**EUROPEAN COMMITTEE OF SOCIAL RIGHTS**
**COMITÉ EUROPÉEN DES DROITS SOCIAUX**

**DECISION ON THE MERITS**

**Adoption: 11 September 2019**

**Notification: 10 October 2019**

**Publicity: 11 February 2020**

***Confederazione Generale Italiana del Lavoro (CGIL)* v. Italy**

Complaint No. 158/2017

The European Committee of Social Rights, committee of independent experts established under Article 25 of the European Social Charter ("the Committee"), during its 308th session in the following composition:

Giuseppe PALMISANO President
Karin LUKAS, Vice-President
François VANDAMME, Vice-President
Eliane CHEMLA, General Rapporteur
Petros STANGOS
Jozsef HAJDU
Krassimira SREDKOVA
Raul CANOSA USERA
Barbara KRESAL
Kristine DUPATE
Karin Møhl LARSEN
Yusuf BALCI
Ekaterina TORKUNOVA
Tatiana PUIU

Assisted by Henrik KRISTENSEN, Deputy Executive Secretary

Having deliberated on 11 September 2019,

On the basis of the report presented by Petros STANGOS,

Delivers the following decision adopted on this date:

## PROCEDURE

1. The complaint introduced by *Confederazione Generale Italiana del Lavoro* (CGIL) was registered on 16 October 2017.

2. The CGIL alleges that the situation in Italy constitutes a violation of Article 24 (right to protection in cases of termination of employment) of the Revised European Social Charter (« the Charter »), on the grounds that the predefined compensation mechanism set up by Legislative Decree No. 23/2015 (Articles 3, 4, 9 et 10) does not allow victims of unlawful dismissals to obtain through the domestic judicial procedure a compensation which would be adequate to cover the damage suffered and dissuasive for employers, as there is a ceiling on this compensation and the amount awarded is automatically calculated strictly on the basis of length of service (the latter point has changed, see §43).

3. On 20 March 2018, in accordance with Article 6 of the 1995 Protocol providing for a system of collective complaints ("the Protocol"), the Committee declared the complaint admissible.

4. In its decision on admissibility, the Committee invited the Italian Government ("the Government") to make written submissions on the merits of the complaint by 31 May 2018. The Government's submission was registered on 20 May 2018.

5. Referring to Article 7§1 of the Protocol, the Committee invited the States Parties to the Protocol and the States having made a declaration in accordance with Article D§2 of the Charter, to submit any observations they wished to make on the merits of the complaint before 31 May 2018. The observations of the Government of France were registered at this date.

6. Referring to Article 7§2 of the Protocol, the Committee invited the international organisations of employers or workers mentioned in Article 27§2 of the European Social Charter to make observations by 31 May 2018. The European Trade Union Confederation (ETUC), requested and obtained an extension of the deadline until 15 June 2018, date at which its submission was registered.

7. The deadline set for the CGIL's response to the Government's submissions on the merits was 30 July 2018, date at which the response by CGIL was registered.

8. The Government was asked to submit a further response by 12 October 2018. The Government's further response was registered on 11 October 2018.

9. The CGIL requested and obtained an extension of the deadline until 25 January 2019 to submit a further response, which it did not ultimately submit.

## SUBMISSIONS OF THE PARTIES

### A – The complainant organisations

10. The CGIL asks the Committee to rule that the provisions contained in Articles 3, 4, 9 and 10 of Legislative Decree No. 23 of 4 March 2015 violate Article 24 (the right to protection in cases of termination of employment) of the Charter as, in cases of unlawful dismissal in the private sector, they provide for compensation that has a ceiling, which precludes any ability of the courts to assess and acknowledge any additional losses suffered by the worker as a result of the dismissal.

### B – The respondent government

11. The Government invites the Committee to find the complaint unfounded in all respects.

## OBSERVATIONS OF THE THIRD PARTIES

### A – European Trade Union Confederation

12. The ETUC wishes to comment on the ceiling to compensation in situations of unfair dismissals in the light of the relevant international law.

13. It finds that the measures challenged are part of a process of labour law reform in response to the financial crisis and points out that the Committee has already had the opportunity to assess this situation's impact on social rights, including as regards dismissals, in other complaints (*Fellesforbundet for Sjøfolk* (FFFS) v. Norway, Complaint No. 74/2011, decision on the merits of 2 July 2013; Finnish Society of Social Rights v. Finland, Complaint No. 106/2014 and 107/2014, decisions on the admissibility and the merits of 8 and 6 September 2016).

14. The ETUC refers to the relevant international texts, namely Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), as commented upon by the Committee on Economic, Social and Cultural Rights (CESCR), ILO Convention No. 158 and ILO Recommendation No. 166 on the termination of employment, as interpreted by its Committee of Experts on the Application of Conventions and Recommendations (CEACR), as well as other less specific but nonetheless relevant instruments, such as the general policy instrument adopted in 2009 "Overcoming the crisis: a Global Jobs Pact". It also makes reference to the concluding findings of the CESCR's fifth periodical report (2015) which called on Italy to assess the impact of its austerity measures on human rights.

15. In this regard, the ETUC also refers to the relevant EU texts (such as Article 153 of the Treaty on European Union, Article 30 of the EU Charter of Fundamental Rights, which was directly inspired by Article 24 of the European Social Charter, and principle No. 7 of the European Pillar of Social Rights.

16. Citing the case law of the European Court of Human Rights, the ETUC also notes that a dismissal can constitute interference with the right to private life (*Özpinar v. Turkey*, application No. 20999/04, judgment of 19 October 2010, final on 19 January 2011; *Oleksandr Volkov v. Ukraine*, application No. 21722/11, judgment of 9 January 2013, final on 27 May 2013).

17. Finally, it refers to the relevant observations, decisions and conclusions of the European Committee of Social Rights on austerity measures and compensation for unlawful dismissal.

18. In the light of the above remarks, the ETUC concludes that the ceiling on compensation in case of unlawful dismissal in Italy violates the Charter, especially since length of service is the only factor taken into account with no consideration given to other important variables.

**B – The Government of France**

19. The Government of France notes that its amended legislation on compensation for dismissal without valid reasons (Order No. 2017-1387 of 22 September 2017, ratified by Law No. 2017-217 of 29 March 2018) employs the same logic of foreseeability as the Italian legislation. It points out that this amendment is also the subject of a collective complaint (*Confédération Générale du Travail Force Ouvrière (CGT-FO)* v. France, Complaint No. 160/2018).

