



## Governing Body

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Institutional Section

INS

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NINTH ITEM ON THE AGENDA

### Report of the Director-General

#### **Fourth supplementary report: Report of the Committee 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)**

##### **I. Introduction**

1. By a communication dated 10 May 2012, the Trade Union Confederation of Workers' Committees (CC.OO.) and the General Union of Workers (UGT), referring to article 24 of the Constitution of the International Labour Organisation (ILO), made a representation to the International Labour Office alleging non-observance by Spain of the Termination of Employment Convention, 1982 (No. 158). On 30 July 2012 the two confederations sent additional allegations.
2. The Termination of Employment Convention, 1982 (No. 158), was ratified by Spain on 18 February 1985 and remains in force for that country.
3. The provisions of the ILO Constitution concerning the submission of representations are as follows:

*Article 24*

*Representation of non-observance of Conventions*

In the event of any representation being made to the International Labour Office by an industrial association of employers or of workers that any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party, the Governing Body may communicate this representation to the government against

which it is made, and may invite that government to make such statement on the subject as it may think fit.

*Article 25*

*Publication of representation*

If no statement is received within a reasonable time from the government in question, or if the statement when received is not deemed to be satisfactory by the Governing Body, the latter shall have the right to publish the representation and the statement, if any, made in reply to it.

4. In accordance with article 1 of the Standing Orders concerning the procedure for the examination of representations, as revised by the Governing Body at its 291st Session (November 2004), the Director-General acknowledged receipt of the representation and informed the Government of Spain thereof. At its 316th Session (November 2012), the Governing Body decided that the representation was receivable and at its 317th Session (March 2013) a tripartite committee was set up to examine it. The tripartite committee was composed of Mr Raffaele De Luca Tamajo (Government member, Italy), Mr Alberto Echavarría Saldarriaga (Employer member, Colombia) and Mr Yves Veyrier (Worker member, France).
5. The Government of Spain sent its observations in a communication dated 21 December 2012.
6. In addition, in April 2013, the Office invited the two confederations to send additional information, which was received on 29 May 2013. The Government of Spain sent additional information on 29 June and 22 August 2013.
7. On 20 March 2014, the Committee transmitted a document of the Spanish Confederation of Employers' Organizations (CEOE) and the Spanish Confederation of Small and Medium-Sized Enterprises (CEPYME), containing observations in regard to the representation, to the Government and the two confederations. The International Organisation of Employers (IOE) expressed its support to the observations submitted by the CEOE and the CEPYME.
8. On 4 April 2014, the Committee also requested the Government and the two confederations to provide additional information concerning the pleas of unconstitutionality which are pending before the Constitutional Court.
9. After reviewing the document of the CEOE and the CEPYME, the two confederations indicated on 7 May 2014 that they did not consider it necessary to provide comments on the document and therefore kept the terms of the representation.
10. On 13 May 2014, the Committee received the Government's observations with regard to the document of the CEOE and the CEPYME and to the other questions raised by the Committee.
11. The Committee met formally on 26 March and 27 May 2014 to examine the representation and adopt its report.

## II. Examination of the representation

### The complainants' allegations

#### *Context of the 2012 labour reform*

12. The two confederations recall that the International Labour Organization was founded in accordance with the principle that lasting peace can be established only if it is based on social justice. In order to improve conditions of employment and protect workers against inequalities in the employment relationship, the International Labour Conference adopted the Termination of Employment Recommendation, 1963 (No. 119), which was subsequently replaced by Convention No. 158 and the Termination of Employment Recommendation, 1982 (No. 166). These instruments seek to reinforce guarantees for workers against dismissal, protecting them against arbitrary and unjustified termination of employment by the employer and against the economic and social problems resulting from loss of employment, thereby fostering job security, which is a key aspect of the right to work.
13. The two confederations refer to the General Survey of 1995, in which the Committee of Experts on the Application of Conventions and Recommendations indicated that a valid reason for termination was the cornerstone of the Convention.<sup>1</sup> In addition, the legal provisions relating to dismissal drew on the recognition of the right to work established in article 35 of the Spanish Constitution. The two confederations point out that the Constitutional Court interpreted the right to work as a labour right, which implies that workers cannot have their employment terminated without a valid reason, in accordance with a previously established procedure and subject to judicial review.<sup>2</sup>
14. The two confederations indicate that the system governing dismissals was modified because of the crisis, particularly by Act No. 35/2010 of 17 September 2010 establishing urgent measures for reform of the labour market. The 2010 labour reform expanded the scenarios allowing fair dismissal by the employer on economic or similar grounds, with compensation equivalent to 20 days per year of service. According to the two confederations, the negative trends that were already apparent in the 2010 labour reform were developed to the fullest extent in Royal Decree-Law No. 3/2012 of 10 February 2012 establishing urgent measures for reform of the labour market, in clear violation of the dismissal model established in the Spanish Constitution and, more specifically, in direct opposition to many of the provisions of Convention No. 158.
15. In their communication of 30 July 2012, the two confederations indicate that Royal Decree-Law No. 3/2012 paved the way for the adoption of Act No. 3/2012 of 6 July 2012 establishing urgent measures for reform of the labour market, with the Act replacing the Royal Decree-Law. The provisions of Convention No. 158 which have been violated by the 2012 labour reform are those that relate to the period of probation (Article 2(2)(b)), the reasons for dismissal (Article 4), temporary absence from work because of illness or injury (Article 6(1)), the opportunity for the worker to defend himself/herself against the

<sup>1</sup> ILO: *Protection against unjustified dismissal*, General Survey of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 4B), International Labour Conference, 82nd Session, Geneva, 1995, para. 76.

<sup>2</sup> The two confederations refer to the following rulings of the Constitutional Court: No. 22/1981 of 2 July 1981; No. 20/1994 of 27 January 1994; Nos 123/1992, 98/1993 and 177/1993; and also No. 192/2003 of 27 October 2003.

allegations made (Article 7), burden of proof (Article 9(2)(a) and (b) and 9(3)) and judicial review (Article 10).

