CFREU also provides in Article 47§1 that *"Article 47 Right to an effective remedy and to a fair trial Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.(…)".*

[53] See Schmitt, M. (2018) Chapter 23 - Article 30 Protection in the event of unjustified dismissal, Lörcher, Dorssemont, Schmitt and Clauwaert (2018) The Charter of Fundamental Rights of the European Union and the Employment Relation, Hart Publishing: London (forthcoming).

[54] It should be noted that in earlier versions of Article 30, the text read as follows: "Article IX 'Right to protection in cases of termination of employment' – 'Workers have the right not to have their employment terminated without valid reason and to adequate compensation or other appropriate relief if their employment is terminated without valid reasons." However, in further drafting process, the text (and title) of Article 30 was subsequently simplified and reduced. (Bruun, N. 12. Protection against unjustified dismissal (Article 30), in Bercusson, B. (ed.) (2006) European Labour Law and the EU Charter of Fundamental Rights, Baden-Baden: NOMOS Verlag, pp. 337-356).

[55] EXPLANATIONS RELATING TO THE CHARTER OF FUNDAMENTAL RIGHTS, OJ C(303), 14.12.2007. (Available at https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:en:PDF)

solemnly proclaimed **European Pillar of Social Rights (November 2017**) (EPSR) provides the following in its Principle 7:

Chapter II: Fair working conditions

7. Information about employment conditions and protection in case of dismissals

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.**[56]

63 The Preamble to the EPSR refers at several occasions to the European Social Charter and ILO Conventions in particular in relation to the interpretation and implementation of the EPSR:

The European Pillar of Social Rights shall not prevent Member States or their social partners from establishing more ambitious social standards. In particular, **nothing in the European Pillar of Social Rights shall be interpreted as restricting or adversely affecting rights and principles as recognised, in their respective fields of application**, by Union law or international law and by international agreements to which the Union or all the Member States are party, including **the European Social Charter signed at Turin on 18 October 1961 and the relevant Conventions and Recommendations of the International Labour Organisation**.

64 In the explanatory notes to the Pillar, it is stated that:

The Pillar also goes beyond the existing acquis by introducing procedural and substantive safeguards for workers in case of dismissals. Adequate reasoning should be provided and a reasonable period of notice be respected. Moreover, the Pillar provides that workers should have access to effective and impartial dispute-resolution procedures. This can include arbitration, mediation or conciliation procedures. **The Pillar also introduces the right to adequate redress in case of unjustified dismissals, such as re-instatement or pecuniary compensation. Unjustified dismissals are to be understood as those that are in breach of the rules applicable to the employment relationship in question**.[57]

65 Furthermore, from these explanatory notes and more in particular in the listing of the applicable "Union acquis", it is clear that Principle 7 builds on certain relevant Articles of the CFREU, and more in particular Articles 30 and 47 CFREU (see also above D.1) by stating:

1. The Union acquis

a) The Charter of Fundamental Rights of the European Union

[56] European Parliament, Council and Commission (2017), The European Pillar of Social Rights", Gothenburg (Sweden), 16 November 2017 (https://ec.europa.eu/commission/sites/beta-political/files/social-summit-european-pillar-social-rights-booklet_en.pdf)

[57] European Commission (2017) COMMISSION STAFF WORKING DOCUMENT Accompanying the document COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS Establishing a European Pillar of Social Rights, SWD(2017) 201 final, Brussels, 26.04.2017.

(…) Article 30 of the Charter lays down the right for every worker to be protected against unjustified dismissal, in accordance with Union law and national laws and practices. Article 47 of the Charter guarantees everyone whose rights and freedoms guaranteed by Union law are violated the right to an effective remedy**.**

66 As Principle 7 thus builds on Article 30 CFREU (and its interpretation), which on its turn draws on Article 24 ESC (and which in its turn draws on ILO Convention No 158) (see section C.2.a), it is clear that both in the interpretation and implementation of Principle 7 due regard needs to be taken to the interpretation given to the latter mentioned ESC and ILO norms.