20. Referring to Article 24 of the Charter and to the Committee's decision on Complaint No. 106/2014 (Finnish Society of Social Rights v. Finland, Complaint No. 106/2014, decision on admissibility and on the merits of 8 September 2016), the Government of France argues that what emerges from the Committee's decision is not that the ceiling on compensation for unlawful dismissal is itself a violation of the Charter, but that consideration must be given to other factors, including the relevant legislative framework and in particular the possibility of compensating the worker for damage suffered, in addition to the aforementioned compensation for which a maximum amount has been set.

21. As regards the adequacy of the compensation, the Government of France notes that in practice dismissed employees rarely request reinstatement and it therefore considers that the employee's length of service is both a straightforward and objective parameter for determining the amount of compensation.

22. Furthermore, the Government of France finds that the foreseeability of the amount awarded in no way diminishes the mechanism's deterrent effect, which results from the amount itself and the prospect of a conviction.

23. The Government of France points out that the arrangements which are challenged in the present complaint do not apply to all cases of unlawful dismissal, and that the most serious cases of employer misconduct (including dismissal constituting discrimination) are excluded from any flat-rate payment or ceiling and make provision for the employee's reinstatement.

## RELEVANT DOMESTIC LAW AND PRACTICE

24. Legislative Decree No. 23/2015 (Provisions on permanent contracts of employment offering a level of protection that increases with length of service, implementing Law No. 183 of 10 December 2014, published in the *Official Journal* of 6 March 2015-General Series No. 54), entered into force on 7 March 2015.

**Article 2 Dismissal constituting discrimination, annulled, or notified verbally**

"1. By the order declaring dismissal to be void on the ground of discrimination pursuant to Article 15 of Law No. 300/1970 or insofar as it falls under the other grounds for invalidity expressly provided for by law, the court shall order the employer, irrespective of whether or not the employer is a business, to reinstate the worker into his or her previous job, irrespective of the reason formally provided. Following an order of reinstatement, the employment relationship shall be deemed to have been terminated if the worker fails to return to work within 30 days of an invitation by the employer, unless he or she has requested a flat-rate compensation [instead of reinstatement] in accordance with paragraph 3. The regime laid down by this Article shall also apply to dismissal that has been declared to be without effect on the ground that it was notified verbally.

2. By the ruling provided for under paragraph 1, the court shall also order the employer to compensate the losses suffered by the worker as a result of the dismissal that has been held to be void and ineffective, and shall to that effect stipulate compensation based on the last reference monthly remuneration for the purposes of calculating the statutory deferred compensation ("*trattamento di fine rapporto*", hereafter "TFR payment") to cover the period falling between the time of dismissal until effective reinstatement, after deducting any amount earned during the period of exclusion through the performance of other gainful activity. The level of compensation may not under any circumstances be lower than five times the last monthly reference salary (…).

3. Without prejudice to the right to compensation of losses as provided for under paragraph 2, the worker shall be entitled to seek from the employer, as an alternative to reinstatement, the payment of a compensation equal to 15 times the last reference monthly remuneration (…), which shall result in the termination of the employment relationship (…).

4. The provisions of this Article shall also apply in the event that the court finds that there was no valid justification, as the reason for dismissal was the physical or psychological disability of the worker".

**Article 3 Dismissal on justified grounds or for just cause** (as amended by Decree-Law No. 87 of 12 July 2018, decision No. 194/2018 of the Constitutional Court of 26 September-8 November 2018 and the law of 30 December 2018)

"1) Except as provided for under paragraph 2, in situations in which it is established that the criteria for dismissal on justified objective grounds or on justified subjective grounds or for good cause are not met, the court shall rule that the employment relationship ended as at the date of dismissal and shall order the employer to pay a compensation, which shall not be subject to social security contributions, at a level in all circumstances not lower than six and not greater than 36 times the reference monthly remuneration (…) (Notes (1) (2))

2) Exclusively in cases involving dismissal for a justified subjective reason or for good cause in which it is directly demonstrated within the proceedings that the actual conduct alleged against the worker did not take place, entirely in isolation from any assessment regarding the proportionality of dismissal, the court shall annul the dismissal and order the employer to reinstate the worker into his or her previous position and to pay compensation based on the last reference salary for the purposes of calculating the TFR payment and covering the period between dismissal and reinstatement (…).'

*Notes*:
1) *Decree-Law No. 87 of 12 July 2018, converted with amendments by Law No. 96 of 9 August 2018, increased the minimum and maximum amounts of the compensation from four to six and from 24 to 36 reference monthly remuneration. The same decree, as amended by Law No. 145 of 30 December 2018, specified that this article does not apply to public administration contracts or to fixed-term employment contracts concluded by private universities. The former provisions continue to apply to workers not covered by this Article.*
*2) In its judgment No. 194 of 26 September - 8 November 2018 (Official Journal, Special Series 1, No. 45 of 14 November 2018), the Constitutional Court declared Article 3(1) of Legislative Decree No. 23 of 4 March 2015 (...) – both in its initial version and in the version amended by Article 3(1) of Decree-Law No. 87 of 12 July 2018 (...) – unconstitutional with regard to the wording "in an amount equal to two times the last reference monthly remuneration for the purposes of calculating the TFR payment for each year of service".*

**Article 4 Formal and procedural defects**

"1. In situations in which dismissal is ordered in breach of the requirement to provide reasons pursuant to Article 2(2) of Law No. 604 of 1966 or of the procedure laid down by Article 7 of Law No. 300 of 1970, the court shall rule that the employment relationship ended as at the date of dismissal and shall order the employer to pay a compensation, which shall not be subject to social security contributions, in an amount equal to the figure of the last reference monthly remuneration for the purposes of calculating the TFR payment for each year of service, at a level in all circumstances not less than two and not greater than 12 reference monthly remuneration, unless the court establishes pursuant to a request by the worker that the criteria for the application of the compensation provided for under Articles 2 and 3 of this Decree have been fulfilled. "