16. The two confederations list the following as flagrant violations of the abovementioned provisions of Convention No. 158:

- the fixing of a one-year trial period (period of probation/probationary period) in a new type of open-ended contract (contract of unlimited/indefinite duration), which means that workers can be dismissed for no reason and without compensation;
- the new regulations concerning dismissal on economic, technical, organizational or production-related grounds, which means that workers can be dismissed without sufficient or proportionate reason and without any genuine judicial review of the employer's decision;
- the abolition of accrued wages relating to dismissal proceedings (*salarios de tramitación*) in cases where the employer opts to terminate the contract further to a ruling of unfair dismissal;
- the inclusion of absences from work because of illness or injury, even when duly justified, as a reason for dismissal: in other words, dismissal for absenteeism.

### ***One-year trial period in the new “open-ended entrepreneur-support contract”***

17. In their representation of May 2012, the two confederations assert that the new “open-ended entrepreneur-support contract” (CAE), established in section 4 of Royal Decree-Law No. 3/2012, establishes a trial period of one year. According to the two confederations, this one-year period is unrelated to the tasks and duties involved or the qualifications necessary for the performance of the job, which amounts to making provision for dismissal without a valid reason and without compensation.

18. With regard to the trial period, section 4(3) of the Royal Decree-Law provides as follows:

[CAE] contracts and the rights and obligations deriving from them shall be governed, as a general rule, by the provisions of the amended text of the Workers' Statute, adopted by Royal Legislative Decree No. 1/1995 of 24 March 1995, and by the provisions of collective agreements regarding open-ended contracts, with the sole exception of the duration of the trial period referred to in section 14 of the Workers' Statute, which shall be one year in all cases.

The two confederations claim that, because the duration of the trial period is unreasonable, the rules governing that period do not meet any of the criteria for exceptions allowed by Article 2(2)(b) of Convention No. 158. They consider a one-year trial period excessive by any standards, as has already been suggested by two decisions of the Labour Division of the Supreme Court.<sup>3</sup>

<sup>3</sup> The two confederations refer to the Supreme Court ruling of 12 November 2007, in case No. 4341/2006, which considered that “it would appear unreasonable to accept that the employer requires such a long trial period [two years] for evaluation of work of this nature” (acquiring clients for inclusion in a telephone directory). The Supreme Court ruling of 20 July 2011, in case No. 152/2010, referred to the previous decision and upheld its reasoning, namely that if the plaintiff was hired as a sales promoter, her work involving the sale of “Yellow Pages” directories and other products, “being subject to a one-year trial period appears excessive by any standards, since the objective of the trial period can be amply fulfilled in a much shorter period of time”.

19. The two confederations stress the fact that, in the CAE contract, the one-year period is not connected, either directly or indirectly, with the worker's vocational qualifications or training, career experience, level of responsibility associated with the job or degree of difficulty of the duties involved, thereby completely distorting the function that the trial period is intended to fulfil: namely, the testing of abilities and the adaptation of the worker to the job concerned. It involves a single, universal time period which is applied indiscriminately to all types of employment, from managerial posts involving the greatest responsibility and technical complexity, to the simplest jobs in terms of training and tasks.
20. In July 2012, the two confederations indicated that section 4 of Act No. 3/2012<sup>4</sup> reproduced the provisions already established in Royal Decree-Law No. 3/2012, with just two changes that make no difference to the representation. The two confederations observe that the legislator simply made an addition to section 4(3) of Act No. 3/2012, namely that "a trial period may not be prescribed when the worker has previously performed the same duties in the enterprise, regardless of the type of contract". According to the complainants, this merely reiterates what is laid down in general terms in section 14(1) of the Workers' Statute regarding all trial periods: namely, that the agreement will be null and void if the worker has performed the same duties in the enterprise under any type of contract. The legislator has thus sought to dispel any doubts regarding how this restriction concerning the trial period should be interpreted and applied in connection with CAE contracts.
21. The two confederations indicate that the second innovation introduced in July 2012 is the declaration that the new CAE contract will remain in use "until the unemployment rate in our country is below 15 per cent", according to the ninth transitional provision of Act No. 3/2012. The two confederations indicate that this seeks to justify the new type of contract on the basis of the high unemployment rates that currently exist in Spain, which are around 25 per cent.
22. The two confederations cannot accept that the new type of contract can be justified as an employment policy measure. The adoption of Royal Decree-Law No. 3/2012 was accompanied by the incorporation of a wide variety of tax incentives in favour of employers and reductions in employers' social security contributions. These incentives can only be understood on the basis of a policy geared to job creation.
23. The two confederations argue that the new type of contract does not have the desired impact on job creation because the duration of the trial period in the contract is unreasonable and disproportionate. The two confederations declare that labour rights cannot be sacrificed in the pursuit of specific macro-economic objectives, given that international labour standards are being treated as mere guidelines that are subordinated to trends in economic policy.
24. The two confederations also refer in their representation to the case law of the Labour Division of the Court of Cassation in France, recalling judgment No. 1210 of 1 July 2008, which examined the conditions for termination of the "new employment contract" (*contrat nouvelle embauche* – CNE). In this judgment the Court of Cassation considered that a period of two years in which the employer could dismiss the worker without reason could not be considered "reasonable" within the meaning of Article 2(2)(b) of Convention No. 158.
25. In this context, the two confederations also referred to the representation submitted under article 24 of the ILO Constitution by the *Confédération générale du travail – Force ouvrière* (CGT-FO) in August 2005, alleging non-observance of Convention No. 158 and

<sup>4</sup> The text of section 4 of Act No. 3/2012 is reproduced in the appendix to the present document.

