European Social Charter | Charte sociale européenne

COUNCIL OF EUROPE 75 1949 - 2024 CONSEIL DE L'EUROPE

EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

DECISION ON THE MERITS

Adoption: 3 December 2024

Notification: 26 February 2025

Publicity: 27 June 2025

Confederación Sindical de Comisiones Obreras (CCOO) v. Spain

Complaint No. 218/2022

The European Committee of Social Rights, committee of independent experts established under Article 25 of the European Social Charter ("the Committee"), during its 345th session in the following composition:

Aoife NOLAN, President
Eliane CHEMLA, Vice-President
Tatiana PUIU, Vice-President
Kristine DUPATE, General Rapporteur
József HAJDÚ
Karin Møhl LARSEN
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Paul RIETJENS
George THEODOSIS
Mario VINKOVIĆ
Miriam KULLMANN
Carmen SALCEDO BELTRÁN
Franz MARHOLD
Alla FEDOROVA
Grega STRBAN

Assisted by Henrik KRISTENSEN, Executive Secretary

Having deliberated on 16 October 2024 and 3 December 2024

On the basis of the report presented by Miriam KULLMANN,

Delivers the following decision adopted on the latter date:

PROCEDURE

1. The complaint lodged by the *Confederación Sindical de Comisiones Obreras* (CCOO) was registered on 18 November 2022.

2. CCOO alleges that the situation in Spain constitutes a violation of Article 24 of the Revised European Social Charter ("the Charter") on the grounds 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; 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; the mechanism for compensation in cases of unfair dismissal does not allow victims to claim additional compensation linked to the actual damage suffered; 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; 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.

3. On 4 July 2023, the Committee declared the complaint admissible.

4. Referring to Article 7§1 of the 1995 Additional Protocol providing for a system of collective complaints ("the Protocol"), the Committee invited the Government to make written submissions on the merits of the complaint by 15 September 2023. Upon the Government's request, the time limit was extended until 22 October 2023.

5. Referring to Article 7§§1 and 2 of the Protocol and pursuant to Rule 32§§1, 2 of its Rules ("the Rules"), the Committee invited the States Parties to the Protocol, the States having made a declaration in accordance with Article D§2 of the Charter as well as the international organisations of employers or workers mentioned in Article 27§2 of the 1961 Charter, to submit any observations they may wish to make on the complaint by 15 September 2023.

6. Observations by the International Organisation of Employers (IOE) and observations by the European Trade Union Confederation (ETUC) were registered on 14 and 22 September 2023 respectively.

7. The Government's submissions on the merits of the complaint were registered on 30 October 2023.

8. Pursuant to Rule 32§4 of the Rules, the Government and CCOO were invited to submit, if they so wished, a response to the observations by IOE and ETUC by 3 November 2023. CCOO's reply to the observations by IOE was registered on 2 November 2023.

9. Pursuant to Rule 31§2 of the Rules, the President of the Committee invited CCOO to submit a response to the Government's submissions on the merits by 10 January 2024. CCOO's response was registered on 9 January 2024.

10. Pursuant to Rule 31§3 of the Rules, the Government was invited to submit a reply to CCOO's response by 29 February 2024. The Government's reply was registered on 29 February 2024.

11. On 16 November 2023, the Government submitted a request for the recusal of Carmen SALCEDO BELTRÁN from the participation in the deliberations in the present complaint. This request was rejected.

SUBMISSIONS OF THE PARTIES

A – The complainant organisation

12. CCOO alleges that the situation in Spain is in violation of Article 24 of the Charter on the following grounds:

- the courts are not allowed to order reinstatement as an appropriate remedy for unfair dismissal, regardless of the circumstances and conduct of the parties;
- 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;
- the mechanism for compensation in cases of unfair dismissal does not allow victims to claim additional compensation linked to the actual damage suffered;
- 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;
- 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.

B – The respondent Government

13. The Government rejects the allegations of the complainant organisation and asks the Committee to find that there is no violation of the Charter provision invoked.

OBSERVATIONS OF THE THIRD PARTIES

A – International Organisation of Employers (IOE)

14. IOE submits that dismissal must always have a just cause and is either based on objective or disciplinary causes. Objective dismissal is in any case compensated because, if it is declared fair, a worker receives 20 days' wage per year of service, with a ceiling of 12 monthly wages. If the objective dismissal is declared unfair, the employer may opt for termination of the contract with the payment of compensation or for reinstatement which would also entail paying the worker the wage they had not received between the time of the dismissal and the time of the reinstatement. Disciplinary dismissal can be fair (without compensation), unfair (with compensation or reinstatement) or null and void (with compulsory reinstatement). IOE argues that under Article 24 of the Charter, reinstatement is only one of the options that can be chosen.

15. IOE states that there are numerous cases in which dismissals should be classified as null and void under domestic law, and they are not limited to those cases in which a fundamental right is breached, but also encompass each reason listed in the part of the Charter's Appendix clarifying the scope of Article 24.

16. IOE states that for workers hired before 2012 a mixed scale of 45/33 days' wage per year of service is still applied. IOE states that objective dismissal, fair or unfair, is always compensated with at least 20 days' wage per year of service, with a ceiling of 12 months and up to 45/33 days wage per years' service in the case of unfair dismissal.

17. IOE further submits that in relation to temporary contracts, in case a person who has systematically been subjected to temporary hiring in fraud of law or abusive temporary hiring, with a threat of unfair dismissal, is dismissed, such circumstance should be taken into account when calculating the amount of damage. IOE also states that the contracts to replace an absent worker still exist, as well as contracts for production, lasting six months or 90 days per year depending on the type of circumstances. In any case, consecutive temporary contracts are turned into permanent contracts from a certain moment. The use of temporary contracts in fraud of law is subject to an administrative penalty of up to €10,000.

18. IOE states that the 2021 labour law reform, which was a result of a social dialogue held also with CCOO, aimed at reducing temporary contracts. After the 2021 labour law reform, there was an increase in permanent contracts and a reduction in temporary contracts, which increased employment stability. More particularly, in April 2023, CCOO stated on its website that in relation to unemployment figures, the secretary of CCOO had confirmed that the figures were very positive, as job creation had been accelerated and 615,674 permanent contracts had been signed, representing 46.8% of all of the contracts signed. Before the entry into force of the

labour reform, this percentage was less than 10%. Temporary contracts have reduced from 30% to 14%, reaching a historic minimum.

19. IOE states that the use of a predetermined scale for compensation for unfair dismissal is something that is linked to the reestablishment of democracy, and it was first introduced following the 1978 Constitution, in the Workers' Statute of 1980. Before that, the calculation and award of compensation was entrusted to the discretion of a judge.

20. IOE further states that, with regard to interim wages, the obligation to pay them exists in some cases of unfair dismissal, for example, if a worker's representative is dismissed and they opt for compensation, as well as in cases in which the dismissal is declared unfair and in the same judgment it is agreed to terminate the employment relationship with the right to compensation because reinstatement is impossible as a result of the closure of the company or cessation of its activities. IOE claims that Article 24 of the Charter does not require interim wages to be paid in all cases of dismissal.

21. IOE states that, with regard to unemployment benefit, CCOO fails to mention that while the worker is receiving unemployment benefit, the payment of contributions to the social security is made by the Public Employment Service.

22. IOE states that the domestic courts acknowledge the possibility of additional compensation for damage suffered because of unfair dismissal.

B – European Trade Union Confederation (ETUC)

23. ETUC provides a detailed overview of international law instruments related to the right to protection in cases of termination of employment, in particular the International Covenant on Economic, Social and Cultural Rights, Convention No. 158 of the International Labour Organisation (ILO) and ILO Recommendation No. 166, the case law of the European Court of Human Rights and of the Committee, as well as European Union law.

24. ETUC underlines that the protection of workers against unfair dismissal is a cornerstone of workers' protection. The two main remedies to overcome the consequences of unfair dismissal are reinstatement and/or compensation. Reinstatement is of the utmost importance because limitation of the financial consequences for employers of such dismissals would deprive workers' protection of its real effect.

25. ETUC states that it is clear that the current domestic regulatory framework does not include a general reinstatement possibility in case of unfair dismissal. Also, the upper limit to the compensation in case of unfair dismissal is contrary to Article 24 of the Charter.