**Article 6: Conciliation proposal**

"1. In the event of the dismissal of workers falling under Article 1, in order to avoid judicial proceedings and notwithstanding the ability of the parties to agree upon any other form of conciliation provided for by law, the employer may offer the worker an amount within the time limits for non-judicial challenges to dismissal in one of the procedures provided for under Article 2113(4) of the Civil Code and Article 76 of Legislative Decree No. 276 of 10 September 2003, as amended, the amount of which shall not constitute taxable income for the purposes of income tax for natural persons and shall not be subject to social security contributions, equal to the figure of the last reference monthly remuneration for the purposes of calculating the TFR payment for each year of service, at a level in all circumstances not less than three and not greater than 27 reference monthly remuneration, which shall be provided to the worker in the form of a banker's draft. Acceptance of the banker's draft by the worker within that procedure shall entail the termination of the relationship as at the date of dismissal and the waiver of any right to challenge the dismissal, including in the event that the worker has already filed a challenge. Any further amounts agreed upon within such conciliation procedures in order to resolve any other issue outstanding from the employment relationship shall be subject to the ordinary taxation regime. (…)"

*Note: (1) Decree-Law No. 87 of 12 July 2018, converted with amendments by Law No. 96 of 9 August 2018, increased the minimum and maximum settlement amounts from two to three and from 18 to 27 reference monthly remuneration respectively. The same decree, as amended by Law No. 145 of 30 December 2018, specified that this article does not apply to public*

*administration contracts or to fixed-term employment contracts concluded by private universities. The former provisions continue to apply to workers not covered by this article.*

**Article 9 Small undertakings and not-for-profit organisations**

"1. Where the size of the employer does not exceed that specified by Article 18(8) and (9) of Law No. 300/70, Article 3(2) shall not apply and the amount of the compensation and the amount provided for under Article 3(1), Article 4(1) and Article 6(1) shall be reduced by half and may not under any circumstances exceed six times the reference monthly remuneration (…)"

**Article 10 Collective dismissal**

**"**In cases involving collective redundancy (...), notice of which is given without complying with the requirement of being given in writing, the sanctions regime laid down by Article 2 of this Decree [*relief through reinstatement*] shall apply. In cases involving the violation of the procedures (...) or selection criteria (...), the regime laid down by Article 3(1) [*compensation*] shall apply."

## 25. Law No. 300 of 20 May 1970, Provisions to guarantee the freedom and dignity of workers, freedom of association and trade union activity in the workplace and provisions on the deployment of workers (Official Journal No. 131 of 27 May 1970)

Section 18. (Protection of workers in the event of unfair dismissal)

"1) By the order declaring dismissal to be void on the ground of discrimination (…) [*or where such dismissal is notified on the occasion of the employee's marriage, or where it violates the provisions protecting maternity and paternity, or in other cases falling under the other grounds for invalidity provided for by law, or where dismissal is ordered on unlawful grounds*] the court shall order the employer, irrespective of whether or not the employer is a business, to reinstate the worker into his or her previous job, irrespective of the reason formally provided or the number of the employer's employees. This provision shall also apply to directors. Following an order of reinstatement, the employment relationship shall be deemed to have been terminated if the worker fails to return to work within 30 days of an invitation by the employer, unless he or she has requested the payment of a flat-rate compensation [*instead of reinstatement*] in accordance with paragraph 3. The regime laid down by this Article shall also apply to dismissal that has been declared to be without effect on the ground that it was notified verbally.

2) By the ruling provided for under paragraph 1, the court shall also order the employer to compensate the losses suffered by the worker as a result of the dismissal that has been held to be void and ineffective, and shall to that effect stipulate compensation based on the last global de facto salary, to cover the period falling between the time of dismissal until effective reinstatement, after deducting any amount earned during the period of exclusion through the performance of other gainful activity. The level of compensation may not under any circumstances be lower than five times the last global de facto salary. The employer shall also be ordered to pay the social contributions for the period specified above.

3) Without prejudice to the right to compensation of losses as provided for under paragraph 2, the worker shall be entitled to seek from the employer, as an alternative to reinstatement, the payment of a flat-rate compensation equal to 15 times the last global de facto remuneration, which shall result in the termination of the employment relationship, and the said payment shall not be subject to social security contributions. The request for compensation must be made within 30 days of notice of the filing of the judgment or of the invitation by the employer to return to work, if this occurred before such notice was given.

4) Where it is established that there is no justified objective or subjective reason or just cause on the part of the employer, on the grounds that the facts alleged are unsubstantiated or because the conduct may be punished by a sanction falling short of dismissal under the terms of collective agreements or applicable disciplinary codes, the court shall invalidate the dismissal and order the employer to reinstate the worker in his or her post, as referred to in paragraph 1 and pay compensation based on the last global de facto salary to cover the period falling between the time of dismissal until effective reinstatement, after deducting any amount earned during the period of exclusion through the performance of any other gainful activity together with the amount he or she could have earned had he or she made diligent efforts to search for new employment. The level of compensation may not under any circumstances be higher than twelve months the last global de facto salary. The employer shall also be ordered to pay the social contributions for the period falling between the time of dismissal until effective reinstatement (…). Following an order of reinstatement, the employment relationship shall be deemed to have been terminated if the worker fails to return to work within 30 days of an invitation by the employer, unless he or she has requested the payment of a flat-rate compensation [instead of reinstatement] in accordance with paragraph 3.

5) In other cases in which the court finds that there are no subjective reasons or good cause on the part of the employer, it shall rule that the employment relationship ended with effect from the date of dismissal and shall order the employer to pay all-inclusive compensation which shall be no lower than 12 times the last global *de facto* monthly remuneration and no higher than 24 times that amount, having regard to the worker's length of service and taking account of the number of employees engaged, the size of the business, the conduct and the circumstances of the parties, and shall be required to state specific reasons regarding this aspect.

6) In the event that the dismissal is ruled invalid for violation of the requirement to state reasons pursuant to Article 2(2) of Law No. 604 of 15 July 1966, as amended, of the procedure provided for under Article 7 of this Law, or of the procedure provided for under Article 7 of Law No. 604 of 15 July 1966, as amended, the arrangements laid down in paragraph five shall apply, but the worker shall be awarded all-inclusive compensation which shall, having regard to the severity of the formal or procedural violation committed by the employer, fall between a minimum of six times the last global *de facto* monthly remuneration and a maximum of 12 times that amount, subject to a requirement to state specific reasons regarding this aspect, unless the court establishes on the basis of the claim filed by the worker that there is no justification for the dismissal, in which case the forms of protection provided for under paragraphs four, five or seven shall apply in place of those provided for under this paragraph.