other Conventions. In the context of that representation a tripartite committee examined the CNE contract created by Ordinance No. 2005-893 of 2 August 2005 establishing contracts of indefinite duration for new recruits to companies in France employing a maximum of 20 workers. The CNE made it possible to evade the application of certain forms of protection provided for in the Labour Code in the event of individual or collective dismissal in the two-year period following the signature of the CNE. The two confederations endorsed the conclusions of the tripartite committee, which expressed doubts regarding the “reasonableness” of the period of up to two years stipulated in the CNE.<sup>5</sup>

26. The two confederations also recalled the observation made in November-December 2008 by the Committee of Experts regarding the application of Convention No. 158 in France, in which it noted with satisfaction that, taking account of the recommendations of the committee that examined the representation and giving effect to a tripartite national agreement, Act No. 2008-596 of 25 June 2008 had been adopted, repealing the provisions relating to CNE contracts. CNEs that were in force when the Act was published were reclassified as open-ended contracts (contracts of unlimited duration).
27. In summary, the two confederations argue that such a lengthy trial period constitutes an open invitation to employers to terminate CAE contracts before the trial period ends. Workers employed on CAEs may be dismissed and replaced in their jobs by other workers, without any creation of new jobs, the result being a mere rotation of workers in the same jobs. The two confederations also indicate that, in the judgment of 1 July 2008, the French Court of Cassation also criticized the rotation of workers for being incompatible with the basis of a social and democratic state of law, claiming to create jobs while in reality promoting dismissals without reason and without adequate compensation.
28. In additional information sent in May 2013, the two confederations indicated that Article (2) of Convention No. 158 excluded certain categories of workers [from all or some of the provisions of the Convention], including those serving a reasonable period of probation determined in advance. The requirement of reasonableness is also fundamental in the Spanish legal system, the question being to define what is meant by “reasonable” on the basis of various elements and criteria, something that the courts have been doing.
29. The two confederations stress that the new type of contract departs from the criteria and principles laid down in the Spanish legal system. The qualifications, knowledge and experience that the worker brings to the job to be performed are crucial with regard to fixing the length of the trial period. The time needed to test the abilities of an unskilled worker is not the same as for a qualified technician required to perform complex tasks in the enterprise. The two confederations recall that this involves a principle of such a fundamental nature that it has shaped, and been incorporated into, legislation and case law, particularly section 14 of the Workers’ Statute, which limits the length of the trial period in cases where this has not been specified in a collective agreement and distinguishes between qualified technicians and other workers. The criterion is quite simple: the more complex the tasks, the longer the trial period needed.
30. The two confederations maintain that the one-year period is considered too long in the Spanish legal system, to the extent that even for a contract as unusual as the “special senior

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<sup>5</sup> Paragraphs 70 and 71 of GB.200/20/6, Report of the committee set up to examine the representation alleging non-observance by France of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), and the Termination of Employment Convention, 1982 (No. 158), made under article 24 of the ILO Constitution by the *Confédération générale du travail – Force ouvrière*.

management contract” (Royal Decree No. 1382/1985 of 1 August 1985) the maximum trial period permitted by law is nine months (section 5(1) of the aforementioned Royal Decree).

31. The two confederations state that the rules established in the new contract do not provide for rational or reasonable use of the duration of the trial period. There are no nuances, the regulations apply “in all cases”, without any margin of flexibility for adapting them to specific scenarios. Such lengthy trial periods cover, or may cover, situations equivalent to those involving temporary contracts but without the rules and guarantees laid down by the latter. In Spanish law, fixed-term contracts also entail compensation when they end and workers have the same rights and protection in cases where they are unfairly dismissed.
32. The two confederations indicate that although the CAE contract is designed for enterprises with fewer than 50 employees “which, despite the economic crisis, are pursuing the creation of employment”, as stated in the preamble to the Act, it provides employers with a possibility reminiscent of a type of temporary contract that has already disappeared from Spanish law (it was repealed in 1997): the “new venture contract”. The *raison d’être* of that type of contract lay in the specific doubts or uncertainties regarding the organization of work or the response of the market which were an inherent part of new entrepreneurial activity, and so it could not be used in connection with entrepreneurial activities that were already operational.
33. The two confederations state that, unlike the “new venture contract”, the CAE contract is not defined in terms of time. The Government has insisted on describing it as “open-ended” (of unlimited duration) while giving the employer absolute freedom to terminate the employment relationship, provided it is within one year of the signature of the contract. The two confederations emphasize that although either the worker or the employer can terminate the employment relationship during the trial period without giving any justification (except where the decision violates fundamental rights), in practice it is the employer who decides whether or not to continue the contract, especially in times of crisis.
34. The two confederations indicate that the 2012 labour reform did not take account of whether the entrepreneur was a newcomer in the business world, whether he had experience, long or otherwise, or even whether he was seeking to launch a new product or service on the market with the logical uncertainty regarding how it would be accepted, as had been the case with the defunct “new venture contract”. The sole requirement to be met by the employer is not to exceed a total of 49 workers since, with 50 or more workers, he would be unable to use this “advantageous” contract. This acts as a disincentive to exceeding that number and ultimately may result either in a *de facto* obstacle to the recruitment of more employees once that figure has been reached or in the rotation of workers who will never be kept for more than a year by the enterprise.
35. In addition, in their communication of May 2013, the two confederations emphasize that the Government has pointedly failed to use the correct term with regard to the CAE by calling it an “entrepreneur-support contract” rather than an “employer-support contract”. *Emprendedor* (entrepreneur) and *empresario* (employer) are not equivalent terms. According to the Royal Spanish Academy dictionary, an “entrepreneur” is one who resolutely performs difficult or hazardous actions; an “employer” is the owner, proprietor or director of an industry, business or enterprise. The two confederations understand that these are different concepts; while an employer conducts business with the aim of meeting others’ needs in exchange for financial reward, an entrepreneur is not necessarily seeking economic recompense but to meet personal or social challenges. The employer’s focus is on making his project profitable while the entrepreneur attaches value to the workers’ effort and commitment towards his enterprise. The CAE should not be called an

open-ended contract since it only becomes open-ended if it is still running more than one year after its inception.