RELEVANT DOMESTIC LAW AND PRACTICE

A – Domestic legislation

26. Workers' Statute No. 2/2015 – as amended

Article 15. Duration of the employment contract

"1. The employment contract is presumed to be concluded for an indefinite period.
A fixed-term employment contract may only be concluded due to circumstances of production or for the replacement of a worker.
In order for a justified cause of temporary employment to be understood to exist, the contract must specify precisely the reason for the temporary contract, the specific circumstances that justify it and its connection with the foreseen duration.
2. […]
When the fixed-term contract is due to these production circumstances, its duration may not exceed six months. The maximum duration of the contract may be extended up to one year by a sector-wide collective bargaining agreement. In the event that the contract has been concluded for a shorter duration than the maximum legally or conventionally established, it may be extended, by agreement of the parties, for a single time, without the total duration of the contract exceeding this maximum duration.
Likewise, companies may enter into contracts due to circumstances of production to deal with occasional, foreseeable situations and which have a reduced and delimited duration under the terms set out in this paragraph. Companies may only use this contract for a maximum of ninety days in the calendar year, regardless of the number of workers needed to deal with the specific situations on each of these days, which must be duly identified in the contract. These ninety days may not be used continuously. In the last quarter of each year, companies must provide the workers' legal representatives with an annual forecast of the use of these contracts.
The performance of work within the framework of contracts, subcontracts or administrative concessions that constitute the habitual or ordinary activity of the company may not be identified as the cause of this contract, without prejudice to its conclusion when the circumstances of production are present in the above terms.
3. Fixed-term contracts may be concluded for the replacement of a worker with the right to the reservation of a post, provided that the name of the person being replaced and the reason for the replacement are specified in the contract. In this case, the provision of services may begin before the absence of the person being replaced occurs, coinciding in the performance of the duties for the time necessary to ensure the proper performance of the post and for a maximum of fifteen days.
Likewise, the substitution contract may be entered into to complete the reduced working day by another worker, when said reduction is covered by legally established causes or regulated in the collective bargaining agreement and the name of the person being substituted and the cause of the substitution are specified in the contract.
The substitution contract may also be entered into for the temporary coverage of a post during the selection or promotion process for its definitive coverage by means of a permanent contract, without its duration in this case exceeding three months, or the shorter term established in the collective agreement, nor may a new contract be entered into for the same purpose once this maximum duration has been exceeded.
4. Persons hired in breach of the provisions of this article shall acquire permanent status.
5. Without prejudice to the foregoing, workers who have been employed for a period of more than eighteen months, with or without interruption, for the same or a different job with the same company or group of companies for a period of twenty-four months, either directly or through temporary employment agencies, shall acquire the status of permanent workers. This provision shall also apply in the event of company succession or subrogation in accordance with legal or contractual provisions.

Likewise, the person who occupies a job that has been occupied, with or without interruption, for more than eighteen months in a period of twenty-four months by means of contracts due to circumstances of production, including contracts made available by temporary employment agencies, shall acquire the status of permanent worker.
[…]"

Article 50. End of contract upon the worker's will

"1. Grounds for the worker to request termination of the contract:
a) substantial changes in working conditions carried out without respecting Article 41 and undermining the dignity of the worker;
b) the lack of payment or continuous delays in payment of agreed salary;
c) any other serious breach of obligations on the part of the employer, except for cases of *force majeure*, as well as refusal of employer to reinstate the worker in their previous conditions of work […].
2. In such cases the worker shall be entitled to compensation for unfair dismissal."

Article 52. Dismissal for objective reasons

"Contracts can be ended:
a) because of the worker's known or observed ineptitude subsequent of their actual placement in the company […];
b) owing to the worker's lack of adaptation to technical modifications to their post, where the said changes are reasonable […];
c) where there is an objective reason to eliminate posts […];
[…]
e) in case of indefinite contracts in the Public Administration or non-profit entities, as a result of insufficient finances to maintain the contract at issue […].
[…]"

Article 53. Form and effects of dismissal for objective reasons

"[…]
5. The classification by the judicial authority of the invalidity, fairness or unfairness of dismissal shall have the same effect as those indicated for disciplinary dismissal, subject to the following amendments:
a) In case of fair dismissal, the worker shall be entitled to the compensation provided for in paragraph 1, consolidating it if they have received it, and shall be deemed to be unemployed for reasons not attributable to them.
b) if dismissal is declared unfair and the employer reinstates the worker, the worker must repay the compensation received. In the case of replacement of reinstatement by financial compensation, the amount of such compensation shall be deducted from it."

Article 54. Disciplinary dismissal

"1. The work contract can be terminated by the decision of the employer based on serious and culpable breach of it by the worker.
2. The following shall be considered cases of contractual breach:
a) repeated offences, and unjustified absences, lack of punctuality at work;
b) lack of discipline or disobedience at work;
c) verbal or physical offences against the employer, persons working at the company or their family members;
d) violation of good faith in contract, as well as the abuse of confidence in one's work performance;
e) continued and voluntary decrease in normal or agreed-on work performance;
f) being under the influence of alcohol or narcotic substances when this has negative repercussions at work;

g) harassment based on racial or ethnic origin, religion or convictions, disability, age or sexual orientation and sexual harassment of the employer or persons working in the company."

Article 55. Form and effects of disciplinary dismissal

"[…]
5. Dismissal based on any of the causes of discrimination prohibited by the Spanish Constitution or by law, or in violation of the fundamental rights and public freedoms of the worker, shall be null and void.
Dismissal shall also be null and void in the following cases:
(a) That of workers during periods of suspension of the employment contract due to birth, adoption, foster care for the purpose of adoption, fostering, risk during pregnancy, risk during breastfeeding referred to in Article 45.1.d) and e), parental leave referred to in Article 48 bis, or due to illness caused by pregnancy, childbirth or breastfeeding, or when the decision is notified on a date such that the period of notice granted ends within those periods.
(b) That of pregnant workers, from the date of the onset of pregnancy until the start of the suspension period referred to in a); that of workers who have requested one of the leaves referred to in Article 37, sections 3.b), 4, 5 and 6, or are enjoying them, or have requested or are enjoying the adaptations to the working day provided for in Article 34.8 or the leave of absence provided for in Article 46.3; and that of female workers who are victims of gender-based violence for exercising their right to effective judicial protection or the rights recognised in this law to make their protection effective or their right to comprehensive social assistance.
(c) That of workers after having returned to work at the end of the periods of suspension of the contract due to birth, adoption, foster care with the purpose of adoption, as referred to in Article 45.1.d), provided that no more than twelve months have elapsed since the date of birth, adoption, foster care for the purpose of adoption.
The provisions of the above paragraphs shall apply, unless, in such cases, the dismissal is declared to be justified for reasons unrelated to pregnancy or to the exercise of the right to the leave and leave of absence indicated.
6. Null and void dismissal shall produce the immediate reinstatement of the worker, along with the payment of wages that the worker stopped receiving."

Article 56. Unfair dismissal

"1. When the dismissal is declared unfair, the employer, within five days of notification of the judgment, may choose between reinstatement of the worker or payment of compensation equivalent to 33 days' wage per year of service, with periods of less than one year being prorated by months, up to a maximum of 24 monthly wages. The option of compensation shall determine the termination of the employment contract, which shall be understood to have occurred on the date of the effective termination of employment.
2. In the event that reinstatement is chosen, the worker shall be entitled to interim wages. These will be equal to an amount equal to the sum of wages not received from the date of dismissal until the notification of the judgment declaring the unfairness or until they found another job, if such placement was prior to said judgment and the employer proved what was received, to be deducted from the interim wages.
3. In the event that the employer does not opt for reinstatement or compensation, it is understood that the former is applicable.
4. If the dismissed worker is a legal representative of the workers or a trade union delegate, the choice shall always be made by the latter. If they do not make the choice, it shall be understood that they are in favour of reinstatement. In that case, reinstatement shall be mandatory. Whether compensation or reinstatement is chosen, the worker is entitled to the interim wages referred to in paragraph 2.
5. When the judgment declaring the dismissal to be unfair is handed down more than 90 working days after the date on which the claim was filed, the employer may claim from the State the

payment of the financial compensation referred to in paragraph 2, corresponding to the period exceeding the said 90 working days.
In cases of dismissal in which, in accordance with this paragraph, the State shall be responsible for the financial compensation, the social security contributions corresponding to such compensation shall be borne by the State."