3. Secondary law

67 As mentioned above, and unlike the ILO (see section B), the EU has not (yet) developed a specific legislative act relating to individual dismissal. However, in different Directive the EU regulated partial aspects of (unfair) dismissal protection in particular circumstances and/or for certain groups of workers. Reference could thereby amongst others be made to: Directive 2001/23/EC, which regulates workers' rights in the case of transfer of undertakings, stipulates that the transfer of an undertaking does not in itself constitute valid grounds for dismissal. Council Directive on insolvencies (Directive 2008/94) obliges Member States to take measures to ensure that institutions guarantee, in case of insolvency of the employer, the payment to employees' outstanding claims including severance pay on termination of employment. Council Directive 92/85/EEC on maternity protection and the revised Framework Agreement on parental leave concluded by social partners (BusinessEurope, UEAPME, CEEP and ETUC) – annexed to Council Directive 2010/18/EU – provide, respectively, specific protection against dismissal for women during their pregnancy and for parents taking paternity or adoption leave. Other EU anti-discrimination directives (such as Directive 2000/43/EC, Directive 2000/78/EC and Directive 2006/54/EC,) also provide specific protection against unfair dismissal. For instance, Council Directive 2000/78/EC (the Employment Equality Directive) on equal treatment in employment and occupation protects workers against dismissal where there is discrimination on a prohibited ground, including victimisation. Protection against dismissal and unfavourable treatment is also provided under EU law through the Part-time Work Directive, the Gender Equality Directive and the Directive on equal treatment between men and women engaged in an activity in a self-employed capacity.[58]

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[58] Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 82, 22.3.2001, p.6.; Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer (Codified version), OJ L 283, 28.10.2008, p. 36–42; Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, OJ L 348 of 28.11.1992, p. 1.; Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC, OJ L68, 18.3.2010, p.13.; Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, OJ L14, 20.1.1998, p.9; Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180 , 19/07/2000, p. 22; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16–22; Directive

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68 These Directives have of course been reinforced by the case-law of the Court of Justice of the EU. In particular in relation to the effective and dissuasive nature of sanctions in case of discriminatory dismissals, reference could be for example made to the *Marshall* judgement and in which the CJEU also addresses the issues of upper limits to compensation awarded:[59]

> 29 The Court's interpretation of Article 6 as set out above provides a direct reply to the first part of the second question relating to the level of compensation required by that provision
>
> 30 It also follows from that interpretation that **the fixing of an upper limit** of the kind at issue in the main proceedings **cannot, by definition, constitute proper implementation** of Article 6 [of the Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40)], **since it limits the amount of compensation a priori to a level which is not necessarily consistent with the requirement of ensuring real equality of opportunity through adequate reparation for the loss and damage sustained as a result of discriminatory dismissal.**[60]

69 From the Opinion of the Advocate General in this case, it also appears that the “damage” has to be looked at with “regard to the most important components of damage which are traditionally taken into account in rules governing liability” such as loss of physical assets {damnum emergens), loss of income {lucrum cessans), moral damage and damage on account of the effluxion of time.[61] In that sense, it should thus be recalled that as mentioned in the complaint, the compensations set by Order N° 2017-1387 are solely made proportionate to and defined based on the seniority/length of service of the worker concerned and thus not taking into account other crucial components/criteria.

70 Finally, it is to note that, in the framework of the implementation of the EPSR, the Commission took the initiative to revise the so-called Written Statement Directive (Directive 91/533/EEC)[62] by incorporating a set of minimum rights attached to any employment relationship (including new forms of work and new categories of vulnerable workers). Among those rights the Commission identified, it its consultation documents addressed to the European social partners, (a) a ‘right to a reasonable notice period in case of dismissal/early termination of contract, (b) a right to adequate redress in case of unfair dismissal or unlawful termination of contract and, finally, (c) a right to access effective and impartial dispute resolution in case of

2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the Principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204, 26.7.2006, p. 23; Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the Principle of equal treatment between men and women engaged in an activity in a self-employed capacity, OJ L 180, 15.7.2010, p.1.

[59] C-271-01, *M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority,* Judgment of the Court of 2 August 1993.

[60] From the Opinion of the Advocate General it also appears that the “damage” has to looked at with “regard to the most important components of damage which are traditionally taken into account in rules governing liability” such as loss of physical assets {damnum emergens), loss of income {lucrum cessans), moral damage and damage on account of the effluxion of time. (§18 of Opinion of Advocate General Van Gerven, delivered on 26 January 1993).

[61] §18 of Opinion of Advocate General Van Gerven, delivered on 26 January 1993.