36. The two confederations suggest that the term “open-ended” is used with an eye to the stated objective of the preamble to promote recruitment for an indefinite period. However, this is an empty declaration since the Government adopted other measures such as those contained in Royal Decree-Law No. 4/2013 of 22 February 2013, published on 23 February 2013, establishing measures to support entrepreneurs, stimulate growth and create employment, which unambiguously favour temporary recruitment. For example, Royal Decree-Law No. 4/2013, “in order to encourage the acquisition of initial professional experience”, allows enterprises to conclude temporary contracts with unemployed young persons under 30 years of age with less than three months’ work experience or none at all (section 12 of the Royal Decree-Law). The Government has not created a new type of contract but has modified one of the existing types of temporary contract (namely, for casual work related to circumstances of production, exceptional workload or heavy demand).
37. The two confederations add that the CAE, no doubt in anticipation of the fact that employers will not let a whole year pass before terminating the contract, provides for a series of generous discounts and incentives designed to ensure that the new worker is retained for at least three years. The signature of a CAE and receipt of the incentives do not necessarily go together, while the lengthy one-year trial period fixed by law is an integral part of the contract.
38. Consequently, the two confederations argue that the incentives constitute an added advantage for the employer who keeps the worker for at least three years but are not decisive as regards signing the contract and ending the employment relationship during the following year, without any explanation or obligation. In the event that employers receive the said benefits and do not keep the worker for the minimum three-year period, they are simply required to repay the amounts received. On the basis of the sparse data available, in 2012 the enterprises that used the new type of contract without taking advantage of the tax incentives available accounted for 82 per cent of all enterprises using such contracts. In other words, what was important for 82 per cent of the enterprises that used this type of contract was the freedom resulting from the trial period, which was preferable to acquiring incentives that would bind them to employing the worker for at least three years.

***New regulations concerning the economic, technical, organizational or production-related reasons for dismissal***

39. In the representation of May 2012, the two confederations claim that the new wording of section 51 of the Workers’ Statute introduced by Royal Decree-Law No. 3/2012 made it possible for workers to be dismissed without sufficient or proportionate reason and without any genuine judicial review of the employer’s decision. Decree-Law No. 3/2012 introduced a number of adjustments without lessening, in the two confederations’ opinion, a twofold violation of Convention No. 158: firstly, of Article 4, which excludes the possibility of a worker being dismissed without a “valid reason” that is sufficient and proportionate; secondly, of Article 9(1) and (3), which provides for a judicial review of employers’ decisions to terminate employment contracts.
40. Under the reforms introduced by Act No. 3/2012, the abovementioned provisions of section 51(1) of the Workers’ Statute state as follows:

Section 51. Collective dismissal.

1. For the purposes of the present Act, “collective dismissal” shall mean the termination of employment contracts for economic, technical, organizational or production-related reasons where, in a period of 90 days, termination affects at least:

- (a) Ten workers, in enterprises employing fewer than 100 workers;
- (b) Ten per cent of the workforce, in enterprises employing between 100 and 300 workers;
- (c) Thirty workers, in enterprises employing more than 300 workers.

Economic reasons shall be deemed to exist where the results of the enterprise indicate a negative economic situation, such as the existence of current or forecast losses, or a persistent drop in the level of ordinary revenue or sales. In any case, the drop shall be deemed to be persistent if, over a period of three consecutive quarters, the level of ordinary revenue or sales for each quarter is lower than that recorded for the same quarter of the previous year.

Technical reasons shall be deemed to exist where changes occur, inter alia, regarding the means or instruments of production. Organizational reasons shall be deemed to exist where changes occur, inter alia, with respect to working systems and staff working methods or the mode of organization of production. Production-related reasons shall be deemed to exist where changes occur, inter alia, in the demand for products and services which the enterprise seeks to place on the market.

- 41.** The two confederations maintain that two important provisions in the previous version of section 51 of the Workers’ Statute were repealed. One repealed paragraph which defined economic reasons [for dismissal] read as follows:

Economic reasons shall be deemed to exist where the results of the enterprise indicate a negative economic situation, such as the existence of current or forecast losses, or a persistent drop in the level of revenue, which may affect the viability of the enterprise or its capacity to maintain the volume of employment. To this end, the enterprise shall substantiate the alleged results and provide justification for deciding on that basis that it is reasonable to terminate contracts in order to preserve or boost its competitive position in the market.

- 42.** According to another repealed paragraph of section 51 of the Workers’ Statute defining technical, organizational or production-related reasons, the enterprise was obliged not only to substantiate the combination of reasons but also to “provide justification for deciding on that basis that it is reasonable to terminate contracts in order to prevent a negative trend in the enterprise or improve its situation through a more appropriate organization of resources designed to boost its competitive market position or ensure a better response to demand”.
- 43.** The two confederations recognize that the wording of these two provisions was extremely flexible with respect to justifying economic, technical, organizational or production-related reasons. However, this formulation obliged the enterprise to justify the reasonableness of collective dismissals according to two criteria: firstly, to prevent a negative trend in the enterprise, which implied that dismissals were the response to a risky situation which could have arisen if the collective termination of contracts had not been undertaken; secondly, to improve the organization of its resources to boost its competitive market position, which meant that dismissals could be seen as a means of tackling the inefficiencies of the enterprise in the market in which it was competing.
- 44.** According to the two confederations, the new wording of section 51(1) of the Workers’ Statute omits any reference to the need for collective dismissals on economic, technical, organizational or production-related grounds to be reasonable. The legislator’s objective and the consequence thereof is the elimination of any criterion of reasonableness, with the aim of denying judges the possibility to “examine the reasons given” for the dismissal and “the other circumstances relating to the case” or to “determine whether the termination was indeed for these reasons” (Article 9(1) and (3) of Convention No. 158).