27. Law Governing Social Jurisdiction No. 36/2011 – as amended

Article 110. Effects of unfair dismissal

"1. If the dismissal is declared unfair, the employer shall be ordered to reinstate the worker under the same conditions as before the dismissal occurred, and to pay the interim wages referred to in Article 56(2) of the Consolidated Text of the Workers' Statute or, at the choice of the employer, to pay compensation, the amount of which shall be fixed in accordance with Article 56(1) of that Statute, with the following particularities:
a) in the judgment the party that can choose between reinstatement and compensation may expressly choose one and the judge will note it in the judgment, without prejudice to Articles 111 and 112.
b) at the applicant's request, if the reinstatement is not possible, it may be agreed, in case of unfair dismissal, to have compensation, with a declaration in the judgment that working relationship has been terminated and the employer is ordered to pay the severance pay calculated up to the date of the judgment.
[…]
2. If the dismissal of a legal representative of the workers or a trade union delegate is declared unfair, the worker can choose.
[…]"

Article 183. Compensation

"1. When the judgment declares that an infringement has taken place, the court shall rule on the amount of any damage that may be payable to the applicant for discrimination suffered or any other infringement of their fundamental rights and freedoms, on the basis of both non-pecuniary damage linked to the infringement of the fundamental right, and the additional damage and losses.
2. The court shall rule on the amount of the damage, making a careful determination of it where it is too difficult or costly to prove the exact amount, in order to compensate the victim sufficiently and, so far as possible, fully restore them to the position they were in prior to the damage, and to contribute to the prevention of damage.
[…]"

Article 281. Order ruling on the incident

"1. At the hearing, the judge examines the facts provided by the parties on the alleged non-reinstatement or irregular reinstatement, providing only such evidence as the judge deems relevant and which can be produced at the time. A record shall be drawn up of the proceedings.
2. Within the following three days, the judge shall issue an order in which, except in cases where neither of the two circumstances alleged by the claimant is proven:
a) shall declare the employment relationship terminated on the date of the said decision.
b) Agree to the payment to the worker of the economic benefits provided for in Article 56(1) and (2) of the Workers' Statute. In view of the circumstances and the damage caused by the non-reinstatement or irregular reinstatement, it may fix an additional indemnity of up to fifteen days' wage per year of service and a maximum of 12 monthly wages. In both cases, periods of less than one year shall be prorated and the time elapsed up to the date of the order shall be counted as service time.
c) The employer shall be ordered to pay the wages not received from the date of notification of the judgment declaring the dismissal to be unfair for the first time until the date of the aforementioned decision."

28. **Civil Code No. 206/1889 – as amended**

Article 1101

"A party shall be liable for damage whenever they have acted in fraud, negligence or default in performing their contractual obligations."

B – Domestic case law

29. In its ruling No. 43/2014 of 12 February 2014, the Constitutional Court stated that the legislator's choice of the system for establishing compensation with fixed calculation elements was lawful and not arbitrary. It stated that the differences established in civil and labour law with regard to compensation for termination of contract are based on the autonomous and separate nature of both branches of the legal system.

30. In its ruling No. 140/2018 of 20 December 2018, the Constitutional Court stated that judges of the ordinary courts can set aside the provision of the domestic law in order to apply the provision of an international treaty.

31. In its ruling No. 61/2021 of 15 March 2021, the Constitutional Court stated that it is mandatory for the courts to always decide on the amount of additional compensation in case of a breach of fundamental rights and freedoms, as well as to determine how this compensation should be calculated.

32. In its judgment No. 576/2023 of 9 May 2023, the Supreme Court examined the situation of a person employed by the public administration as a temporary agent in 2008 and dismissed in 2017 after the post was filled by a career civil servant who passed the competition. The Supreme Court stated that the existence of an objectively abusive situation did not automatically imply that the temporary civil servant subsequently dismissed had suffered effective and proven damage. Therefore, this alone did not mean that a right to compensation should be recognised for pecuniary or non-pecuniary damage.

33. In its judgment No. 3263/2019 of 28 June 2021, the Supreme Court stated that the fact that the worker, at the time of the termination of the contract, was considered to be an "non-regular permanent" worker, leads to the application of the case law, according to which termination of employment of the "non-regular permanent" worker due to the statutory coverage of the post she occupied, entails the recognition in her favour of a severance payment of 20 days' per year of service with a maximum of 12 monthly payments.

34. In its judgment No. 360/2021 of 23 March 2021, the High Court of Justice of the Basque Country refused to award additional compensation because its amount was not justified. In particular, the dismissed worker received €23,000 of compensation in accordance with the law and claimed additional €10,000.

35. In its judgment No. 1586/2021 of 23 April 2021, the High Court of Justice of Catalonia did not award additional compensation to the worker but referred extensively to Article 10 of the ILO Convention No. 158 and Article 24 of the Charter. It noted that

it is possible to apply the conventionality control and in certain exceptional cases the compensation resulting from the domestic law may not be adequate. The High Court of Justice of Catalonia reiterated several times that these situations are exceptional.

36. In its judgment No. 1841/2022 of 29 November 2022, the High Court of Justice of Asturias stated that the power of judicial bodies to award additional compensation is exceptional. Moreover, two coinciding elements are required: the manifest insufficiency of the compensation awarded and clear existence of illegality, fraud of law or abuse of the right of the company to decide to terminate the contract.

37. In its judgment No. 6219/2022 of 30 January 2023, the High Court of Justice of Catalonia awarded higher compensation to the dismissed worker. It stated that the statutory compensation of €1,000 was clearly insufficient and did not compensate the damage caused to the dismissed worker, nor had it a dissuasive effect for the company. Additional compensation of €3,500 euros was awarded, taking into account lost earnings.

38. In its judgment No. 6061/2022 of 10 February 2023, the High Court of Justice of Catalonia stated that there were no reasons to apply the same approach as in the case of the same High Court of Justice of 30 January 2023, No. 6219/2022. The amount of damage was not specified and no proof to justify it was provided.

39. In its judgment No. 145/2024 of 8 April 2024, the Social Tribunal No. 2 of Tarragona, referring to the ILO Convention No. 158 and an earlier decision of the domestic courts following which in exceptional circumstances higher compensation was possible, declared the disciplinary dismissal unfair and awarded the compensation requested by the dismissed worker, i.e. €8,736.90.

40. In its judgment No. 852/2024 of 9 April 2024, the High Court of Justice of the Basque Country stated that recently, and without there yet being a uniform doctrine, the debate on the possibility of increased compensation for unfair dismissal is raised again. The Court referred to the Charter and the ILO Convention No. 158 and stated that it would be possible to award higher compensation in exceptional circumstances. However, in the present case the Court stated that the compensation of €38,345.31 awarded to the worker was much higher than that usually received by workers in cases of unfair dismissal with short service as in the present case and dismissed the appeal of the worker.

41. In its judgment No. 2762/2024 of 14 May 2024, the High Court of Justice of Catalonia referred to Article 24 of the Charter and awarded higher compensation to the dismissed worker namely €20,762.28 instead of €823.90, and it also granted the choice to the employer to reinstate the worker.

42. In its judgment No. 848/2019 of 28 July 2020, the Social Tribunal No. 26 of Barcelona did not award additional compensation but acknowledged that such right exists under Article 10 of the ILO Convention No. 158 and Article 24 of the Charter.

43. In its judgment No. 170/2020 of 31 July 2020, Social Tribunal No. 26 of Barcelona reinstated the worker and awarded additional compensation, it also referred to a right to an additional compensation under Article 10 of the ILO Convention No. 158 and Article 24 of the Charter.

44. In its judgment No. 1134/2024 of 19 July 2024, the Social Tribunal No. 42 of Madrid referred to the ILO Convention No. 158 and the Charter and awarded higher compensation to the dismissed worker, instead of €1,512.50 it awarded €8,600. The Social Tribunal held that to date, the Supreme Court has not ruled on the consistency of jurisprudence regarding additional compensation.

45. In its judgment No. 286/2024 of 2 September 2024, the Social Tribunal No. 1 of Tarragona found the worker's dismissal unfair, referred to the ILO Convention No. 158 and the Charter and the right to higher compensation, ordered reinstatement of the worker with an award of interim wages or alternatively awarded the dismissed worker compensation of €12,224.82.

46. In its judgment No. 318/2024 of 7 November 2024, the Social Tribunal No. 2 of Guadalajara found the worker's dismissal unfair, referred to the Committee's decision in *Unión General de Trabajadores* (UGT) v. Spain, Complaint No. 207/2022, decision on the merits of 20 March 2024, as well as ILO Convention No. 158, and the conventionality control. The Tribunal awarded the dismissed worker additional compensation of €10,000.

RELEVANT INTERNATIONAL MATERIAL

A – The United Nations (UN)

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

Article 6

"1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts and will take appropriate steps to safeguard this right.
2. The steps to be taken by a State Party to the present Covenant to achieve the full realisation 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."

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

"4. The right to work, as guaranteed in the ICESR, affirms the obligation of States parties to assure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly.
[…]
11. ILO Convention No. 158 concerning Termination of Employment (1982) defines the lawfulness of dismissal in its article 4 and in particular imposes the requirement to provide valid grounds for dismissal as well as the right to legal and other redress in the case of unjustified dismissal.
[…]

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."

B – International Labour Organisation (ILO)

49. Convention (No. 158) concerning Termination of Employment (adopted on 22 June 1982, entry into force on 23 November 1985)

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."