7) The court shall also apply the provisions laid down by paragraph four of this Article if it establishes that there is no justification for the dismissal ordered, also pursuant to Articles 4(4) and 10(3) of Law No. 68 of 12 March 1999, on objective grounds pertaining to the worker's physical or psychological unsuitability, or that the dismissal was ordered in breach of Article 2110(2) of the Civil Code. It may also apply the provisions referred to above if it establishes that the facts on which the objective justification for the dismissal is based are manifestly unsubstantiated; under any other circumstances in which it establishes that there is no objective justification, the court shall apply the provisions set forth in paragraph five. In this last-mentioned eventuality, when setting compensation between the minimum and maximum levels stipulated, the court shall also take account, alongside the criteria set forth in paragraph five, of any efforts made by the worker to seek new employment and of the conduct of the parties in relation to the procedure provided for under Article 7 of Law No. 604 of 15 July 1966, as amended. If it transpires during the course of proceedings launched pursuant to a claim brought by the worker that the dismissal was ordered due to discriminatory or disciplinary reasons, the relevant forms of protection provided for under this Article shall apply.

8) The provisions of paragraphs four to seven shall apply to any employer, irrespective of whether or not the employer is a business, who in any location, facility, branch, office or autonomous department in which the dismissal has occurred employs more than 15 workers, or more than five if an agricultural business, and to any employer, irrespective of whether or not the employer is a business, who within the same municipality employs more than 15 employees, or more than five employees in the same agricultural business within the same geographical area, even if each productive unit considered individually does not reach those limits, and under all circumstances to any employer, irrespective of whether or not the employer is a business, employing more than 60 employees.

9) For the purposes of calculating the number of employees referred to in paragraph eight, consideration shall be given to the actual proportion of time worked by workers engaged under part-time permanent contracts (…)."

### 26. Civil Code

Article 1418 (causes of nullity of a contract)

"A contract shall be null and void if it violates mandatory provisions, unless the law provides otherwise.

A contract shall be rendered void by failure to meet one of the requirements set out in Article 1325, the illegality of its essence (*causa*), the illegality of the grounds in the circumstances set out in Article 1345 and the lack of an object meeting the requirements of Article 1346.

A contract shall also be null and void in the other cases established by law."

### 27. Code of civil procedure

Article 91, paragraph 1, sub-paragraph 2 (awarding of procedural costs)

"(…) where the court approves an amount which is not more advantageous than any conciliation proposal made, it shall order the party that refused the proposal without justified reason to pay the costs of the proceedings arising after the proposal was made (…)."

## RELEVANT INTERNATIONAL MATERIALS

## A – United Nations

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

Article 6

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

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

Article 7

"The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

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

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

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

"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."

## 30. UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 23 (2016) on the Right to just and favorable conditions of work (Article 7 of the Covenant), adopted on 27 April 2016

"Article 7 (a): remuneration which provides all workers, as a minimum, with:

2. Fair wages

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

C. Article 7 (c): equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence

(…) The reference to equal opportunity requires that hiring, promotion and termination not be discriminatory. (…)

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

D. Article 7 (d): rest, leisure, reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays

(…) Upon termination of employment, workers should receive the period of annual leave outstanding or alternative compensation amounting to the same level of pay entitlement or holiday credit.

B. Specific legal obligations

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

IV. Violations and remedies

States parties must demonstrate that they have taken all steps necessary towards the realization of the right within their maximum available resources, that the right is enjoyed without discrimination (…).

Violations of the right to just and favourable conditions of work can occur through acts of commission, which means direct actions of States parties. Adoption of labour migration policies that increase the vulnerability of migrant workers to exploitation, failure to prevent unfair dismissal from work of pregnant workers in public service, and introduction of deliberately retrogressive measures that are incompatible with core obligations are all examples of such violations."

## 31. CESCR Concluding observations on the fifth periodic report of Italy, adopted on 9 October 2015

"C. Principal subjects of concern and recommendations

Austerity measures

8. While recognizing the financial crisis faced by the State party, the Committee expresses concern that the levels of effective protection for the rights enshrined in the Covenant have been reduced as a result of the austerity measures adopted by the State party, which adversely affects enjoyment of the Covenant rights, particularly by disadvantaged and marginalized individuals and groups.

9. The Committee recommends that the State party review, based on a human rights impact assessment, all the measures that have been taken in response to the financial crisis and are still in place, with a view to ensuring the enjoyment of economic, social and cultural rights. In this regard, it draws the State party's attention to its open letter of 16 May 2012 to States parties on economic, social and cultural rights in the context of the economic and financial crisis, and in particular to the requirements that austerity policies must meet."

## B – International Labour Organisation (ILO)

32. Convention No. 158 on Termination of Employment, 1982 (not ratified by Italy):

"Part II. Standards of general application

Division A. Justification for termination

Article 4

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

…

Division C. Procedure of Appeal Against Termination:

Article 10

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

33. "Recovering from the crisis: A Global Jobs Pact" Resolution adopted by the ILO on 19 June 2009

"14. International labour standards create a basis for and support rights at work and contribute to building a culture of social dialogue particularly useful in times of crisis. In order to prevent a downward spiral in labour conditions and build the recovery, it is especially important to recognize that:

(1) Respect for fundamental principles and rights at work is critical for human dignity. It is also critical for recovery and development. Consequently, it is necessary to increase:

(i) vigilance to achieve the elimination and prevention of an increase in forms of forced labour, child labour and discrimination at work; and

(ii) respect for freedom of association, the right to organize and the effective recognition of the right to collective bargaining as enabling mechanisms to productive social dialogue in times of increased social tension, in both the formal and informal economies.

(2) A number of international labour Conventions and Recommendations, in addition to the fundamental Conventions, are relevant. These include ILO instruments concerning employment policy, wages, social security, the employment relationship, the termination of employment, labour administration and inspection, migrant workers, labour conditions on public contracts, occupational safety and health, working hours and social dialogue mechanisms. (…)"

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

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

## C – European Union

35. Charter of Fundamental Rights of the European Union:

> **Article 30 Protection in the event of unjustified dismissal**
>
> "Every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices."

36. Treaty of the Functioning of the European Union, Official Journal No. C 326 of 26/10/2012

> **Article 153** (former 137)
>
> "1. With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields:
> (…)
> (d) protection of workers where their employment contract is terminated;
>
> 2. To this end, the European Parliament and the Council:
>
> (a) may adopt measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States;

(b) may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.