45. The two confederations state that paragraph V of the preamble to the Royal Decree-Law and subsequent Act No. 3/2012 confirm that there is non-compliance with the abovementioned provisions of Convention No. 158, as expressed in the passage below:

Innovations have also been made with respect to justification of these dismissals. The Act now merely defines the economic, technical, organizational or production-related reasons that justify these dismissals, removing other legal references which had given rise to uncertainty. Going beyond the specific content (...), such references incorporated projections relating to the future, which were impossible to prove, **and a definitive evaluation of these dismissals, which resulted in the courts ruling, on several occasions, on the appropriateness of actions in the sphere of enterprise management. It is now clear that the judicial review of these dismissals must restrict itself to the consideration of certain factors, namely the reasons for dismissal.** This principle is valid both for the judicial review of collective dismissals and for dismissals for objective reasons on the basis of section 52(c) of the Workers' Statute [emphasis added by the two confederations].

46. The two confederations assert that the preamble reflects the Government's wish to exclude the assessment of whether or not the dismissal is a necessary or reasonable measure from judicial review. The employer may claim that the dismissals are reasonable in terms of preserving or boosting his competitive market position. The employer is relieved of the obligation to supply the elements or criteria used for determining the number of workers and their contracts affected by the collective dismissal.
47. As part of the additional information communicated in May 2013, the two confederations indicated that the statements in the preamble had been endorsed in the parliamentary discussion, as reflected in the record of proceedings of the Spanish Congress of Deputies. In the debate for the adoption of Royal Decree-Law No. 3/2012 that took place on 8 March 2012, the socialist spokesperson made the following statement:

Ladies and gentlemen, **dismissals are being made easier because they are no longer subject to any review**, review by the unions, administrative review, and we are doing away with authorization. **And they are not subject to any judicial review** – which is a violation of article 24 of the Constitution, the right to effective judicial protection – **because you are introducing a clearly perverse amendment with regard to the powers of the labour courts.** Do you know what that perverse amendment is? **That you are telling the judges and the courts that from now on, in deciding whether applications for dismissal are admissible, they may only verify whether a reason exists but not whether it is proportionate. When the preamble refers to amending judicial procedures, how can it be claimed that labour judges were ruling on the appropriateness of employers' decisions? Judges are not ruling on appropriateness; they are assessing whether the reason for dismissal, once it has been substantiated, is in proportion to its consequences.** Now, because of the mere allegation of a drop in revenue and the reference to competition, **the judge is prevented from assessing whether the proportional aspect is present.**

The two confederations indicate that the Minister for Employment and Social Security, in defending the Act and after stating at the beginning of the debate that “the reasons for fair dismissal are also being clarified in order to avoid excessive recourse to the courts”, replied to these statements, somewhat edgily, that “what we are trying to do is clarify the reasons in order **to avoid judicial complications**”.

48. The two confederations state that the purpose of the 2012 labour reform is quite clear and leaves no doubts. It is to exclude from judicial review the assessment of whether the dismissal is necessary or justified in terms of criteria of reasonableness and proportionality.
49. The two confederations explain in their communication of July 2012 that Act No. 3/2012 qualified the scope of economic reasons for objective and collective dismissal in stating that “in any case, the drop shall be deemed to be persistent if, over a period of three consecutive quarters, the level of ordinary revenue or sales for each quarter is lower than

that recorded for the same quarter of the previous year.” The two confederations indicate that Royal Decree-Law No. 3/2012 only referred to the level of revenue, without specifying whether or not this was ordinary revenue, and there was no mention of using the corresponding quarter of the previous year as the basis for comparison of the recorded figures. The two confederations point out that only ordinary revenue is taken into account without considering changes in other types of revenue that might correspond to different aspects of the business, such as the lack of extraordinary revenue from the sale of assets, shares or property.

50. Furthermore, Act No. 3/2012 brought in other adjustments to the way of calculating a drop in sales, which, in itself, can be a reason for dismissal. The legislation has not added any element enabling that economic factor to be established as a legitimate reason for dismissal; rather, it reinforces the conclusion that dismissal can be an automatic measure justified by changes in the ordinary revenue figures of the enterprise. Such negative trends, as well as a drop in revenue compared with the corresponding quarter of the previous year, is what is taken into consideration for dismissing the worker, quite apart from the impact that such factors might have on the operation of the enterprise, and without allowing the judicial or administrative bodies to verify whether the dismissal is reasonable, justified and proportionate.
51. The two confederations maintain that although Article 4 of Convention No. 158 provides that no worker may be dismissed “unless there is a valid reason for such termination” which is sufficient and proportionate, Article 8(1) recognizes that a dismissed worker “who considers that his employment has been unjustifiably terminated shall be entitled to appeal” against the dismissal to an impartial body, including a court or labour tribunal. The two confederations consider that the key is to be found in Article 9(1) and (3) of the Convention, which provide that judges “shall be empowered to examine the reasons given” for the dismissal “and the other circumstances relating to the case” and “to determine whether the termination was indeed for these reasons”, on the basis of the operational needs of the enterprise.
52. The two confederations emphasize in their communication of May 2013 that there has been a violation not only of part of Article 4 of Convention No. 158, which provides that a worker shall not be dismissed without any reason or without “a valid reason” which is sufficient and proportionate, but also of Article 9(1) and (3) of the Convention, which ensure judicial review of employers’ decisions to terminate an employment contract by empowering judges “to examine the reasons given for the termination **and the other circumstances relating to the case and to render a decision on whether the termination was justified**” and also to verify whether the dismissal “was indeed for these reasons”, namely, where the reasons related to the operational requirements of the enterprise. The right of workers to effective judicial protection is also violated, since they are deprived in practice of any remedy (Article 8(1)) for reviewing whether the decision to terminate the contract was either reasonable or necessary. In direct connection with that, the right to retain employment and the need for a sufficient reason for terminating it (Article 4) is also violated.
53. In view of the above, the two confederations find that there is a blatant lack of application of Article 9 of the Convention, which categorically provides that a judge must be able to examine the reasons for the dismissal and the other circumstances relating to the case, considering whether the reasons cited are proportionate and sufficient to justify the dismissal, in order “to determine whether the termination was indeed for these reasons” and not for other considerations subject to the discretion of the enterprise. The objective of the new legislation is to enable the judiciary to settle the cases of dismissal submitted to it without considering whether the measure taken by the employer is rational or proportionate.