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

"218. Under Article 10 of the Convention, "if the bodies referred to in Article 8 […] find that termination is unjustified and if they are not empowered or do not find it practicable, in accordance with national law and practice, to declare the termination invalid and/or order or propose reinstatement of the worker, they shall be empowered to order payment of adequate compensation or such other relief as may be deemed appropriate.
219. The wording of Article 10 gives preference to declaring the termination invalid and reinstating the worker as remedies in the case of unjustified termination of employment. However, it is flexible in that it offers other possible remedies, depending on the powers of the impartial body and the practicability of a decision to nullify the termination and reinstate the worker. The text specifies, moreover, that when compensation is paid it should be "adequate".
[…]
232. In the light of the above, the Committee considers that compensation, in the case of termination of employment impairing a basic right, should be aimed at compensating fully, both in financial and in occupational terms, the prejudice suffered by the worker, the best solution generally being reinstatement of the worker in his job with payment of unpaid wages and maintenance of acquired rights. In order to do this, the impartial bodies should have all the necessary powers to decide quickly, completely and in full independence, and in particular to decide on the most appropriate form of redress in the light of the circumstances, including the possibility of reinstatement. When reinstatement is not provided as a form of redress, when it is

not possible or not desired by the worker, it would be desirable for the compensation awarded for termination of employment for a reason which impairs a fundamental human right to be commensurate with the prejudice suffered, and higher that for other kings of termination. […]"

51. In the report of the Director-General, fourth supplementary report : report the Committee set up to examine the representation alleging non-observance by Spain of the Termination of Employment Convention, 1982 (No. 158) of 11 June 2014, submitted under Article 24 of the ILO Constitution by the Trade Union Confederation of Workers' Committees (CCOO) and the General Union of Workers (UGT), it was held that the measures introduced with the 2012 reform did not mean that Spanish system breached the standard of protection defined in Article 10 of the Convention.

52. In the report of the Director-General, third supplementary report: report of the Committee set up to examine the representation alleging non-observance by France of the Termination of Employment Convention, 1982 (No. 158) of 16 February 2022, it was stated that the compatibility of a table, and therefore of a cap, with Article 10 of the Convention depends on whether sufficient protection is ensured for persons whose employment has been unfairly terminated and, in all cases, whether adequate compensation is paid.

C – European Union (EU)

53. Charter of Fundamental Rights of the EU

Article 30 – Protection in the event of unjustified dismissal

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

54. European Pillar of Social Rights

Principle No. 7 of the Pillar:

"7. Information about employment conditions and protection in case of dismissals
[…]
b. Prior to any dismissal, workers have the right to be informed of the reasons and be granted a reasonable period of notice. They have the right to access to effective and impartial dispute resolution and, in case of unjustified dismissal, a right to redress, including adequate compensation."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 24 OF THE CHARTER

55. Article 24 of the Charter reads as follows:

Article 24 –The right to protection in cases of termination of employment

Part I: "All workers have the right to protection in cases of termination of employment."

Part II: "With a view to ensuring the effective exercise of the right of workers to protection in cases of termination of employment, the Parties undertake to recognise:

a. the right of all workers not to have their employment terminated without valid reasons for such termination connected with their capacity or conduct or based on the operational requirements of the undertaking, establishment or service;

b. the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief.

To this end the Parties undertake to ensure that a worker who considers that his employment has been terminated without a valid reason shall have the right to appeal to an impartial body."

A – Arguments of the parties

1. The complainant organisation

56. CCOO alleges that the protection against unfair dismissals in accordance with the Workers' Statue applies to:

- dismissals on disciplinary grounds that are considered unjustified for lack of cause or guarantees;
- objective dismissals;
- collective dismissals;
- termination of employment at the request of the worker for serious breach of the employer's obligations to pay wages or of basic labour rights;
- unjustified termination of temporary contracts.

In case of unfair dismissal, the company is given the right to choose between reinstatement, with payment of interim wages or termination of employment, with payment of statutory compensation of 33 days' salary per year of service, with a maximum limit of 24 monthly wages. The right to choose can be exercised freely by the company, without providing reasons, and the judicial authority cannot verify the reasons of the company. By way of exception, the right to choose is given to representatives of workers or those who hold trade union representative positions.

57. CCOO states that, in practice, the following has been accepted as unfair dismissal:

- corporate dismissal without a cause of any kind;
- allegation of simulated or false cause;
- non-compliance not only with the form in which the corporate will is expressed, but also with the other requirements that may be established by law in order to carry out dismissal;
- unfair allegation of the expiry date of the temporary contract;
- unfair allegation of other grounds for termination of the temporary contract;
- termination based on the alleged termination of a temporary contract concluded in fraud of law despite the fact that the worker is recognised as a permanent staff member.

In such cases, the worker's employment relationship will be terminated and they will only be protected if they file a complaint before the domestic courts within 20 working days. If not, the person will only have access to unemployment benefits.

58. CCOO alleges that generally domestic courts consider that a dismissal which does not comply with the form or the cause provided for by law must be characterised as unfair and it is not necessary to examine whether the company has engaged in fraudulent behaviour. CCOO provides a list of standard cases which would require reinstatement in its opinion because of the lack of protection of the worker: no just cause for termination or the cause invoked is false, simulated or unreal; termination does not respond to an objective business interest; termination is only a disciplinary mechanism to preserve corporate order or authority; termination of temporary contracts in fraud of law and others. However, as stated by CCOO, in these cases domestic courts in practice declare the dismissal unfair and not null and void.

59. CCOO states that, in case of null and void dismissal (dismissal in breach of fundamental rights, discriminatory dismissal, or in cases expressly established by law), reinstatement of a worker is obligatory, and the worker is entitled to wages for the period between the date of dismissal and the date of reinstatement. Additional compensation is only possible when a dismissal decision is based on discriminatory grounds or in violation of fundamental rights and other civil liberties. However, grounds for null and void dismissal are not interpreted extensively by the domestic courts and are limited to those established in the domestic law.

60. CCOO alleges that the legislation and judicial practice do not allow the court to assess reinstatement as an appropriate relief in case of unfair dismissal. Even when the company chooses reinstatement but decides not to go through with it, legislation imposes termination of employment, without the court being able to order reinstatement (however, in this case additional compensation of up to 15 days' salary per year of service with the maximum of 12 monthly wages and interim wages can be awarded).

61. CCOO also alleges that prior to the 2012 labour reform in Spain compensation for unfair dismissal was determined on the basis of 45 days' wage per year of service, with a maximum limit of 42 monthly wages. In addition, the worker was entitled to interim wages, which were designated to cover the financial losses of the worker. These interim wages amounted to the sum of the remuneration unpaid between the date of dismissal and the date on which the notice of the decision of the appeal body was served, or the date on which the worker took up other employment if recruited before such decision was delivered.

62. Since 2012 labour law reform, the worker cannot claim interim wages and can only receive them in case the company opts for reinstatement or when the representative of workers chooses reinstatement or compensation. The legislator considered that the duration of legal proceedings was not an adequate criterion to compensate for the damage caused by the loss of employment, especially bearing in mind that the worker was eligible for unemployment benefit from the very moment when the decision to terminate the employment became effective; interim wages also

sometimes acted as an incentive for procedural delays. CCOO argues that the right to unemployment benefits is not related to unfair dismissal but stems from having paid contributions over a period of time. Unemployment benefits are often significantly lower than the wages received prior to dismissal. Access to unemployment benefits has no dissuasive effect on the company's unlawful conduct, but rather the opposite, when a significant part of the damage caused by its unlawful conduct is borne by public resources.

63. CCOO states that compensation in the event of unfair dismissal is based on the length of service and is subject to a ceiling. This legal regime does not allow claims for additional damage, no provision is made for a minimum amount of compensation, meaning that, in case of contracts of short duration, dismissal has no dissuasive effect for employers. Finally, in case of temporary contracts concluded in fraud of law, especially in respect of workers under temporary contracts in public administrations, they receive lower compensation than that provided for in cases of unfair dismissal.

64. CCOO states that the reduction in the amount of compensation and the removal of the so-called interim wages show that the all-inclusive compensation provided for under domestic law does not cover the actual damage caused to the worker by unfair dismissal. In addition, CCOO states that even in the event of reinstatement of the worker, domestic law does not allow the worker to seek compensation for the actual losses arising out of the dismissal. The law and practice do not recognise the right to compensation of default interest.