The European Parliament and the Council shall act in accordance with the ordinary legislative procedure after consulting the Economic and Social Committee and the Committee of the Regions. In the fields referred to in paragraph 1(c), (d), (f) and (g), the Council shall act unanimously, in accordance with a special legislative procedure, after consulting the European Parliament and the said Committees.

The Council, acting unanimously on a proposal from the Commission, after consulting the European Parliament, may decide to render the ordinary legislative procedure applicable to paragraph 1(d), (f) and (g).”

37. European Pillar of Social Rights (November 2017) (EPSR),

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

38. Judgment of the European Court of Justice of 2 August 1993, *M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority,* Reference for a preliminary ruling: *House of Lords - United Kingdom. Directive 76/207/EEC - Equal treatment for men and women - Right to compensation in the event of discrimination*. *Case C-271/91*

“29 The Court's interpretation of Article 6 as set out above provides a direct reply to the first part of the second question relating to the level of compensation required by that provision

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

## PRELIMINARY CONSIDERATIONS

*As to the relevant domestic legislation and practice*

39. As a preliminary remark, the Committee takes note of recent developments in the domestic legal order which have an impact on the case at hand.

40. First of all, it notes that some of the legislative provisions originally challenged have since been amended.

41. Decree-Law No. 87 of 12 July 2018 raised the minimum and maximum amounts of compensation payments set forth in Article 3, paragraph 1 of Legislative Decree No. 23/2015, which have risen from four to six and from 24 to 26 times the last reference monthly remuneration respectively. It also increased the amounts which employers can offer by way of out-of-court settlements, pursuant to Article 6 of Legislative Decree No. 23/2015: these amounts have risen from two to three and from 18 to 27 reference monthly remuneration.

42. The same decree, as amended by Law No. 145 of 30 December 2018, stipulates that the previous provisions, set forth in Article 18 of Law No. 300 of 1970, would continue to apply to public administration contracts and to fixed-term contracts concluded by private universities.

43. In the meantime, the Constitutional Court, in its judgment No. 194 of 26 September - 8 November 2018 (Official Journal, 1st special series, No. 45 of 14 November 2018), referring to Article 24 of the Charter, as interpreted by the European Committee of Social Rights, declared Article 3, paragraph 1, of Legislative Decree No. 23/2015 unconstitutional – this applies to both the original version and the version amended by Article 3, paragraph 1, of Decree-Law No. 87/2018 – with regard to the wording "*in an amount equal to two times the last reference monthly remuneration for the purposes of calculating the TFR payment for each year of service*".

44. In its decision, the Court points out that this passage also violates Articles 76 and 117 of the Constitution in that it is not in conformity with Article 24 of the Charter. It notes that in annulling this passage and with due regard for the minimum and maximum compensation to be paid to employees in cases of unlawful dismissal, the courts must take into account length of service (as provided for by Article 1.7c of Law No. 184/2013) and also other factors (number of employees, scale of the undertaking and the conduct and circumstances of the parties). As a result, the amount of the compensation for unlawful dismissal is no longer automatically determined.

45. The Committee recalls that it rules on the legal situation prevailing on the day of its decision on the merits (European Council of Police Trade Unions (CESP) v. France, Complaint No. 57/2009, decision on the merits of 1 December 2010, § 52). In view of the fact that the Constitutional Court's decision No. 194/2018 as well as Decree-Law No. 87/2018 were issued after the date of lodging the complaint, the Committee will examine them as applicable domestic law for the purposes of the legal assessment of the complaint at hand.

## THE LAW

## ALLEGED VIOLATION OF ARTICLE 24 OF THE CHARTER

46. 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."

"Appendix

1. It is understood that for the purposes of this article the terms "termination of employment" and "terminated" mean termination of employment at the initiative of the employer.

2. It is understood that this article covers all workers but that a Party may exclude from some or all of its protection the following categories of employed persons:

a workers engaged under a contract of employment for a specified period of time or a specified task;
b workers undergoing a period of probation or a qualifying period of employment, provided that this is determined in advance and is of a reasonable duration;
c workers engaged on a casual basis for a short period.

3. For the purpose of this article the following, in particular, shall not constitute valid reasons for termination of employment:

a trade union membership or participation in union activities outside working hours, or, with the consent of the employer, within working hours;
b seeking office as, acting or having acted in the capacity of a workers' representative;
c the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;
d race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
e maternity or parental leave;
f temporary absence from work due to illness or injury.

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."

## A – Arguments of the parties

47. The Committee points out that the texts in italics between square brackets hereafter indicate factual elements which have become outdated as a result of changes made in the applicable domestic law after the lodging of the complaint (see preliminary considerations, §§39-45).

### 1. The complainant organisation

48. The CGIL alleges that Italy does not comply with Article 24 of the Charter because Articles 3, 4, 9 and 10 of Legislative Decree No. 23/2015 make provision, for private-sector workers hired after 7 March 2015, for an all-inclusive compensation amount in cases of unlawful dismissal, which [*is predetermined on the basis of length of service and*] has a ceiling, and precludes any ability of the courts to assess the losses suffered by the worker and award, where appropriate, additional compensation.

49. In cases of unlawful dismissal, namely those without any justified objective or subjective reason or valid disciplinary reason (good cause) – accounting for the majority of cases brought before the courts – the compensation [*is fixed and predetermined and*] corresponds to [*two times the reference monthly remuneration per year of service, with*] a minimum of [*four*] six and a maximum of [*24*] 36 times the reference monthly remuneration. Employees of small enterprises (production units with up to 15 employees or enterprises employing a total of up to 60 employees) receive a reduced compensation, specifically a single reference monthly remuneration per year of service with a minimum of [*two*] three and a maximum of six times the reference monthly remuneration.

50. The CGIL states that the “reference monthly remuneration” for the purposes of calculating the compensation in case of unlawful dismissal does not correspond to the global de facto remuneration actually owed to the worker. It is a formal parameter – specifically, the last reference monthly remuneration for the purposes of calculating the TFR payment – which rarely takes certain fixed salary components into account.

51. However, the law prohibits the courts from considering those salary components which are excluded from this calculation [*or indeed any circumstances other than the length of service of workers with permanent contracts*]. Any time spent working for the same employer under a fixed-term contract is also excluded from the calculation.