54. The two confederations refer to the 1995 General Survey, which states that the *raison d'être* of Convention No. 158 is to strengthen guarantees for workers with regard to dismissal, in order to “restrict the employer’s discretionary power to terminate the employment relationship for any reason or without reason”, protecting them against any arbitrary or unjustified decision on the part of the latter by establishing the requirement for the dismissal to be justified. This justification constitutes the cornerstone of the whole Convention and is based on preventing abuse of the legislation by the employer and the wrongful termination of the employment relationship, so that where the termination of employment “is not objectively reasonable”, it is deemed to be an abuse of the right to terminate employment.<sup>6</sup>
55. According to the two confederations, the new wording of section 54(1) of the Workers’ Statute violates the right to effective judicial protection since workers are deprived in practice of any legal remedy, contrary to Article 8(1) of the Convention, which provides for verifying the reasonableness or necessity of the decision to terminate the contract. Moreover, in the same way, there is a violation of the right to retain employment and the need for sufficient reason to terminate it, as required by Article 4.
56. In the communication of May 2013, the two confederations indicate that the flagrant violation of international standards, and of constitutional standards in the sphere of national law, which is a feature of the 2012 labour reform, has given rise to criticism in the area of legal doctrine. The two confederations point out that judicial decisions were adopted which consider the need for a strongly corrective interpretation of the scope of the 2012 labour reform, to the extent of continuing to prescribe that the termination must be reasonable and to require a full judicial review of the reasons for dismissal, including directly applying Convention No. 158. However, the Supreme Court has only ruled on one case of collective dismissal in relation to the new legislation – the Supreme Court ruling of 20 March 2013 in case No. 81/2012 – and has merely emphasized the need to supply sufficient documentation to workers’ representatives during the consultation period.
57. The two confederations also indicate that the Constitutional Court has not issued any ruling on the 2012 labour reform but a number of pleas of unconstitutionality are pending which, precisely, denounce the failure to meet the requirements of a valid reason and judicial review for collective dismissals, incorporating the principles established by the ILO.

***Abolition of accrued wages relating to dismissal proceedings (salarios de tramitación) in cases where the employer opts for termination of the contract further to a ruling of unfair dismissal***

58. In the representation of May 2012, the two confederations indicated that Royal Decree-Law No. 3/2012 changed the wording of section 56(1) and (2) of the Workers’ Statute, amending the regulations governing accrued wages relating to proceedings resulting in a ruling of unfair dismissal where the enterprise opted for reinstatement of the worker. Accrued wages relating to dismissal proceedings (*salarios de tramitación*) (hereinafter: accrued wages) are wages which, under the terms of the Workers’ Statute, must be paid from the date of notification of dismissal until the date of notification of the ruling of unfair dismissal.
59. The two confederations recall that section 56 of the Workers’ Statute provided that if a dismissal was found to be unfair, the employer had the choice between reinstating the worker or terminating the contract with payment of compensation equivalent to 33 days’

<sup>6</sup> ILO: *Protection against unjustified dismissal*, op. cit., para. 83.

wages per year of service. The new regulations state that if the employer opts for termination of the contract with compensation, he is not obliged to pay accrued wages but is obliged to do so if he opts for reinstatement. Consequently, a worker who has been unfairly dismissed retains the right to payment of outstanding wages for the period from notification of the dismissal to notification of the ruling only if the employer opts for reinstatement. According to section 56(4) of the Workers' Statute, the abovementioned provision does not apply to workers' representatives, who retain the right to payment of accrued wages regardless of whether reinstatement or termination of the contact with compensation is the chosen option further to a ruling of unfair dismissal; here, the option lies with the workers' representative, not with the employer.

- 60.** The two confederations recall that the Constitutional Court, in ruling No. 84/2008 of 20 October 2008, already objected to the abolition of accrued wages when it examined the situation arising from Royal Decree-Law No. 5/2002 of 24 May 2002 establishing urgent measures for reform of the system of protection against unemployment and the improvement of employability, and found that there was a violation of the right to effective judicial protection, as follows:

The fact that the form of the employer's right of option further to a judicial ruling of unfair dismissal can, according to various circumstances, make the choice of one of its terms more or less attractive or the fact that in such a choice one consideration may carry more weight than another are all issues that affect the material regulation of the effects of unfair dismissal but in no way limit the scope of judicial protection.

- 61.** According to the two confederations, the abolition of accrued wages maintained by Act No. 3/2012 signifies non-compliance with Article 4 of Convention No. 158 since the employer's right of option – in cases involving the abolition of accrued wages in connection with the option for termination and not involving any workers' representatives – implies a violation of the right to work and the consequent right not to be dismissed without a valid reason. With the abolition of accrued wages the worker is deprived of real and effective protection against unlawful or unjustified dismissals which are not covered by the adequate compensation prescribed by Article 10 of the Convention. Furthermore, a mechanism is established which often makes reinstatement of the worker more burdensome than the option for compensation, as is the case with workers having limited seniority in the enterprise.
- 62.** In the communication of July 2012, the two confederations stress that the amendments introduced by Act No. 3/2012 serve only to replace the reference to payment of compensation with the option of payment of compensation when the dismissal has been declared unfair by the court, as a result of which termination of the employment contract will depend simply on the employer's decision, even if no compensation has actually been paid to the worker and even if the dismissal is unjustified or no procedures have been followed. The two confederations emphasize that, in this way, termination can occur simply because the employer indicates willingness to pay compensation that is sufficient to end the contract, and this constitutes a complete departure from the general principles of recruitment in preventing an unfairly dismissed worker from receiving compensation owed to him before the termination takes effect.
- 63.** The two confederations indicate that this simple indication of the employer's wish also deprives the worker of his wages or of adequate compensation prior to dismissal since throughout the judicial proceedings relating to the dismissal, notwithstanding any ruling of unlawful action on the part of the employer, Act No. 3/2012 relieves the employer of the obligation to compensate the worker for the loss of wages that have accrued during the proceedings or to offer any other appropriate relief.

