European Social Charter | Charte sociale européenne

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

EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

DECISION ON THE MERITS

Adoption: 20 March 2024

Notification: 28 March 2024

Publicity: 29 July 2024

***Unión General de Trabajadores* (UGT) v. Spain**

Complaint No. 207/2022

The European Committee of Social Rights, committee of independent experts established under Article 25 of the European Social Charter ("the Committee"), during its 340th 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
Yusuf BALCI
Paul RIETJENS
George THEODOSIS
Mario VINKOVIC
Miriam KULLMANN
Franz MARHOLD
Alla FEDOROVA
Grega STRBAN

Assisted by Henrik KRISTENSEN, Deputy Executive Secretary

Having deliberated on 18 October 2023 and 20 March 2024

On the basis of the report presented by George THEODOSIS,

Delivers the following decision adopted on the latter date:

PROCEDURE

1. The complaint lodged by the *Unión General de Trabajadores* (UGT) was registered on 24 March 2022.

2. UGT 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 mechanism for compensation in cases of termination of employment without a valid reason provided for in national law and as interpreted in domestic case law, does not allow victims of dismissals without a valid reason to obtain a compensation which would be adequate to cover the damage suffered and have a dissuasive effect for employers.

3. On 14 September 2022, 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 30 November 2022. Upon the Government's request, the time limit was extended until 31 January 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 notify any observations they may wish to make on the complaint by 30 November 2022.

6. Observations by the International Organisation of Employers (IOE) were registered on 1 December 2022.

7. The Government's submissions on the merits of the complaint were registered on 31 January 2023.

8. Pursuant to Rule 28§2 of the Rules, the Government and UGT were invited to submit, if they so wished, a response to the observations by IOE by 28 February 2023. UGT's comments to these observations were registered on 14 April 2023.

9. Pursuant to Rule 31§2 of the Rules, the President of the Committee invited UGT to submit a response to the Government's submissions on the merits by 14 April 2023. UGT's response was registered on 14 April 2023.

10. Pursuant to Rule 31§3 of the Rules, the Government was invited to submit a reply to UGT's response by 2 June 2023. Upon the Government's request, the deadline was extended to 3 July 2023. The Government's reply was registered on 3 July 2023.

11. Carmen SALCEDO BELTRÁN was recused from participation in the deliberations on the complaint.

SUBMISSIONS OF THE PARTIES

A – The complainant organisation

12. UGT alleges that the mechanism for compensation in cases of termination of employment without a valid reason provided for in national legislation and as interpreted in domestic case law, does not allow victims of dismissal without a valid reason to obtain a compensation which is adequate to cover the damage suffered and does not have a dissuasive effect for employers, in violation of Article 24 of the Charter. In particular, the worker is only entitled to compensation automatically by law that sets a maximum ceiling and does not take into account the actual damage suffered.

B – The respondent Government

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

OBSERVATIONS OF THE THIRD PARTIES

International Organisation of Employers (IOE)

14. IOE submits that in Spanish law, 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 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).

15. IOE states that UGT fails to mention 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.

16. IOE further submits that the UGT's statement that reinstatement is a completely exceptional option in Spanish law is not accurate and is formulated with a clear omission of numerous cases in the case law where reinstatement was ordered. IOE also states that the UGT's statement that the obligation to pay the wage in cases of unfair dismissal was revoked, limiting it to cases of null and void dismissal, is also incorrect. To the contrary, such obligation still exists in some cases of unfair dismissal.

17. IOE states that the Spanish courts acknowledge the possibility of additional compensation for damages suffered as a result of unfair dismissal. IOE further submits that the Spanish compensatory scale is above the one in force in the majority of the neighbouring countries.

18. IOE states that UGT bases its allegation about the insufficiency of the Spanish compensatory scale on the high percentage of temporary contracts, which has been dealt with in the last agreement between the Employers' Associations and the Trade Unions in December 2021 (2021 labour reform), and under which the most used temporary contracts (for works and certain services) were eliminated and the cases in which the contracts for production could be used were limited, and the administrative sanctions for fraudulent temporary hiring were increased. It is true that before the 2021 reform temporary contracts were used very frequently, and this had an impact on the stability of contracts and employers were more likely to dismiss workers because of the predetermined system of the calculation of compensation in case of unfair dismissal. After the 2021 reform, there was an increase in permanent contracts and a fall in temporary contracts, which increased employment stability.