52. Furthermore, compensation determined in this way may subsequently be reduced by half as a result of formal defects, such as the failure to indicate the grounds for dismissal, or in the event of a breach of disciplinary procedures. In this respect, the CGIL challenges the Government’s claim that these are “less serious” cases and insists that a failure to give reasons, far from constituting a “less serious” defect, has a huge influence on the dismissal procedure, as does failure to uphold the rights of the defence laid down for situations of disciplinary dismissal.

53. The CGIL also claims that the payments actually received by victims of unlawful dismissals are being subsequently reduced because the law encourages out-of-court settlements (conciliation) which, while admittedly making it possible for victims of unlawful dismissals to obtain compensation without having to bear the costs and comply with the time-frames of judicial proceedings, are disproportionally advantageous to employers, enabling them to cut costs by about 50% (at public expense, as society must then bear the cost of tax relief), and avoid a conviction of unlawful dismissal. Therefore the CGIL maintains that rather than dissuading employers from resorting to unlawful dismissal, the current regime is actually making unlawful dismissal much easier.

54. In cases where the dismissal is disputed, the employer may offer the worker in question, by way of out-of-court settlement, a payment of between [*two and 18*] three and 27 times the reference monthly remuneration (calculated on the basis of a single reference monthly remuneration per year of service) which is neither taxed nor subject to social contributions.

55. According to the CGIL, court practice shows that, even when the worker refuses the offer and initiates legal proceedings, these are largely resolved by settlements involving modest amounts, which are lower than the progressive parameter introduced by the law. This is partly due to the procedural system requiring the court to draw up a conciliation proposal and consider any refusal of this proposal when allocating the cost of the proceedings.

56. The CGIL points out that no provision for alternative or supplementary relief under civil law is made under the existing sanctions regime. It concludes that the mechanism for compensation in cases of unlawful dismissal does not therefore allow for adequate redress and does not have a dissuasive effect, especially since it facilitates the delaying tactics of employers, given that the maximum amount of the compensation is fixed for the duration of the proceedings and does not take into account the losses actually suffered, including the loss of wages between the date of dismissal and the date it is declared to be unlawful as well as the reduced chances of finding a new job: as such, workers almost always opt to drop prosecutions and collect the proposed payment as quickly as possible, rather than await the outcome of the proceedings which could take years and incur additional costs, without necessarily affecting the amount ultimately awarded and resulting in a net compensation amount not significantly greater than that which could have been received through the conciliation offer.

57. The CGIL points out that the Italian courts statistics reveal a significant lack of legal action against dismissals under the regime introduced by Legislative Decree No. 23/2015, and the cases concerning unlawful dismissals are almost always resolved in out-of-court settlements which result in the payment to the worker of 50% (plus the share exempt from tax) of the amount of compensation provided for by Article 3, paragraph 1 of the aforementioned Legislative Decree. The CGIL makes the point that, as against an average tax benefit of around 25% for the worker, the employer obtains a 50% reduction in the costs of dismissal.

58. In addition, the possibility of reinstatement applies only in very restricted circumstances (dismissals which are verbal, discriminatory, retaliatory or void for being related to pregnancy or a request for leave and in cases where the alleged misconduct did not take place) and requires the worker to have satisfied the burden of proof. In the light of the available case law, the CGIL emphasises that [*the law does not authorise the courts to take into account the conduct of the parties, the actual economic situation of the company, the subjective circumstances of the worker, or the proportionate nature of the dismissal in relation to any misconduct by the worker. It claims, therefore, that*] the slightest breach of contract or any economic reason, even one which is not provided for by the law as a justification for suppressing a post, would exclude any possibility for the worker to obtain reinstatement.

59. Reinstatement is also impossible in cases of collective redundancies (with the exception of dismissals which are notified verbally) for workers hired after 7 March 2015 but continues to apply to workers hired before that date, in the event of a violation of the criteria for selecting the workers who are to be dismissed.

60. In this regard, the CGIL considers that this difference in treatment is such that it puts workers hired after 7 March 2015 at greater risk of dismissal, as they are less protected, both in terms of reinstatement and compensation. The regime applying to workers hired before 7 March 2015 (Article 18 of Law No. 300/1970) provides more broadly for reinstatement [*and in particular, enables the courts to consider factors other than length of service (such as the number of employees, the scale of the economic activity and the conduct and circumstances of the parties) for the purposes of calculating the compensation, even when it is subject to a maximum amount (of six, 12 or 24 times the reference monthly remuneration, depending on the case*)].

61. The CGIL also draws attention to the fact that the unemployment benefit system, reformed at the same time as the adoption of the provisions at issue (Legislative Decree No. 23/2015) is also determined by length of service, meaning that a worker who has a short length of service and is unlawfully dismissed will be subject to not only a low level of compensation for unlawful dismissal but also reduced unemployment benefit which he or she will receive for a shorter period of time. In any event the duration of payment of this benefit ranges from 6.5 weeks to 24 months and the benefit itself, which is set at a maximum of 75% of the workers' salary and never more than €1,300, is reduced by 3% after the third month.

62. The CGIL argues that workers who are unlawfully dismissed at an older age, but not old enough to qualify for retirement, are particularly penalised by the inadequacy of the compensation, combined with the lack of income support instruments.

63. This affects workers in small companies (branches or undertakings with fewer than 16 employees, or companies employing a total of up to 60 workers) even more, almost half of the employees working in Italy, according to the CGIL, since in these cases the provisions at issue provide for an even lower level of compensation in case of unlawful dismissal, unrelated to the damage actually sustained.

64. Lastly, the CGIL notes that the measures at issue were not adopted in the context of a serious economic and financial crisis and, although they were supposed to promote employment growth, the CGIL considers that, in view of the employment statistics since the entry into force of the measures in question, there is no evidence that the enactment of legislation on dismissal providing for fewer protections will result in increased employment; it therefore concludes that such a restriction of a fundamental right of workers is not proportionate to the aim pursued and is therefore not justified under Article G of the Charter.

65. In response to the Government, the CGIL states that the alleged violation of the Charter has not been rectified by the amendments introduced in July 2018 (Decree-Law No. 87 of 12 July 2018, in force since 14 July 2018, converted into law, with amendments, by Law No. 96 of 9 August 2018), insofar as these amendments increase only the ceilings for compensation in the event of unlawful dismissal in production units with more than 15 employees, and in particular the lower limit from four to six times the reference monthly remuneration and the upper limit from 24 to 36 times the reference monthly remuneration (Article 3(1), Legislative Decree No. 87/2018) for employment relationships established in 2015.