65. CCOO states that the Charter requires that the system for determining compensation is regulated in such a way that the amount of compensation can be set according to criteria of effective accessibility for workers. It is difficult to quantify damage incurred by the loss of employment and therefore certain elements have to be set in law. A model that allows the company to know the cost of compensation in detail has no deterring effect and can be an incentive to resort to unfair dismissal practices. However, a model featuring the possibility of claiming, in addition to the minimum legal damage, additional damage depending on the damage proven, does not have this risk of allowing the financial burden to be calculated. CCOO alleges that it is compatible with the Charter to establish minimum compensation, which can be based on the parameters of the length of service and salary, provided this minimum amount is truly dissuasive, and additional compensation must be allowed.

66. CCOO states that the absence of the minimum amount of compensation for unfair dismissal means that such compensation fails to meet two requirements of Article 24 of the Charter. Firstly, it does not have the function of remedying the damage caused because one month of service in the company generates 2.7 days' salary as the amount of compensation, so in case of several months of service, the compensation is very small. Secondly, it does not have any dissuasive effect. This affects two groups of workers: persons subject to temporary contracts concluded in fraud of law and those working under a part-time contract.

67. CCOO further states that in the specific case of temporary staff who are victims of hiring in fraud of law, and who by law have the status of permanent staff, they should be clearly protected under Article 24 of the Charter. Domestic case law has dealt with the case of termination of employment of Public Administrations and Public Entities staff who were subject to abusive temporary hiring practices. When the contracts were terminated, despite the fact that by law they were abusive contracts and their limited duration should have had no legal effect, the case law has recognised compensation equivalent to that which occurs in the case of objective dismissal, which in Spain is quantified at 20 days' wage per year of service, with a ceiling of 12 monthly wages.

68. CCOO states that the seventeenth additional provision of the amended text of the Public Service Regulations Act, approved by Royal Legislative Decree No. 5/2015, as amended by Law No. 20/2021 on urgent measures to reduce temporary employment in the public sector, provides for specific compensation in the event that temporary staff provide services in breach of the maximum periods of employment. It gives rise to compensation consisting of the difference between the maximum of 20 days' of the salary per year of service, with a maximum of 12 monthly payments, and the compensation that would have been owed for termination of contract. However, this does not cover all cases of hiring in fraud of law, nor does it prevent the payment of compensation for unfair dismissal, but it is deducted from the amount of the latter.

69. CCOO states that the 2021 labour law reform is having a favourable impact on employment and its stability but it did not address the issue of protection against unfair dismissal.

70. CCOO refutes the Government's argument that domestic courts have acknowledged the worker's right to additional compensation in exceptional cases by stating that only five Social Chambers of the High Courts of Justice out of 19 applied the criterion that the compensation resulting from Article 56 of the Workers' Statute does not comply with Article 24 of the Charter, and even those courts do not maintain a stable doctrine. Moreover, these judgments are not endorsed by the Supreme Court.

2. The respondent Government

71. The Government submits that in the domestic law, dismissal has to be based on a just cause because the decision to dismiss, in order to be lawful, must always be based on a legally established cause and must comply with the formal requirements established by law. Dismissal is lawful in three cases: disciplinary dismissal, dismissal for objective reasons and collective dismissal for economic, organisational, technical or productive reasons. In the event of disciplinary dismissal, no compensation is paid. In the event of dismissal for objective reasons and collective dismissal, compensation amounts to 20 days' wage per year of service, with a maximum of 12 monthly wages. If the worker does not agree with the dismissal, they may challenge it before the domestic courts. The court may declare the dismissal fair, unfair or null and void. Dismissal is null and void in the following cases: based on discriminatory grounds; in violation of the worker's fundamental rights and freedoms; in situations connected with maternity.

72. The Government further states that the dismissal is unfair if the legal ground on which it is based cannot be justified or when the formal and procedural requirements are not met. If the dismissal is declared unfair, the employer can generally choose between reinstatement together with the payment of interim wages, or a compensation equivalent to 33 days' wage per year of service with a maximum of 24 monthly wages. The worker can choose between reinstatement and compensation when they hold positions as representatives of the workers or as a trade union delegate or when the applicable collective agreement so provides.

73. The Government further states that dismissal described by CCOO as means of preventing the legitimate exercise by the workers of their rights recognised by the Charter in the domestic legal system would generally be classified as null and void dismissal, and in this case compulsory reinstatement is provided for. When a violation of fundamental rights is established, it is mandatory for the domestic courts to establish additional compensation and determine how this compensation should be calculated.

74. The Government states that the current system of predetermined compensation has been applied for more than 40 years. The Workers' Statute of 1980 provided that, in case of unfair dismissal, the employer could choose between reinstatement of the worker or the payment of a predetermined compensation of 45 days' wage per year of service, and the payment of interim wages. The 2012 labour law reform maintained the system of predetermined compensation but reduced it to 33 days' wage per year of service and abolished the payment of interim wages when the employer chose to pay compensation and not to reinstate the worker. This system was endorsed by the Constitutional Court. The Government states that Article 24 of the Charter does not require the payment of interim wages. The Government refers to the Report of the Director General of the International Labour Organisation of 13 June 2014, where it was held that Article 10 of Convention No. 158 refers to the payment of adequate compensation or such other relief as may be deemed appropriate, without specifically mentioning interim wages.

75. The Government further states that the domestic case law on the calculation of compensation based on 33 days' wage per year of service is flexible and favourable to the worker. The Government describes the advantages of the system of predetermined compensation, such as the exemption of workers from proving the damage, greater predictability of dismissal costs and the uniform application of the system to all companies, irrespective of their size.

76. The Government further states that the courts have frequently been asked to add a supplementary amount based on the subsidiary application of civil rules regarding contractual liability, but such requests have usually been rejected by the domestic courts because of the particularity of the labour law regime and the impossibility of applying the civil law regime in matters governed by labour law. However, as of 2018, in exceptional cases, the court can decide that the compensation

established by law is manifestly insufficient and award additional compensation through a direct application of Article 24 of the Charter or Article 10 of ILO Convention No. 158. The Government refers to the Constitutional Court's ruling No. 140/2018, where it is stated for the first time that it is for the ordinary judges to set aside a domestic law provision or order in application of the provision of an international treaty. According to the Government, there are numerous examples that this ruling has been widely accepted in practice by the social courts. The Government mentions a number of judgments where the existence of a right to such additional compensation was acknowledged in principle.

77. The Government also points out that between 2018 and 2023 the minimum wage increased from €735.90 per month to €1,080 per month, which has a direct impact to the compensation in case of dismissal.

78. The Government considers that neither Article 24 of the Charter, nor any other international instrument on the protection of workers in the event of unfair dismissal, recognises in absolute terms the right of the worker to be reinstated or the right of the domestic court to assess the appropriateness of reinstatement as an alternative to compensation or other relief. In the Government's view, the obligation of the States is to provide for a system of adequate compensation or other means or relief. Even if Article 24 of the Charter could be considered as giving rise to a preference for reinstatement, there is no doubt that it does not prevent the national legislature from providing alternative solutions. The Government further states with regard to reinstatement that in cases where it is considered appropriate to grant special protection to the worker, the regulations give the workers, and not the company, the right to choose between reinstatement and predetermined compensation.

79. The Government states that the legislation adequately protects workers who are subject to irregular temporary employment because domestic law provides for the conversion of the temporary employment into a permanent one. In case of irregular temporary contracts, the workers shall continue to provide services with the status of a permanent worker in their company and shall enjoy the same rights and conditions as if they had this status from the beginning of the employment relationship.

80. The Government states that, with regard to abusive temporary contracts, the termination of employment relationship due to the alleged expiry of the term of the allegedly temporary contract will, in any event, will be considered unfair or null and void. The situation is similar when it comes to staff hired by the Public Administrations under temporary contracts used in an irregular manner. The situation of temporary staff in the public administrations is considered as a "non-regular permanent" employment and in case of dismissal, it may be classified as fair, unfair or null and void. If such worker is dismissed for objective reasons, they are paid compensation of 20 days' wage per year of service with the maximum 12 monthly wages. Also, in case of "non-

regular permanent" workers, due to the very nature of the position, there is an objective cause that justifies the termination of the employment relationship, given that the post is then filled by a worker who has passed the selection process established for this purpose. If a dismissal is classified as unfair or null and void, the consequences of dismissal are identical to those that apply to workers hired on a permanent basis.

81. The Government further states that, in addition to taking into account the specific system for calculating the compensation to be awarded to the worker affected by the dismissal decision, it is necessary to assess the set of measures to favour employment stability and avoid situations of dismissal, and measures to protect those who have lost their job. In this context, the Government describes the 2021 labour law reform which was adopted in the framework of a process of social dialogue through which an agreement was reached between the Government and the social partners, including the complainant organisation. The reform advocates for the elimination of temporary contracts. Also, greater employment stability is achieved through the reduction of the number of dismissals.