[62] Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, OJ L 288, 18.10.1991, p. 32–35.

dismissal and unfair treatment'.[63] This specific language did not anymore appear in the Commission proposal for a Directive, but rather provides a general right to redress which states: *"Article 15 - Right to redress -Member States shall* ***ensure that workers, including those whose employment relationship has ended, have*** *access to effective and impartial dispute resolution and* ***a right to redress, including adequate compensation, in case of infringements of their rights arising from this Directive****".[64] Following trialogue negotiations between the Commission, European Parliament and Council, the final outcome accumulated in* the [Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union]() (OJ L 186, 11.7.2019, p. 105–121) which provides the following:

> Article 16 Right to redress
>
> Member States shall ensure that workers, including those whose employment relationship has ended, have access to effective and impartial dispute resolution and a right to redress in the case of infringements of their rights arising from this Directive.
>
> Article 18
>
> Protection from dismissal and burden of proof
>
> 1. Member States shall take the necessary measures to prohibit the dismissal or its equivalent and all preparations for dismissal of workers, on the grounds that they have exercised the rights provided for in this Directive.
>
> 2. Workers who consider that they have been dismissed, or have been subject to measures with equivalent effect, on the grounds that they have exercised the rights provided for in this Directive, may request the employer to provide duly substantiated grounds for the dismissal or the equivalent measures. The employer shall provide those grounds in writing.
>
> 3. Member States shall take the necessary measures to ensure that, when workers referred to in paragraph 2 establish, before a court or other competent authority or body, facts from which it may be presumed that there has been such a dismissal or equivalent measures, it shall be for the employer to prove that the dismissal was based on grounds other than those referred to in paragraph 1.
>
> 4. Paragraph 3 shall not prevent Member States from introducing rules of evidence which are more favourable to workers.
>
> 5. Member States shall not be required to apply paragraph 3 to proceedings in which it is for the court or other competent authority or body to investigate the facts of the case.
>
> 6. Paragraph 3 shall not apply to criminal proceedings, unless otherwise provided by the Member State.

The accompanying recitals provide the following:

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[63] European Commission, Consultation Document of 26 April 2017, First phase consultation of Social Partners under Article 154 TFEU on a possible revision of the Written Statement Directive.
[64] European Commission (2017f) Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union, COM(2017) 797 final, Brussels, 21.12.2017.

(39) The public consultation on the European Pillar of Social Rights showed the need to strengthen enforcement of Union labour law to ensure its effectiveness. The evaluation of Directive 91/533/EEC conducted under the Commission's Regulatory Fitness and Performance Programme confirmed that strengthened enforcement mechanisms could improve the effectiveness of Union labour law. The consultation showed that redress systems based solely on claims for damages are less effective than systems that also provide for penalties, such as lump sums or loss of permits, for employers who fail to issue written statements. It also showed that employees rarely seek redress during the employment relationship, which jeopardises the goal of the provision of the written statement, which is to ensure that workers are informed about the essential features of the employment relationship. It is therefore necessary to introduce enforcement provisions which ensure the use of favourable presumptions where information about the employment relationship is not provided, or of a procedure under which the employer may be required to provide the missing information and may be subject to a penalty if the employer does not do so, or both. It should be possible for such favourable presumptions to include a presumption that the worker has an open-ended employment relationship, that there is no probationary period or that the worker has a full-time position, where the relevant information is missing. Redress could be subject to a procedure by which the employer is notified by the worker or by a third party such as a worker's representative or other competent authority or body that information is missing and to supply complete and correct information in a timely manner.

(40) An extensive system of enforcement provisions for the social acquis in the Union has been adopted since Directive 91/533/EEC, in particular in the fields of equal treatment, elements of which should be applied to this Directive in order to ensure that workers have access to effective and impartial dispute resolution, such as a civil or labour court and a right to redress, which may include adequate compensation, reflecting the Principle No 7 of the European Pillar of Social Rights.

(41) Specifically, having regard to the fundamental nature of the right to effective legal protection, workers should continue to enjoy such protection even after the end of the employment relationship giving rise to an alleged breach of the worker's rights under this Directive

(43) Workers exercising rights provided for in this Directive should enjoy protection from dismissal or equivalent detriment, such as an on-demand worker no longer being assigned work, or any preparations for a possible dismissal, on the grounds that they sought to exercise such rights. Where workers consider that they have been dismissed or have suffered equivalent detriment on those grounds, workers and competent authorities or bodies should be able to require the employer to provide duly substantiated grounds for the dismissal or equivalent measure.