66. In particular, in the opinion of the CGIL, this legislative amendment does not substantively alter the compensation mechanism provided for in Legislative Decree No. 23/2015, which entails a global and capped compensation, [*the amount of which automatically increases only according to length of service*] and through the dispute settlement procedure provided for in Article 6 of the aforementioned Legislative Decree, which is dissuasive for workers and advantageous for the employer.

67. The CGIL also challenges the relevance of the Government's argument that the provision providing for the payment of a contribution by the employer to finance the unemployment benefit provided for in Article 2.31 of Law No. 92/2012 could discourage the use of unlawful dismissals. In this respect, the CGIL states that this contribution is a widespread measure that applies to all types of dismissal, regardless of its validity and effectiveness, and therefore does not specifically penalise unlawful dismissals. Moreover, this measure does not constitute compensation for the worker, since he or she does not benefit from this contribution. In the view of the CGIL, it is therefore simply a state funding measure, which is not able to penalise and provide compensation for the damage suffered by the worker as a result of unlawful dismissal. More generally, the CGIL considers that the social protection represented by unemployment benefit alone does not prevent the employer from taking unlawful action and therefore leaves the termination of contract entirely without any tangible and appropriate measures to protect employment.

68. As regards the possibility, invoked by the Government, of obtaining additional compensation on the basis of the general rules of civil liability, the CGIL observes that the situation to which the Government refers is that of “injurious dismissal”. However, the CGIL states that the non-pecuniary compensation in question concerns the damage caused to the dignity of the person by the insulting terms of the dismissal, regardless of whether it is an unlawful dismissal. Compensation in the latter case remains exclusively covered by the provisions at issue, as can be seen from the relevant case law of the Court of Cassation (Cass., 12 March 2014, No. 5730; Cass., 19 November 2015, No. 23686). The condition for additional compensation is therefore not the unlawful loss of the employment protected by Article 24 of the Charter, but the method of dismissal (including, theoretically speaking, in the case of legal dismissal, valid and effective disciplinary dismissal but imposed in a way that violates the private life or image of the worker). Consequently, the CGIL maintains that the compensation provided for in Articles 3, 4 and 9 of Legislative Decree No. 23/2015 constitutes a special measure derogating from the general principles on compensation for damage caused by breach of contract, resulting in the inapplicability of Article 1223 of the Civil Code for the purpose of quantifying the damage caused by unlawful termination.

**2. The respondent Government**

69. The Government points out that Legislative Decree No. 23/2015 provides for compensation in case of unlawful dismissal, the amount of which is calculated on the basis of the last reference monthly remuneration for the purposes of calculating the TFR payment, within predetermined limits.

70. For example, in the event of unlawful dismissal, the amount of compensation, initially ranging from four to 24 times the reference monthly remuneration *[(two months per year of service)*], is now between six and 36 times the reference monthly remuneration, following an amendment introduced by Legislative Decree No. 87 of 12 July 2018 (converted by Law No. 96 of 9 August 2018).

71. In response to the CGIL’s observation that this 2018 amendment relates to employment contracts concluded as from 2015 and terminated in 2030, the Government reiterates that employment contracts concluded before 2015 remain subject to the protection arrangements provided for in Article 18 of Law No. 300 of 20 May 1970 (as amended by Law No. 92 of 28 June 2012), which sets a maximum compensation of 24 monthly payments.

72. If the termination has not been notified in writing, or if the procedure regarding individual disciplinary has been breached or the criteria for deciding who should be made redundant in the framework of collective redundancies have not been complied with, the amount of compensation shall be between two and 12 times the reference monthly remuneration (one per year of service). For workers in small undertakings (up to five workers for an agricultural undertaking, or 15 workers per unit of production or up to 60 workers in total), the amounts are reduced by half and may not exceed six times the reference monthly remuneration.

73. With regard to the limited situations where reinstatement is applicable, the Government considers that Article 24 of the Charter confers on the national legislature

a discretionary power with regard to the measures to be adopted and does not oblige it to provide for reinstatement as the only possible form of compensation for the damage suffered by a worker who has been dismissed without just cause. In this regard, it points out that reinstatement, except in cases provided for by law, is not in itself protected by the Constitution.

74. The Government also points out that in the event of dismissal, the employer is required to pay contributions to finance unemployment benefit, which could have a dissuasive effect.

75. With regard more particularly to the capping of compensation, the Government stresses that this makes it possible to accurately assess the costs, if any, of litigation resulting from the legal action brought against the dismissal.

76. The Government considers that the adequacy of compensation in case of unlawful dismissal must be assessed in the overall context of the relevant legislation, taking into account the broadening of the scope of income support measures in the event of involuntary unemployment.

77. The Government acknowledges that the conciliation proposal provided for by law (Article 6 of Legislative Decree No. 23/2015) is intended to guarantee a reduction in the number of cases brought before the courts, but stresses that it is in the interest of workers to be able to decide whether to continue legal proceedings or accept conciliation in full knowledge of the facts. If the worker accepts the conciliation proposal, he or she does not have to bear the risks relating to the duration and costs of the legal proceedings, and can quickly obtain an amount, admittedly lower than that which he or she would obtain through the judicial proceedings but which, unlike the latter, is tax-free and not subject to social security contributions. In this regard, it points out that, following the above-mentioned amendments of 2018, the amount proposed in the conciliation, which ranged from 2 to 18 times the reference monthly remuneration, is now between 3 and 27 times the reference monthly remuneration.

78. The Government underlines the fact that the Italian law grants workers the right of recourse before an impartial body in order to protect their rights and that this possibility is not removed or reduced by the fact that workers have the option of taking a specific decision on whether to choose the conciliation procedure over the judicial procedure, depending on their personal situation.

79. The Government further claims that the use of predetermined parameters for calculating the amount of compensation is intended to increase certainty about the consequences of unlawful dismissal. It also considers that the courts, while bound by these parameters for quantifying the amount of compensation, remain free to assess the nature and facts that led to the dismissal.

80. With regard to the measures applicable to collective redundancies carried out in disregard of the criteria used to determine which employees are to be made redundant, the Government accepts that there is different treatment for workers hired before or after 7 March 2015 (the former may request reinstatement, while the latter may claim only compensation) but points out that reinstatement does apply if it is proven that the dismissal was discriminatory and adds that eventually the provisions of Legislative Decree No. 23/2015 should apply to all employees.