RELEVANT DOMESTIC LAW AND PRACTICE

A – Domestic legislation

19. **Workers' Statute No. 2/2015 – as amended**

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

"[…]
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 payments. 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."

20. 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 damages 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.
[…]"

21. Civil Code No. 206/1889 – as amended

Article 1101

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

B – Domestic case law

22. 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.

23. 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 (conventionality control).

24. 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.

25. In its judgment No. 848/2019 of 28 July 2020, the Social Court 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.

26. In its judgment No. 170/2020 of 31 July 2020, Social Court 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.

27. 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.

28. 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.

29. In its judgment No. 6762/2021 of 14 July 2021, the High Court of Justice of Barcelona did not award additional compensation but referred to a right to additional compensation under Article 10 of the ILO Convention No. 158 and Article 24 of the Charter.

30. In its judgment No. 355/2021 of 24 June 2021, the High Court of Justice of Navarra held that there were no exceptional circumstances allowing it to award additional compensation to the worker but acknowledged that a right to such additional compensation exists.

31. In its judgment No. 289/2022 of 5 May 2022, the High Court of Justice of the Basque Country refused to award additional compensation to the dismissed worker. The worker asked for a compensation to include the number of certain sales that she did not make because she was dismissed. The High Court of Justice of the Basque Country stated that it was not possible to accept the argument for higher compensation based on remuneration that the worker had not obtained on the basis of expectations for sales.

32. In its judgment No. 1498/2022 of 12 July 2022, the High Court of Justice of the Basque Country stated that there were no exceptional circumstances to award additional compensation.

33. 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 coincinding 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.

34. 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 was awarded, taking into account lost earnings.

35. 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 damages was not specified and no proof to justify it was provided.

RELEVANT INTERNATIONAL MATERIAL

A – The United Nations (UN)

36. **International Covenant on Economic, Social and Cultural Rights (ICESCR) (adopted on 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."

37. 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)

38. 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."

39. 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 impars a fundamental human right to be commensurate with the prejudice suffered, and higher that for other kings of termination. […]"

40. In its report of 11 June 2014, the Committee of Experts on the Application of Convention and Recommendations, set up to examine the representation alleging non-observance by Spain of the Termination of Employment Convention, 1982 (No. 158), submitted under Article 24 of the ILO Constitution by the Trade Union Confederation of Workers' Committees (CC.OO) and the General Union of Workers (UGT), 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.

41. In the report of the Director-General, third supplementaty 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)

42. **Charter of Fundamental Rights of the European Union, proclaimed on 7 December 2000**

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."

43. **European Pillar of Social Rights, proclaimed in November 2017**

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

44. 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

45. UGT alleges that Spain does not comply with Article 24 of the Charter because certain provisions of the Workers' Statute and the Law Governing Social Jurisdiction provide for a compensation in the event of unfair dismissal, which is based on the length of service and is subject to a ceiling. UGT asserts that this legal regime precludes the domestic courts from assessing the losses actually suffered by the worker and awarding, where appropriate, additional compensation. UGT states that the reduction of all situations to the same classification means that the courts have very little scope to assess actual damages.

46. UGT states that the current mechanism for awarding compensation in cases of unfair dismissal in practice amounts to a standardisation of reduced compensation. Furthermore, UGT states that such mechanism does not have a dissuasive effect on employers, in other words it does not sufficiently deter them from proceeding to unfair dismissals.

47. UGT 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.

48. UGT alleges that the reform introduced by Law No. 3/2012 on urgent measures for the reform of the Labour market, reduced the compensation for unfair dismissal from 45 days' wage per year of service to 33 days' wage per year of service (around 30% less) and the limit of 42 monthly wages was reduced to 24 (almost 50% less). UGT further alleges that the so-called interim wages were eliminated by Law No. 3/2012, except when the employer opts for the reinstatement of the worker, or the reinstatement is mandatory in accordance with the law.

49. UGT adds that Royal Decree-Law No. 32/2021 concerning urgent measures for labour reform (2021 reform) did not introduce any amendments to the system established by Law No. 3/2012 with regard to the calculation of compensation in cases of unfair dismissal.

50. UGT 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 Spanish law does not cover the actual damages caused to the worker by unfair dismissal. In addition, UGT states that even in the event of reinstatement of the worker, Spanish law does not allow the worker to seek compensation for the actual losses arising out of the dismissal.