(44) The burden of proof with regard to establishing that there has been no dismissal or equivalent detriment on the grounds that workers have exercised their rights provided for in this Directive, should fall on employers when workers establish, before a court or other competent authority or body, facts from which it may be presumed that they have been dismissed, or have been subject to measures with equivalent effect, on such grounds. It should be possible for Member States not to apply that rule in proceedings, in which it would be for a court or other competent authority or body to investigate the facts, in particular in systems where dismissal has to be approved beforehand by such authority or body

4. EU economic (governance) policy

71 Whereas the abovementioned international and European instruments (incl. EU law) have as a primar objective to protect fundamental social rights by laying down minimum standards, EU policy-making has however, in particular since the outbreak of the economic and financial crisis and under the pretext of mitigating the negative consequences of the crisis, on the contrary been characterised and driven by a contested 'soft law approach' with as main objective to increase competitiveness, boost productivity, ensure budgetary discipline (i.e. via budgetary cuts) and render labour markets more flexible (including by making labour law 'less rigid') rather than protecting or even enhancing the protection of workers' rights.

72 The most recent example of this is the 'European Semester'. In 2011, the EU established indeed a new economic governance system, called the European Semester, whereby it via so-called Council country-specific Recommendations (CSRs) "recommends" Member states to implement structural reforms, including in the area of 'Employment Protection Legislation' (EPL and including in particular also individual and collective dismissal law). The approach taken thereby has been overall the same as described above, i.e. a deregulatory and flexibilization approach, and thus led over time to recommendations to several member states to make dismissal law less rigid and costly, including by reducing the (financial) sanctions for unjustified dismissal.

73 Also the Spanish government received over the years several CSRs encouraging it to 'reform its labour law', 'flexibilise its labour market' and 'to further reduce the regulatory burden for firms', including the reforms in relation to individual dismissals. [65]

E. Organisation of American States (OAS)

74 From the outset, it should be recalled that the ECSR's case law refers to other regional human rights courts, in particular the Interamerican Court of Human Rights (IACtHR).[66]

1. Inter-American Court of Human Rights (IACtHR)

75 Concerning the dismissal of workers and effective judicial remedies, the IACtHR has tackled the matter from the perspective of both a procedural perspective (the right to a fair trial) and a substantive perspective (the right to work. Indeed, the IACtHR has found states not providing an effective judicial remedy to challenge dismissals to be in violation of of articles 8 (judicial guarantees), 25 (judicial protection), and 26 (the right to work) of the American Convention on

[65] See amongst others Clauwaert, S. (2013) The Country-specific recommendations (CSRs) in the social field. An overview and initial comparison, Background analysis 2013.02, Brussels, ETUI, as well as subsequent annual updates for the European Semester Cycles 2014-2019; all available at https://www.etui.org/content/search?keys=Clauwaert&f%5B0%5D=authors_external%3A703&f%5B1%5D=content_type%3Apublication. See more specifically, S Clauwaert, 'The country-specific recommendations (CSRs) in the social field. An overview and comparison', Update including the CSRs 2017–2018, Background Analysis 2017/02, ETUI, Brussels, where for Spain (p 69) for instance, the country-specific recommendations (CSRs) focus on the uncertainty of firing costs in case of legal dispute following dismissals of permanent workers, especially when dismissals are deemed unfair, but also address high severance payments (Spain) and the possibility of reinstatement (Portugal, p.70), which are implicitly treated as financial obstacles to a flexible labour market.