82. The Government mentions several laws that contributed to discouraging employers from adopting unfair dismissal decisions. For example, Law No. 43/2006 prohibits companies that have terminated indefinite contracts in an unfair manner within 12 months from using a certain type of temporary hiring. Law No. 3/2012 provided that companies that had not terminated contracts in an unfair manner in the 12 months prior to the application, could receive a 50% refund on employer social security contributions. Currently, Royal Decree-Law No. 1/2023 provides for the loss of reduction of social security contributions in case dismissals are unfair.

83. On this basis, the Government maintains that there is no violation of Article 24 of the Charter.

B – Assessment of the Committee

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

i. Adequate compensation

85. Compensation systems are considered to comply with the Charter when they meet the following conditions: provide for reimbursement of financial losses incurred between the date of dismissal and the decision of the appeal body (Conclusions 2012, Slovak Republic, Article 24; Conclusions 2012, Bulgaria, Article 24); provide for the possibility of reinstatement of the worker (Conclusions 2012, Finland, Article 24); and/or provide for the compensation of a high enough level to dissuade the employer and make good the damage suffered by the victim (Finnish Society of Social Rights v. Finland, Complaint No. 106/2014, decision on admissibility and the merits of 8 September 2016, §45; *Confederazione Generale Italiana del Lavoro* (CGIL) v. Italy, Complaint No. 158/2017, decision on the merits of 11 September 2019, §87;

Conclusions 2012, Türkiye, Article 24). Compensation for unlawful dismissal must be both proportionate to the loss suffered by the victim and sufficiently dissuasive for employers (Conclusions 2016, North Macedonia, Article 24). Any ceiling on compensation that may preclude damages from being commensurate with the loss suffered and sufficiently dissuasive is in principle contrary to Article 24[.b] of the Charter (*Syndicat CFDT de la métallurgie de la Meuse* v. France, Complaint No. 175/2019, decision on the merits of 5 July 2022, §83). If there is such a ceiling on compensation for pecuniary damage, the victim must be able to seek compensation for non-pecuniary damage through other legal avenues, and the courts competent for awarding compensation for pecuniary and non-pecuniary damage must decide within a reasonable time (Conclusions 2012, Slovenia; Conclusions 2012, Finland).

86. The Committee recalls that in Finnish Society of Social Rights v. Finland, Complaint No. 106/2014, op. cit., a ceiling of 24 months provided by the Finnish legislation was considered insufficient by the Committee, as it did not allow for adequate compensation within the meaning of Article 24[.b] of the Charter. It also recalls that in *Confederazione Generale Italiana del Lavoro (CGIL)* v. Italy, Complaint No. 158/2017, op. cit., it considered that predetermined amounts of compensation (capped at 12, 24 or 36 times the reference monthly remuneration as the case may be, and six times the reference monthly remuneration for small undertakings) made the compensation inadequate over time to the damage suffered. The Committee further recalls that it considered the compensation ceiling of 20 months, applicable only for 29 years of seniority provided for by French legislation to be insufficient (see *Confédération Générale du Travail Force Ouvrière* (CGT-FO) v. France, Complaint No. 160/2018 and *Confédération Générale du travail* (CGT) v. France, Complaint No. 171/2018, decision on the merits of 23 March 2022; *Syndicat CFDT de la métallurgie de la Meuse* v. France, Complaint No. 175/2019, op. cit., as well as in *Syndicat CFDT général des transports et de l'environnement de l'Aube* v. France, Complaint No. 181/2019 and *Syndicat CFDT de la métallurgie de la Meuse* v. France, Complaint No. 182/2019, decision on the merits of 19 October 2022). The Committee also recalls that in *Unión General de Trabajadores* (UGT) v. Spain, Complaint No. 207/2022, decision on the merits of 20 March 2024, a ceiling of 24 months provided by the Spanish legislation was in breach of the Charter.

87. In its assessment of the present complaint, the Committee will focus on ascertaining whether domestic legislation satisfies the Charter's requirement of adequate compensation as laid out in §84 above. As regards interim wages (see §26 above, Article 56 of the Workers Statute), the Committee considers that this aspect should be taken into account as part of the overall assessment of whether the scales and the regulations applicable in Spanish law ensure adequate compensation.

88. The Committee notes that CCOO alleges that compensation in case of unfair dismissal is insufficient and that it is not possible to claim additional compensation for damage suffered. CCOO further alleges that there should be a minimum amount set in law, which would have a dissuasive effect on employers when making decisions regarding dismissal, and interim wages should be awarded in all cases of unfair dismissal.

89. The Committee notes that the maximum ceiling of compensation in cases of unfair dismissal cannot exceed 33 days' wage per year of service, with a maximum limit of 24 monthly wages. In case of dismissal for objective reasons and collective dismissal for economic, organisational, technical or productive reasons, the maximum ceiling cannot exceed 20 days' wage per year of service, with a maximum limit of 12 monthly wages.

90. The Committee considers that while the Government asserts that one of the aims of the system introducing compensation ceilings was to provide greater legal certainty for both parties to the employment contract, it cannot be precluded that the predetermined compensation might rather serve as an incentive for the employer to dismiss workers in an unfair manner. Indeed, in certain cases, the established compensation ceilings could prompt employers to make a pragmatic estimation of the financial burden of an unfair dismissal on the basis of cost-benefit analysis. In some situations, this could encourage unfair dismissals.

91. Moreover, the Committee notes that the upper limit of the compensation scale does not allow the award of higher compensation on the basis of the personal and individual situation of the worker, as the courts can only order compensation for unfair dismissal within the limits of the scale, and the courts consider the employment rules *lex specialis* in comparison with civil regulations and usually reject the requests for additional compensation submitted in accordance with the Civil Code.

92. The Committee takes note of the information submitted by the Government that recently domestic courts started acknowledging the right to additional compensation referring to the Article 10 of ILO Convention No. 158 and Article 24 of the Charter. The Committee notes that there are several decisions on the matter, but the domestic courts still refer to a right to additional compensation as an exception (see §§35, 37, 41-42). It appears from the information submitted by the parties that the general practice of the domestic courts to reject such requests for additional compensation still prevails.

93. The Committee takes note of the measures aimed at discouraging employers to adopting unfair dismissal decisions as well as of the amounts of unemployment benefit that dismissed workers can receive.

94. The Committee notes that the ceiling of compensation that the worker can receive in cases of unfair dismissal, applicable to workers hired before the 2012 labour law reform, is higher than the one in the other cases examined by the Committee (42 months before the reform in comparison to 24 and 20 months in cases of Finland and France respectively and 12, 24 or 36 months in Italy). However, the Committee has already held that the ceilings applicable to workers hired after the 2012 labour law reform, notably 24 months, are insufficient and in breach of the Charter (see §86 above).

95. The Committee welcomes the recent developments in domestic case law where a right to possible additional compensation has been acknowledged in case of unfair dismissal. The Committee also notes that there have been several decisions of the domestic courts which carried out conventionality control and assessed the compatibility of the compensation scale with international treaties (see §§32-33, 354, 41-46 above). However, despite the fact that additional compensation was awarded in several cases (see §§38 and 43-46 above), it seems that the practice has not been widely followed by other domestic courts. In fact, even the domestic courts acknowledged that the Supreme Court has not ruled on the consistency of jurisprudence regarding additional compensation (see §44 above). Moreover, the Government itself acknowledges that additional compensation in case of unfair dismissal is possible only in exceptional cases according to domestic case law, thus it would not apply in all cases of unfair dismissals.

96. With regard to the minimum amount of compensation, the Committee states that, contrary to what CCOO states, the establishment of such a minimum compensation would not be sufficiently dissuasive for the employer and would not necessarily allow such compensation to be commensurate with the loss suffered.

97. The Committee considers that the ceilings set by legislation are not sufficiently high to make good the damage suffered by the victim in all cases and to be dissuasive for the employer. The real damage suffered by the worker concerned linked to the specific characteristics of the case may not be appropriately taken into account, not least because the possibility of additional compensation is very limited. The Committee therefore considers that in light of all of the above elements the right to adequate compensation or other appropriate relief within the meaning of Article 24.b of the Charter is not adequately guaranteed.

98. The Committee therefore holds that there is a violation of Article 24.b of the Charter.

ii. Reinstatement

99. The Committee has previously considered that while Article 24.b of the Charter does not explicitly refer to reinstatement, it refers to compensation or other appropriate relief. The Committee considered that other appropriate relief should include reinstatement as one of the remedies available to national courts or tribunals in cases of termination of employment without a valid reason. The possibility of awarding reinstatement recognises the importance of placing the employee back into an employment situation no less favourable than they previously enjoyed. Whether reinstatement is appropriate in a particular case is a matter for the domestic courts to decide. The Committee recalls that it has consistently held that reinstatement should be available as a remedy also under other provisions of the Charter as interpreted by the Committee, for example under Article 8§2 and Article 27§3 of the Charter (Finnish Society of Social Rights v. Finland, Complaint No. 106/2014, op. cit., §55).