81. More generally, the Government disputes the argument that reinstatement is now an exceptional remedy and points out that while the various scenarios used may appear limited (i.e. in the event of annulled or discriminatory dismissal, or where there is no such contested disciplinary conduct) they actually cover a variety of non-standard cases, pursuant to Article 1418 of the Civil Code concerning the annulment of the contract.

82. In this respect, the Government disputes the allegation that there is no alternative protection under civil law and maintains that nothing prevents the worker from requesting and claiming additional damages, for example in respect of ill-health damage caused by the unlawful termination and “injurious” dismissal.

83. Finally, with regard to the reduction of the amount of compensation where there are formal or procedural defects, the Government stresses that these are less serious situations and points out that the courts may, at the worker’s request, find that other protection criteria apply (for example, in the event of dismissal constituting discrimination).

**B – Assessment of the Committee**

84. The Committee notes that the complaint concerns the adequacy of the compensation provided for in the event of unlawful dismissal in the private sector after 7 March 2015, pursuant to Articles 3, 4, 9 and 10 of Legislative Decree No. 23/2015, as amended after the complaint was lodged.

85. In this connection, it notes that the complaint concerning the automatic nature of the calculation of the compensation amount under Article 3 paragraph 1 of Legislative Decree No. 23/2015 is no longer pertinent, following the finding that this clause is unconstitutional (Constitutional Court, Judgment No. 194/2018, cited above), as a result of which courts may take into account not only length of service but also other factors (number of workers, company size, and conduct and situation of the parties).

86. It notes, however, that the complainant organisation still objects to other aspects of the compensation mechanism in case of unlawful dismissal, namely the ceiling on compensation combined with the restrictions that apply to the reinstatement of workers, the alleged lack of alternative or supplementary protection from unlawful dismissal through other provisions, the alleged lack of suitable social protection mechanisms for dismissed workers, and the conciliation mechanism, which, it claims, encourages employers to resort to unlawful dismissal.

87. The Committee points out that, under the Charter, workers dismissed without valid reason must be granted adequate compensation or other appropriate relief. Compensation systems are considered to comply with the Charter when they provide for:
- reimbursement of financial losses incurred between the date of dismissal and the decision of the appeal body;
- the possibility of reinstatement of the worker and/or
- compensation of a high enough level to dissuade the employer and make good the damage suffered by the victim (Finnish Society of Social Rights v. Finland, Complaint No. 106/2014, decision on admissibility and the merits of 8 September 2016, §45; Conclusions 2016, Bulgaria).

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

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

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

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

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

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

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

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

96. The Committee points out that any ceiling in compensation that may preclude damages from being commensurate with the loss suffered and sufficiently dissuasive is, in principle, contrary to the Charter, as the Constitutional Court has also, to some extent, acknowledged in its decision No. 194/2018. If there is a ceiling on compensation for pecuniary damage, the victim must be able to seek compensation for non-pecuniary damage through other legal avenues and the courts competent for awarding compensation for pecuniary and non-pecuniary damage must decide within a reasonable time (Finnish Society of Social Rights v. Finland, Complaint No. 106/2014, decision on the admissibility and the merits of 8 September 2016, §46; Conclusions 2012, Slovenia and Finland).

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

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

99. The Committee notes that the Government has not provided any examples of cases in which compensation has been granted for unlawful dismissal on the basis of the rule on civil liability or under Article 1418 of the Civil Code. The Committee notes that this provision has been used to recognise that unlawful dismissals were null and void in some cases (Judgment No. 4517/2016 of the Rome Labour Court recognising the retaliatory nature of the dismissal of a worker who had contested disciplinary measures taken against him; Judgment No. 687/2016 of the Vicenza Labour Court recognising the unlawful nature of a dismissal supposedly carried out for economic reasons whereas the employer actually wished to take advantage of new hiring incentives), but considers that there is nothing to demonstrate that these examples, taken from the lower courts, are indicative of stable and consolidated case-law and that they can apply to all the different situations.

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

101. Yet, it notes that in the event of unlawful dismissal (other than when it is discriminatory, null and void, notified verbally or substantially unfounded, see §§89-91 above), victims may choose between two options to compensate for their pecuniary damage – a judicial remedy and a non-judicial one – which are subject to a ceiling and do not cover the financial losses actually incurred since the dismissal date. The Committee considers that the conditions attaching to each of these options are, however, of a nature to encourage, or at least not inhibit, recourse to unlawful dismissal.

102. In the event of dismissal, the conciliation measures provided for in Italy enable employers to avoid judicial proceedings and curb the costs of dismissal (which are limited to 27 times the reference monthly remuneration and 6 times the reference monthly remuneration for small undertakings) whereas victims undertake to waive their right to initiate any subsequent proceedings, their sole benefit being that they are certain to receive compensation within a short time span.

103. Nor do judicial remedies necessarily have any deterrent effect on unlawful dismissal given that firstly, the net amount of compensation for pecuniary damage is not significantly higher than that provided for in the event of conciliation and secondly, the length of proceedings are to the advantage of employers, since the compensation payment in question may not exceed the predetermined amounts (capped at 12, 24 or 36 times the reference monthly remuneration as the case may be, and 6 times the reference monthly remuneration for small undertakings) and hence the compensation becomes inadequate over time to the damage suffered. As to the other remedies referred to by the Government, the Committee notes the lack of any conclusive evidence that they generally make it possible in practice to obtain additional compensation.

104. In the light of the foregoing, the Committee considers that neither the alternative legal remedies offering victims of unlawful dismissal the possibility of compensation exceeding the upper limit set by the law in force nor the conciliation mechanism, as laid down in the provisions at stake, make it possible in all cases of dismissal without valid reason to obtain appropriate redress proportionate to the damage suffered and apt to discourage employers from resorting to unlawful dismissal.

105. Consequently, the Committee holds that there is a violation of Article 24 of the Charter.

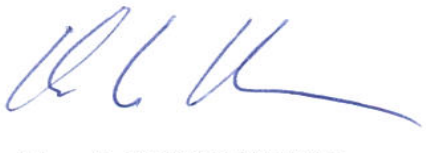
**CONCLUSION**

For these reasons, the Committee concludes:

- by 11 votes to 3 that there is a violation of Article 24 of the Charter

Petros STANGOS
Rapporteur

Giuseppe PALMISANO
President



Henrik KRISTENSEN
Deputy Executive Secretary