[66] See e.g. ECSR, Decision on the merits of 6.12.2006, No. 30/2005, Marangopoulos Foundation for Human Rights (MFHR) v. Greece, para. 196

human Rights, in relation to the obligations established in Article 1.1 (obligation to respect rights).[67]

76 It is also important to recall the Optional Protocol of San Salvador which has enshrined in its article 7 (d) that:

> *"The […] right to work […] presupposes that everyone shall enjoy that right under just, equitable, and satisfactory conditions, which the States Parties undertake to guarantee in their internal legislation, particularly with respect to: Stability of employment, subject to the nature of each industry and occupation and the causes for just separation.* ***In cases of unjustified dismissal, the worker shall have the right to indemnity or to reinstatement on the job or any other benefits provided by domestic legislation".***

III. The law

77 Generally speaking, the protection of workers against unfair dismissal is a cornerstone of workers' protection. It has a direct relationship to the basic principle and foundation of all human rights which is **human dignity**. It is also directly related to the '**right to work**' as well as the **right to just and favourable conditions at work**. (see e.g. above Section II.A)

78 Moreover, as the ECtHR pointed out dismissals have "tangible consequences for the material well-being" of the worker concerned as well as for his or her family. A dismissed worker will have to "suffer… distress and anxiety on account of the loss of (his or) her post"; the dismissal also affects "a wide range of (his or) her relationships with other people" (see above para. 37-38).

79 These elements require a high threshold for allowing termination of an employment relationship by a dismissal. This is all the truer if the reason for a dismissal does not lie in the worker's but employer's sphere (as it is the case in this complaint).

80 The ETUC therefore stresses the importance of this protection.

81 As for the particular consequences of an unlawful dismissal these are also of great importance. The two main remedies/measures to overcome the consequences of such a dismissal are reinstatement and/or compensation (and whereby the former should always be given priority) and which have both been already considered by the ECSR.

82 As for the question of **reinstatement** as remedy in case of an unlawful dismissal, this is of utmost importance as the continuation of the employment contract is the 'normal' consequence in case of a violation of this right (restitutio ad integrum). Moreover, a limitation to financial consequences would deprive the workers' protection of its real effect. Indeed, if employers were allowed just to pay a certain financial amount as compensation to unlawfully dismissed workers, they could just choose what they want to do and the main interest of the worker to keep his or her workplace in such a situation would be totally neglected. Finally this would have

[67] See i.a. Case 11.602, 12.385, 12.665 y 12.666 Trabajadores Cesados de Petroperú y otros v. Peru (2017) and Case 12.666-B Cesar Bravo Garvich y otros (Trabajadores Cesados de la Empresa Nacional de Puertos S.A.) v. Peru (2023), accessible here.

devastating consequences in particular in cases where a specific reason for termination is not permitted.[68]

83 From the complaint, it is clear that the current Spanish regulatory framework does not include a general reinstatement possibility in case of unlawful dismissal. In this respect the ECSR had found in its Conclusions 2012 against Finland:

> "that the situation in Finland is not in conformity with Article 24 of the Charter on the ground that the legislation does not provide for the possibility of reinstatement in case of unlawful dismissal."[69]

84 The ECSR furthermore confirmed this in its Decision on the Merits in the Collective Complaint N° 106/2014 Finnish Society of Social Rights v. Finland by stating that:

> ii) Reinstatement
>
> 55. As regards the second allegation; the lack of a possibility for the court to order reinstatement, 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 (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 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.

85 As for **the 'cap' or upper limit for compensation for unlawful termination of employment**, the ECSR has, a demonstrated above in more details (see Section II.C.2.c)), at several occasions already expressed itself on upper limits for unlawful dismissals. For example, in its Conclusions 2012 for Finland, the ECSR stated:

> "In its previous conclusion the Committee held that the situation in Finland was not in conformity with Article 24 of the Charter on the ground that the compensation for unlawful termination of employment was subject to an upper limit."

86 Other examples, concern conclusions in relation to Bulgaria, Italy and France whereby the ECSR expressed concerns about the existence of such an upper limit and whereby it recalled in its Conclusions 2016 for France for example that "that any ceiling in compensation that may preclude damages from being commensurate with the loss suffered and sufficiently dissuasive are prohibited".

87 Applying these principles to the complaint at hand it is obvious that the 'cap' violates Article 24 ESC.

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[68] See Appendix Part II to Article 24 RESC point 3 and ILO Convention No. 158 Article 5.

[69] It might be recalled that the ECSR, in its Conclusions 2012, also found the situation in Albania as being not in conformity with Article 24 RESC on this point.

IV. Conclusions

88 As demonstrated above, the ETUC considers that the measures criticised by the complainant organisation are not in conformity with Article 24 RESC as regards

- the consequences of unlawful dismissals concerning both the lack of a reinstatement requirement and the (upper) limit for compensation.

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