51. UGT further states that according to the domestic case law, the all-inclusive compensation for damages provided for under Labour Law excludes the award of alternative or supplementary relief under general civil law (except for dismissal in violation of fundamental rights in the strict sense – Articles 14 to 30 of the Constitution, which do not include either the right to health or the right to dignity at work, strictly speaking). This is because labour law is a *lex specialis* that excludes the application of the provisions of general civil law.

52. UGT refutes the Government's argument that domestic courts have acknowledged the worker's right to additional compensation in exceptional cases by stating that such an interpretation is not followed by the majority of domestic courts and there has only been one case where such additional compensation was awarded. Moreover, that same court which awarded additional compensation adopted another judgment reversing its previous approach. UGT also states that 80% of the appellate courts have rejected the possibility of direct application of Article 24 of the Charter. According to UGT, the right to additional compensation is therefore abstract, residual, exceptional and episodic.

53. As regards reinstatement in case of unfair dismissal, UGT states that under Spanish labour law on private employment relationships, in the event of unfair dismissal (unjustified dismissal) and fraudulent or abusive dismissal (unlawful or bogus grounds dismissal), the possibility of reinstatement of the worker or payment of compensation for termination depends on the decision of the employer, except in the following cases: (i) dismissal that is null and void (dismissal in breach of fundamental rights, discriminatory dismissal, or in cases expressly established by law) and where reinstatement of the worker is mandatory; (ii) unfair dismissal of persons who are legal representatives of workers or hold trade union representative positions, where the choice of reinstatement is granted to the worker; (iii) unfair dismissal where a collective agreement grants the choice between reinstating the worker or paying compensation (very rarely used in practice).

2. The respondent Government

54. The Government states that in the Spanish legal system, dismissal without the existence of a legal cause can be classified as unfair dismissal (*despido improcedente*)

or as a dismissal which is null and void (*despido nulo*) with very different consequences in each case. In the Government's view, UGT, however, uses different terms that are difficult to understand. According to the Government, UGT questions the compatibility of the Spanish regime with Article 24 of the Charter only in relation to the compensation in case of unfair dismissal and not in case of dismissals which are null and void. Nevertheless, the examples of situations of dismissal provided by UGT are included in the category of dismissals which are null and void in the Spanish system.

55. The Government submits that 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 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.

56. 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 and 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.

57. 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 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 of 20 December 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 (conventionality control). 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 and one judgment where additional compensation was actually awarded.

58. In the Government's view, it is incorrect to state that the direct application of Article 24 of the Charter has been rejected by 80% of the appellate courts. More specifically, there are Chambers of the High Courts of Justice that have not yet had the opportunity to issue judgments on the matter, but that does not mean that they have rejected the direct application of Article 24 of the Charter.

59. The Government further states that in the examples quoted by the UGT, in most cases the additional damages had not been proven or no exceptional circumstances existed justifying the award of additional compensation, and therefore they were not awarded (see §§25-27 and 30 above). Again however, the rejection of additional compensation in those specific cases had nothing to do with the alleged refusal of the courts to accept the direct application of Article 24 of the Charter.

60. The Government notes that in case of dismissals which are null and void, the employer has an obligation to reinstate the dismissed worker. If such dismissal is carried out in violation of the worker's fundamental rights and freedoms, the court can also decide to award pecuniary and non-pecuniary damages to the worker.

61. 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. The Government refers to the study carried out by UGT on "First effects of the labour reform 2021. A blow to temporary employment and improvement of rights" where it is stated that the results of the reform were positive with an increase in permanent contracts and a fall in temporary contracts.

62. The Government considers that the Spanish system has several advantages in terms of certainty and security of contracts. For example, in the event of unfair dismissal, workers are exempt from the burden of proving the actual damages suffered. The system offers certainty and security for all parties involved in the employment relationship. If subjective factors were taken into account when determining the amount of compensation, dismissal would become more expensive and it would undoubtedly affect the hiring decisions of employers.

63. The Government states that the current system of predetermined compensation has been applied for more than 40 years. If the system of calculation of compensation was subjective and had to be determined on a case-by-case basis, certain persons belonging to vulnerable groups could face discrimination when deciding on whether to

employ them. Furthermore, Spain favours employment stability and seeks to improve remuneration conditions and the protection of workers against unfair termination of employment. Employers who continue to dismiss workers in an unfair manner, will lose their entitlement to reductions of social security contributions, and this system thus discourages them from dismissing workers unfairly.