100. The Committee notes that the complainant organisation's argument regarding reinstatement is twofold: that domestic courts are not allowed to order reinstatement as an appropriate remedy for unfair dismissal, regardless of the circumstances and conduct of the parties, and that domestic courts are not allowed to order reinstatement as an appropriate remedy for unfair dismissal in situations in which it is established that 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. The Committee considers that, notwithstanding the reasons for dismissal, which is declared unfair, the core of the argument of the complainant organisation is that reinstatement cannot be ordered by domestic courts in cases of unfair dismissal and when dismissal is a fraudulent act.

101. The Committee notes that under domestic law, reinstatement is only mandatory when dismissal is declared null and void by domestic courts (see §§26-27 above). If dismissal is declared unfair, the choice of whether to reinstate the worker rests with the employer, unless the worker is a legal representative of the workers' or a trade union delegate. It clearly follows from the information provided by the parties that unless the dismissal is declared null and void, the domestic courts cannot assess the appropriateness of the reinstatement on their own motion. Even when the employer chooses reinstatement but decides not to effectuate its decision, the domestic courts cannot assess that the reinstatement would be more appropriate than the payment of compensation, and the employment relationship ends with the payment of a predetermined compensation. In such a case, the domestic court awards interim wages and can award additional compensation.

102. The Committee considers that domestic courts cannot decide whether reinstatement is appropriate in a particular case because the law either explicitly requires reinstatement in case the dismissal is null and void, or the company or a worker may choose it. It is not possible for the domestic court to assess that the reinstatement is appropriate after considering all the circumstances of the case, the conduct of the parties and assessing whether reinstatement is the most suitable solution. The Committee notes that, even though reinstatement is possible under domestic law in limited cases, the domestic courts cannot assess whether it is the most appropriate option in a given case. The Committee considers that the domestic courts should be able to assess the appropriateness of the reinstatement in consultation with the parties to the proceedings. The Committee therefore considers that the lack of the opportunities for the domestic courts to assess the possibility of reinstatement does not meet the requirements of Article 24.b of the Charter.

103. The Committee therefore holds that there is a violation of Article 24.b of the Charter.

iii. Temporary contracts

104. The Committee notes that CCOO argues that the compensation is insufficient in relation to the damage suffered as a result of successive temporary contracts concluded “in fraud of law” (see §§26 and 67 above), 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. The Committee further notes that CCOO alleges that workers in public administrations that are characterised as “non-regular permanent” staff can have their contracts terminated when their position is filled after a selection procedure and in such cases termination of employment is not subject to compensation for unfair dismissal but to a lower compensation of 20 days’ wage per year of service with a maximum on 12 monthly payments.

105. The Committee notes that if temporary contracts are used in breach of the Workers’ Statute, which would characterise them as being concluded “in fraud of law”, such workers acquire permanent status (see §26 above). If the fraudulent nature of a temporary contract becomes evident during the termination of the employment relationship, the termination is usually declared null and void with the consequences pertaining to such declaration. In case of “non-regular permanent” workers in public administrations, their dismissal can be declared null and void or unfair, and the consequences are identical as in the case of permanent workers, i.e. predetermined compensation can be paid or the worker can be reinstated, or, in case a dismissal is declared null and void, reinstatement is mandatory, together with the payment of interim wages.

106. The Committee therefore considers that in case of unfair dismissal or dismissal of a temporary worker that is null and void, the applicable provisions are identical to those for permanent workers. In these circumstances, the Committee considers that the same considerations apply (see §§85-97 above) and that ceilings set by the legislation are not sufficiently high to make good the damage suffered by the victim in all cases and to be dissuasive for the employer. The real damage suffered by the worker concerned linked to the specific characteristics of the case may not be appropriately taken into account, not least because the possibility of additional compensation is very limited.

107. The Committee holds that there is a violation of Article 24.b of the Charter with regard to adequate compensation in case of unfair dismissal of temporary workers hired in fraud of law.

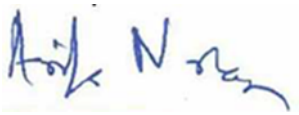
CONCLUSION

For these reasons, the Committee concludes:

- unanimously that there is a violation of Article 24.b of the Charter with regard to compensation for unfair dismissal;

- unanimously that there is a violation of Article 24.b of the Charter with regard to reinstatement;

- unanimously that there is a violation of Article 24.b of the Charter with regard to compensation for unfair dismissal of temporary workers hired in fraud of law**.**



Miriam KULLMANN	Aoife NOLAN	Henrik KRISTENSEN
Rapporteur	President	Executive Secretary

In accordance with Rule 35§1 of the Rules of the Committee, a separate concurring opinion of Carmen SALCEDO BELTRÁN is appended to this decision.

SEPARATE CONCURRING OPINION OF CARMEN SALCEDO BELTRÁN

I agree with the Committee's unanimous finding of a violation of Article 24.b of the Charter on all the grounds which the complainant organisation submitted concerning Spain's legislation, particularly with regard to compensation for unfair dismissal, reinstatement, and compensation for the unfair dismissal of temporary workers hired in fraud of law.

However, I would like to submit this concurring opinion for the following reasons:

a) Firstly, to make a formal observation concerning the finding of a violation in relation to interim wages.

b) Secondly, to add some arguments to support the findings of a violation concerning the implementation of conventionality control in the specific context under examination, which the state itself highlighted in its allegations. These arguments confirm and reveal the effectiveness of the treaty and the decisions on the merits in this area.

1. The violation of Article 24 b. of the Charter because the obligation to pay interim wages applies only in some cases of unfair dismissal.

The Committee examined interim wages "as part of the overall assessment of whether the scales and the regulations applicable in Spanish law ensure adequate compensation" (§ 87).

In the trade union's complaint, there is a specific section on this subject (IV. Third). In addition, in the last part of the document (pages 75 and 76), which organises the complaints into a six-point list, the complainant trade union asks the Committee, in the third point, to give a specific ruling on Article 56, paragraph 2, which has been in force since the 2012 labour law reform and does not require payment of interim wages in cases where, after a dismissal has been deemed unfair, the employer, or in exceptional circumstances the workers' representative, opts for compensation.

In its ruling, the Committee decided that this legislation is in breach of Article 24 b. of the Charter in accordance with its long and well-established case law, in which it holds that workers dismissed without valid reason must be granted compensation or other appropriate relief. It noted that compensation mechanisms are considered appropriate if they include "reimbursement of financial losses incurred between the date of dismissal and the decision of the appeal body" (*Finnish Society of Social Rights* v. Finland, Complaint No. 106/2014, decision on admissibility and merits of 8 September 2016, § 45).

During the deliberations, I argued that since the request was precise, the description was detailed and the practice connected with this legislative amendment showed that it was most certainly a very regressive measure for workers, meaning that losses were not made good and employers were encouraged to dismiss workers without a valid reason as they ran no risk of financial loss if they acted unlawfully, the Committee's decision should have responded in equivalent terms and in a more specific and distinct

manner as no such explicit request had been made in any of the complaints previously ruled on.

In any case, although the outcome of the decision on this point was the same, as the Committee found that there was a violation of Article 24.b of the Charter as part of its finding that there was no adequate compensation, I would like to use this opinion to qualify this observation, basing myself on the fact that there is already specific case law on this subject. An examination of this aspect would not have changed the way in which the Committee went on to assess the instant case and would in fact have made its arguments more structured and comprehensible.

2. The implementation of conventionality control and the effectiveness of the Charter in this case: an international legal principle raised as an argument by both parties and indisputable evidence of the violation of the Charter.

A key aspect of the complaint under examination is of course that relating to the effective application of Article 24 b. of the Charter through the conventionality control carried out by the Spanish courts.

I would emphasise that its impact is not limited to Spain, as the courts in other countries which follow the same line refer to it in their judgments as a model for the consistent application of the system of sources of law and international and constitutional or legal obligations with regard to the prevalence of treaties. The aim is to strengthen their argument in favour of compliance with Article 24 b. and the Committee's related decisions and to *refute the judgments of high courts* which have repudiated the obligation to comply (see Court of Cassation, 11 May 2022, Nos. 21-14.490 and 21-15.247). This is reflected, for example, in the judgments of the Grenoble Court of Appeal of 22 June 2023 (No. 21/03352), 6 July 2023 (No. 21/03641), 14 September 2023 (No. 21/04008), 7 November 2023 (No. 21/03362), 1 February 2024 (No. 21/02004) and 11 June 2024 (No. 22/01136) ("… [because of] the direct applicability of Article 10 of ILO Convention No. 158 and Article 24 of the European Social Charter … and the fact that the compensation scales provided for by Article L 1235-3 of the Labour Code do not guarantee unlawfully dismissed employees adequate compensation except in cases of invalidity, it is most appropriate *purely and simply to dismiss the appeal in the abstract and to assess the losses incurred independently*").