64. 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.

65. The Government states that the amount of compensation for unfair dismissal is higher than the amount of compensation in case of fair dismissal for objective reasons and takes the view that it is sufficiently dissuasive in case of unfair dismissal.

66. The Government also points out that between 2018 and 2022 the minimum wage increased from €735.90 per month to €1,000 per month, which has a direct impact on the compensation in case of dismissal.

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

B – Assessment of the Committee

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

69. 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; provide for the possibility of reinstatement of the worker; and/or provide for 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 Italianna del Lavoro (CGIL)* v. Italy, Complaint No. 158/2017, decision on the merits of 11 September 2019, §87). Compensation for unlawful dismissal must thus 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 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, Article 12; Conclusions 2012, Finland, Article 24).

70. In the present complaint, the Committee notes that UGT argues that the limits of compensation to be paid in cases of unfair dismissal, introduced by the 2012 reform, are inadequate. More specifically, UGT claims that the 2012 reform reduced the compensation to be paid in cases of unfair dismissal from 45 to 33 days' wage per year of service with the maximum monthly wages reduced from 42 to 24. The Government argues that the Spanish system relieves workers from the burden of proving actual damages suffered and that it offers certainty to both workers and employers. The Government also asserts that the amount of compensation is dissuasive enough and that recent changes in domestic case law shows that a worker can be awarded additional compensation in certain exceptional cases.

71. 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 sense of Article 24 of the Charter. It also recalls that in *Confederazione Generale Italianna 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 in *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 and in *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, a ceiling of 20 months provided by the French legislation and applied only for 29 years of seniority was also considered insufficient by the Committee.

72. The Committee notes that in the Spanish legislation, 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.

73. 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 excluded 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.

74. 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, according to Spanish legislation, 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.

75. The Committee takes note of the Government's argument that the ceilings of compensation are significantly higher than in some other countries. The Committee also takes note of the information submitted by the Government that recently domestic courts started acknowledging the right to additional compensation referring to 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 it also notes that the domestic courts refer to a right to additional compensation as an exception (see §§28 and 33).

76. The Committee also takes note of the information submitted by UGT that, so far, there has only been one case in which the domestic courts actually awarded higher compensation to the worker than that established in the compensation scale and that the general practice of the domestic courts to reject such requests for additional compensation still prevails.

77. The Committee takes note of the measures aimed at discouraging employers from making unfair dismissal decisions.

78. 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 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 ceilings applicable to workers hired after the 2012 reform, notably 24 months, are very similar to those of the Finnish, French and Italian systems already examined by the Committee (see §71 above).

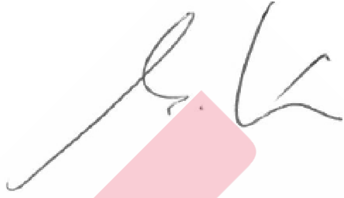
79. The Committee welcomes recent developments in the Spanish case law where a right to possible additional compensation has been acknowledged in case of unfair dismissal. The Committee also notes that there have been several decisions of the domestic courts which carried out "conventionality control" and assessed the compatibility of the compensation scale with international treaties (see §§25-26 and 28-30 above). However, as noted above (see §76 above), it appears that the additional compensation was only awarded in one case and it seems that the practice has not been widely followed by other domestic courts. 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.

80. The Committee considers that the ceilings set by the Spanish 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.

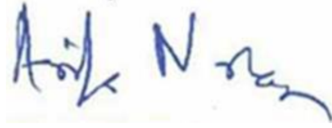
81. The Committee therefore holds that there is a violation of Article 24.b of the Charter.

CONCLUSION

For these reasons, the Committee concludes by 13 votes against 1 that there is a violation of Article 24.b of the Charter.



George THEODOSIS
Rapporteur



Aoife NOLAN
President

Henrik KRISTENSEN
Deputy Executive Secretary

APPENDIX

Decision on admissibility

UGT

European Social Charter | Charte sociale européenne

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

UGT

DECISION ON ADMISSIBILITY

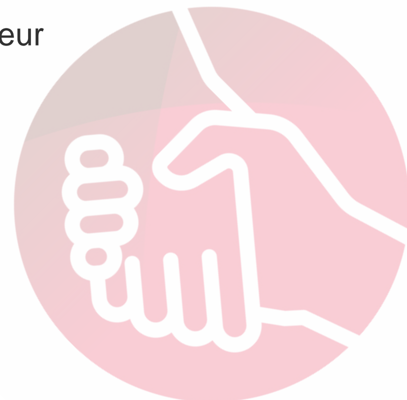
14 September 2022

***Unión General de Trabajadores* (UGT) v. Spain**

Complaint No. 207/2022

The European Committee of Social Rights, a committee of independent experts established under Article 25 of the European Social Charter ("the Committee"), during its 329th session, in the following composition:

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



Assisted by Henrik KRISTENSEN, Deputy Executive Secretary,

Having regard to the complaint registered on 24 March 2022 as number 207/2022, lodged by *Unión General de Trabajadores* (UGT) against Spain and signed by its Secretary General, José María Álvarez Suárez, requesting the Committee to find that the situation in Spain is not in conformity with Article 24 of the Revised European Social Charter ("the Charter");

Having regard to the documents appended to the complaint;

Having regard to the Charter, and in particular to Article 24, which 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."

Having regard to the Additional Protocol to the European Social Charter providing for a system of collective complaints ("the Protocol");

Having regard to the Rules of the Committee adopted by the Committee on 29 March 2004 at its 201st session and last revised on 6 July 2022 at its 328th session ("the Rules");

Having deliberated on 14 September 2022;

Delivers the following decision, adopted on this date:

1. UGT alleges that the situation in Spain constitutes a violation of Article 24 of the Charter on the grounds that the mechanism for compensation in cases of termination of employment without a valid reason provided for in national law and as interpreted in domestic case law, does not allow victims of dismissals without a valid reason to obtain a compensation which would be adequate to cover the damage suffered and have a dissuasive effect for employers.

2. The Government has not objected to the admissibility of the complaint.

THE LAW

3. The Committee observes that Spain accepted the collective complaints procedure by a declaration made at the time of ratification of the Revised Charter on 19 May 2021 and that this procedure entered into force in respect of Spain on 1 July 2021. In accordance with Article 4 of the Protocol, the complaint has been submitted in writing and concerns Article 24 of the Charter, provision accepted by Spain when it ratified this treaty on 19 May 2021. Spain is bound by this provision since the entry into force of the treaty in its respect on 1 July 2021.

4. The Committee notes that the grounds of the complaint are indicated, detailing in what respect UGT considers that Spain has not ensured the satisfactory application of the Charter. The complaint therefore satisfies Article 4 of the Protocol for the purposes of admissibility.

5. The Committee notes that UGT has more than 941.000 members. Its delegates elected in trade union elections represent more than 32.6% of workers in Spain. UGT is considered as a representative trade union at the national level for collective bargaining and has participated in more than 4,500 collective agreements. Moreover, since it exercises its activities in Spain, UGT is a trade union within the jurisdiction of this country as required by Article 1 (c) of the Protocol. On the basis of the information at its disposal, the Committee considers that UGT is a representative trade union for the purposes of the collective complaints procedure.

6. The Committee also notes that the complaint submitted on behalf of UGT is signed by its Secretary General, José María Álvarez Suárez who, according to Article 42 of its statute, represents the organisation in all legal matters. The Committee therefore considers that the complaint complies with Rule 23.

7. For these reasons, the Committee, on the basis of the report presented by George THEODOSIS, and without prejudice to its decision on the merits of the complaint,

DECLARES THE COMPLAINT ADMISSIBLE

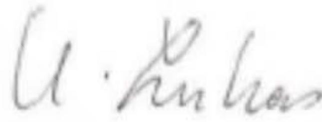
Pursuant to Article 7§1 of the Protocol, requests the Deputy Executive Secretary to notify the complainant organisation and the Respondent State of the present decision, to transmit it to the parties to the Protocol and the States having submitted a declaration pursuant to Article D§2 of the Charter, and to publish it on the Council of Europe's Internet site.

Invites the Government to make written submissions on the merits of the complaint by 30 November 2022.

Invites UGT to submit a response to the Government's submissions by a deadline which the Committee shall determine.

Invites the Parties to the Protocol and the States having submitted a declaration pursuant to Article D§2 of the Charter to notify by 30 November 2022 any observations they may wish to submit.

Pursuant to Article 7§2 of the Protocol, invites the international organisations of employers or workers mentioned in Article 27§2 of the European Social Charter to make observations by 30 November 2022.



George THEODOSIS Rapporteur	Karin LUKAS President	Henrik KRISTENSEN Deputy Executive Secretary

UGT