In its decision, the Committee "welcomes the recent developments in domestic case law where a right to possible additional compensation has been acknowledged in case of unfair dismissal". It "also notes that there have been several decisions of the domestic courts which carried out conventionality control and assessed the compatibility of the compensation scale with international treaties" (§ 95).

In my opinion, this approach should have been taken further. The Committee should in particular have bolstered its finding of a violation by deploying this key component of the effective application of the Charter and its case law, including the more recent decision on the merits of 20 March 2024, *Unión General de Trabajadores* (UGT) v. Spain, Complaint No. 207/2022, applying it in the instant case and taking account of the impact at European level referred to above.

Firstly, this legal principle of *jus cogens*, enshrined in Articles 24 and 25 of the Vienna Convention and in the Spanish legal system through its Constitution and legislation (Article 96 and Law 25/2014), has the unusual feature in this case of having been invoked by both parties. Both effectively highlighted the beneficial effect of international law in showing that Spain's compensation mechanism for wrongful dismissal is inadequate because, among other things, it does not guarantee redress in all cases for the damage suffered by a worker, thus explaining why it is necessary to turn to international law (Article 24 b. of the Charter and Article 10 of the ILO Convention) to claim additional compensation.

However, there is a significant difference of opinion between the parties which is to be found in their reasoning with regard to the *dismissal* or the *selection* of the applicable law which the courts carry out for the purposes of the "preferential" application of the provision contained in a binding international treaty in relation to the national legislation having the force of law. The complainant trade union considers the conventionality control exercised as evidence of the "violation" by Spanish law of Article 24 b. of the Charter.

The Government, however, works this from the other direction, i.e. as an argument that the law is in compliance with the treaty, based on the Appendix to the Charter (Article 24, paragraph 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"), alleging that "[w]ith the introduction of this avenue, the Spanish system could not be considered contrary to Article 24 of the Charter, since the fact that the system itself empowers judges and courts to directly apply that provision when adjudicating a case, displacing if necessary national legislation, is a guarantee of the system's compatibility with that provision" (paragraph 134 of the Government's submissions on the merits).

This is a point which the Committee should have emphasised in the reasoning behind its decision, because it is a very clear acknowledgment by the respondent Government that Spain's legislation is in breach of Article 24.b of the Charter, in keeping with the Committee's authentic and consolidated interpretation of this provision, which its decision incorporates. This would have enabled it to respond at the same time to the Spanish Government's allegation based on a self-interested view of conventionality control which both wrongly invokes the Appendix to the Charter and overlooks the Committee's well-established case law on violations arising from compensation ceilings. The Committee is also alleged to have stated in its case law that conventionality control is not one of the *appropriate means* provided for by the Appendix to the Charter to determine appropriate relief.

Secondly, in this more nuanced ruling which the Committee could have addressed to the parties, it should also have responded to an argument by the Spanish Government which is clearly incompatible with its international undertakings and its own legislation. The Government argues that conventionality control makes it possible, in some exceptional cases in which the compensation arising from the application of Article 56 of the Workers' Statute is not adequate, bearing in mind the specific circumstances, for the judicial authorities to award higher compensation in application of ILO Convention No. 158 and the revised European Social Charter. I note, however, that it

adds its own supposition, asserting that “it could be considered whether it is *advisable* for this route to be expressly transferred to the regulations” and that this is “an assessment of *appropriateness* which … falls within the State's *margin of discretion*” (paragraph 135 of the submissions on the merits).

In response to this interpretation, the Committee should have pointed out that on 22 March 2022, it adopted the decision on the merits of Collective Complaint No. 207/2022, *Unión General de Trabajadores (UGT)* v. Spain, in which it found that the right to adequate compensation or other appropriate relief within the meaning of Article 24 b. of the Charter is not guaranteed by the upper limit set by Spanish legislation on compensation for unfair dismissal and therefore that there has been a violation of Article 24 b. of the Charter. This decision on the merits was upheld on 27 November 2023 by the Committee of Ministers through Recommendation CM/RecChS(2024)44, which calls on Spain to “proceed to review and modify the relevant legislation … in order to ensure that compensation awarded in unlawful dismissal cases, and any scale used to calculate it, takes into account the real damage suffered by the victims and the individual circumstances of their case”.

Conventionality control is aimed at all the authorities which make up the state, that is the legislative, the executive and the judiciary. All public authorities, not just the judiciary, are required to respect the above-mentioned finding of a violation, and the state does not have a *margin of discretion* just as this cannot be a matter of *expediency* or *advisability* for it to consider.

There must not be any ambiguity, and I would like to add the nuance that the state does have “institutional autonomy” in connection with its powers to decide on how to proceed to respect the measures which are requested from it by international organisations. That is to say that, in the light of its independent organisation or the internal division of powers under the constitution, the state decides on the appropriate methods or instruments (a legislative, administrative or executive measure, a judicial intervention or even a general or *erga omnes* agreement with or between the social partners) to fulfil its obligation to comply with a treaty in accordance with the case law of the supervisory bodies, namely, in this case, the Committee.

In addition to this it is worth pointing out again that the Spanish state is the only country which has doubled its commitment to the collective complaints procedure: when depositing its instrument of ratification of the revised Charter, it announced that it accepted the monitoring of the obligations entered into under this procedure (Part IV, Article D 2. of the Charter and Official Gazette of 11 June 2021) while it also signed and ratified the Additional Protocol of 9 November 1995 (Official Gazette of 2 November 2022). In other words, it has *twice* recognised legally and publicly the power of the Committee to monitor respect for the treaty’s social rights and of course submitted itself to its supervision. In the context of the process of ratification by the state of the Collective Complaints Protocol, the Ministry of Justice presented the Conseil d'État with a report by the State Secretary for Justice (File No. 486/2021, published in the Official Gazette[1]) issued by the Director General of International Legal Co-operation and Human Rights on 17 December 2020, which includes the very same legal analysis: “… Having given details of the content of the Additional Protocol

[1] Voir https://www.boe.es/buscar/doc.php?id=CE-D-2021-486

establishing a system of collective complaints, describes the effects that its ratification will have on Spain, which are considerable as the treaty is legally binding and the decisions of the Committee of Experts are mandatory".

Third, the Spanish Government states that the Supreme Court has not yet ruled on the matter of compensation for dismissal (paragraph 13 of the submission on the merits). Pending a future decision, the Committee should have highlighted the case law established by the judgments of the French Court of Cassation referred to above and pointed out that "the Charter sets out international law obligations which are legally binding on the States Parties and that the Committee *as a treaty body is vested with the responsibility of making legal assessments of whether the Charter's provisions have been satisfactorily applied*. The Committee considers that it is for the national jurisdictions to rule on the issue at stake (*in casu*, adequate compensation) *in the light of the principles it has laid down* in this regard or, as the case may be, it is for the Spanish legislator to provide the national jurisdictions with the means to draw the appropriate consequences as regards the conformity with the Charter of the domestic provisions in question (*Syndicat CFDT de la métallurgie de la Meuse* v. France, Complaint No. 175/2019, decision on the merits of 5 July 2022, §91, and Confederation of Swedish Enterprise v. Sweden, Complaint No. 12/2002, decision on the merits of 22 May 2003, §43)".

This case law of the Committee tallies with that established by the Spanish Constitutional Court in judgment 61/2024, of 9 April 2024, under which the state's obligation to respect ratified human rights treaties incorporated into the Spanish legal system "arises from the correct interpretation of Article 98.1 of the Spanish Constitution" and this undertaking entails "the obligation to *respect the guarantee mechanisms* of international treaties where they exist" and "the express will of the state to submit to these mechanisms". I would refer to the Spanish state's dual subjection to the authority of the Committee described above. Likewise, the Contentious-Administrative Chamber of the Supreme Court ruled on 29 November 2023 (judgment No. 85/2023), with regard to the force of the opinions of treaty monitoring committees including the Committee, "that there is no doubt that they have binding/mandatory force for the State Party in that these decisions come from *a body created as part of an international standard-setting process*, which under express provision of Article 96, forms part of our domestic legal system". To reiterate this assertion, the Court added that the decision of an international body "*cannot be deprived of its effect by pitting it against the binding effect of the Convention as this could, if not render it ineffective, at the least limit its force and its real and effective impact*".

These are the reasons for my differing approach to the violations of Article 24 b. of the Charter.