- 64.** The abolition of accrued wages creates an irrational and arbitrary financial incentive in favour of dismissal and against stability of employment, in direct opposition to the right to work. The abolition of accrued wages cannot be an impartial measure but one that openly stimulates and promotes the option of terminating employment. The two confederations consider that the measure openly conflicts with the scope and meaning of Convention No. 158 and the explanations given by the Committee of Experts in the 1995 General Survey: “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” because they “guarantee job security” should workers be unfairly dismissed.<sup>7</sup>
- 65.** The two confederations indicate that the abolition of accrued wages has an adverse impact in the case of employment contracts involving limited previous service, namely less than one year and nine months of work. In such situations, the amount of accrued wages payable by the employer, for an average period of 60 days, entails an amount higher than the compensation for termination of the contract, calculated on the basis of the 33 days fixed by the new regulations. If the dismissal proceedings are shorter, the difference is smaller; if they are longer, the effect is the opposite: the difference is greater. At all events, the option of dismissal without a valid reason or without observance of the legal procedure is more economically advantageous for the employer than reinstating the worker in his post. This legal effect can be exclusively ascribed to the new regulations, which deprive unfairly dismissed workers of accrued wages and relieve the employer of the obligation to make up the shortfall should he opt to terminate the employment.
- 66.** The two confederations stress that Convention No. 158 must ensure “adequate” compensation in the event of unjustified dismissal – and therefore workers’ right to accrued wages must be recognized if the enterprise opts for reinstatement. In this scenario, the worker does not receive severance pay because the employment is not actually terminated but is maintained. At all events, redress for a dismissed worker does not have to be solely in the form of payment of compensation since such compensation does not include any provision relating to the duration of the dismissal proceedings, while in the case of a reinstated worker accrued wages are paid. Hence it is clear that compensation to the worker does not include reparation for lack of occupation up to the date of the ruling or up to the actual termination of the contract with the payment of severance pay.
- 67.** The two confederations indicate that in cases where the enterprise opts for termination of the worker’s employment, the procedures for compensating the worker for the waiting period until settlement of the case have been modified. Accrued wages are no longer a structural element of the employment relationship but have become another component left to the discretion of the employer, who will use it according to his subjective interests. In order to ensure compliance with Article 10 of Convention No. 158, which expressly provides that in the event of dismissal without a valid reason judges “shall be empowered to order payment of adequate compensation”, workers must be afforded protection in the event of any judicial delay in the settlement of the proceedings relating to unfair dismissal.
- 68.** The two confederations underline the fact that in the current situation the worker is completely unprotected for the duration of the dismissal proceedings if he has not been contributing to, or does not meet the legal requirements for access to, the unemployment protection system. During the period for which accrued wages are payable, the worker has not been released from the employment relationship since, firstly, termination takes effect only after payment of compensation (section 56(1) of the Workers’ Statute) and, secondly, reinstatement agreed by the enterprise presupposes that the worker is obliged to resume his

<sup>7</sup> ILO: *Protection against unjustified dismissal*, op. cit., paras 219 and 221.

work. The abolition of accrued wages entails not only the loss of compensation but also of unemployment benefits at a time when the worker's capacity for taking up another productive activity, either through wage employment or through other means, is limited. Despite the precariousness of the situation, the 2012 labour reform has got rid of any compensation for the worker during the dismissal proceedings, at which time, if he does not qualify for unemployment protection or other social benefits, he finds himself completely unprotected.

69. The two confederations indicate that for temporary workers the impact of the reduction in the amount of compensation will be even worse, since many of them have only a limited period of service to be taken into account for compensation and will wonder whether they have any possibility of contesting their dismissal.
70. The two confederations point out that Article 10 of Convention No. 158 favours reinstatement of the worker when the dismissal is unfair and without sufficient reason and provides that, if reinstatement is not possible, it must be the court or similar body that determines what compensation is adequate and orders payment thereof to the unfairly dismissed worker. Under the terms of Article 10 of the Convention, the decision regarding what compensation is adequate must belong exclusively to the court, not to the employer.
71. In their communication of May 2013 the two confederations recall that the Supreme Court has been reiterating that accrued wages "are a sum of money designed to make up for the worker's lack of income during proceedings culminating in a declaration that his dismissal is unfair or null and void" (all references are to the Supreme Court ruling of 1 March 2004 in case No. 008/4846/2002). In the case of an "unlawful dismissal", the Spanish legal system specifies the different forms of redress for the worker. Loss of a job in the case of an unlawful dismissal with no reinstatement is subject to compensation to be agreed upon by the employer. In Spain, if the dismissal is declared to be unfair, the employer has the option of reinstating the worker or compensating him for the loss of his job. If the dismissed worker is a workers' representative, it is the worker who has that option. Lastly, for dismissals that have been declared null and void, that option does not apply and the worker must be reinstated.
72. The two confederations indicate that for the dismissal to be declared "unlawful", the worker must contest it in the courts, instituting the corresponding proceedings, irrespective of any final court ruling that the dismissal is null and void or unfair, or of the option for reinstatement or compensation. It is a tradition in Spanish law that if the dismissal proves to be "unlawful", "adequate" redress for the illicit termination entails payment by the employer of the accrued wages, that is, of an amount equivalent to the wages that were unpaid during the dismissal proceedings.
73. The two confederations emphasize that the compensatory nature of accrued wages is reflected in section 56(2) of the Workers' Statute, where it states that any wages received by the worker in other employment during the dismissal proceedings may be deducted from the total amount. The ruling of 12 March 2013 of the Fourth Division of the Supreme Court summarizes its repeated doctrine as follows:

... if the worker has provided services for another enterprise during the dismissal proceedings, any remuneration received for this new work must be deducted from the amount of accrued wages in question; this is echoed by the Supreme Court rulings of 29 January 1987 and 27 February, 30 April and 11 May 1990. **Thus, in accordance with this doctrine, the concept of accrued wages is clearly of a compensatory nature since the objective, in cases of both null and void and unfair dismissals, is to compensate the worker for one of the forms of damage resulting from the dismissal, namely the lack of remuneration from the date of dismissal until the end of the dismissal proceedings;** consequently, if the worker concerned has worked for another enterprise for all or part of this time and has received the

corresponding remuneration, it is obvious that, as regards the amount of the latter, no damage has occurred; and if there is no damage, there can be no redress. Hence the *ratio legis*, the very basis of the obligation to pay the accrued wages, disappears in such cases; and with the disappearance of its basis, this obligation cannot exist, at least with regard to equivalence of amounts.

74. The two confederations indicate that the 2012 labour reform, in depriving workers of economic reward when the employer opts for compensation rather than reinstatement, violates the principles of Convention No. 158 since in these cases the decision depends exclusively on the employer. In relation to the same facts, the same circumstances, the same legislation applicable in deciding whether or not the dismissal is lawful, and an identical ruling, that of unfair dismissal, it is the employer who determines through his choice what compensation is payable to the worker. The two confederations recall that they already expressed the view that, under the terms of Article 10 of Convention No. 158, it is not for the employer to make that decision. If the employer chooses not to renew the employment contract in a case of unlawful dismissal, the regulations against which the present representation is being brought deprive the worker of “redress” for the duration of the dismissal proceedings.
75. The two confederations indicate that what is to be understood by “adequate compensation or such other relief as may be deemed appropriate”, in the terms of Convention No. 158 regarding unlawful dismissals, is naturally open to discussion, but for a definition to be appropriate, it must certainly relate to the circumstances of each labour market. The trend in Spanish law in recent years and in particular following the 2012 labour reform has been to facilitate the dismissal of workers and substantially reduce the cost of the corresponding compensation. However, the situation of the Spanish labour market, with an unemployment rate that stood at about 8.5 per cent in 2007 but rose to 27.2 per cent by 2013 and continues to rise, does not justify a reduction in relief when the loss of a job entails great upheaval for the worker in the current context, especially when the reforms of recent years have also had a severe impact on social protection against unemployment and on allowances.
76. The two confederations recognize that compensation or redress in relation to the “processing” of the dismissal continues to exist and is considered appropriate in law when the employer opts for reinstatement. Since compensation for dismissal in Spain comprises two aspects and there is redress for the worker for the time it takes to process the dismissal case and not for the value of the lost job, compensation for dismissal which eliminates one of the elements of compensation without the other element being increased in these cases cannot be “adequate”. On the contrary, the 2012 labour reform has resulted in compensation for unfair dismissal being fixed at 33 days’ wages per year of service instead of the previous 45 days’ wages per year of service. The situations in which the legislator has eliminated this aspect of redress for unlawful dismissal are identical to the cases in which it does apply. With regard to the worker and with regard to the response of the legal system to the employer’s conduct, the situations are identical: the dismissal is unfair. What makes the difference between the situations, with the result that the worker will obtain compensation in the form of accrued wages in one case but not in another, is the mere wish of the employer, expressed once his decision to terminate has been declared unlawful; this is also incompatible with Article 10 of Convention No. 158.
77. Lastly, the two confederations indicate that the abolition of accrued wages in cases where compensation is paid is undoubtedly an effective way of ensuring that the employer prefers this option over reinstatement since it entails significantly lower costs for the employer to the detriment of the interests of the workers – who, apart from the direct economic damage, will suffer other collateral effects such as lack of social security contributions and the consequent erosion of protection.

- 78.** The two confederations consider that the legal decision to limit accrued wages solely to cases involving reinstatement encourages the employer to opt for the solution that entails less observance of labour law and the principle of employment stability. The situation concerned does not reflect the preference for reinstatement expressed in Article 10 of Convention No. 158, which states as follows: “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.”

### ***Dismissal for absenteeism***

- 79.** In their representation of May 2012, the two confederations claim that the new wording of section 52(d) of the Workers’ Statute, which regulates termination of a contract for objective reasons, introduces the concept of dismissal for absenteeism, which is contrary to Article 6(1) of Convention No. 158. As a result of the reforms introduced by Act No. 3/2012, the contested provisions of section 52(d) of the Workers’ Statute read as follows:

Section 52. Termination of the contract for objective reasons. The contract may be terminated on the following grounds:

...

- (d) Intermittent absences from work, even if justified, which total 20 per cent of working days in two consecutive months, provided that the total absences in the previous 12 months account for 5 per cent of working days, or 25 per cent of working days in four non-consecutive months within a 12-month period.

For the purposes of the previous paragraph, absences for the reasons listed below shall not be counted as absences from work: a legal strike and its duration; activities concerning the legal representation of workers; occupational accidents; maternity; risks during pregnancy and nursing (breastfeeding); illnesses resulting from pregnancy, childbirth or nursing (breastfeeding); paternity; leave or holidays; illness or non-occupational accident where sick leave has been certified by the official health authorities and exceeds 20 consecutive days; absences resulting from the physical or psychological effects of gender-based violence which has been certified by the social welfare or health authorities, as the case may be.

In addition, for the purposes described in the first paragraph above, absences resulting from medical treatment for cancer or a serious disease or illness will not be counted as absences from work.

- 80.** The two confederations indicate that what has changed in the new rules is that individual absences of short duration, even those on grounds of illness or accident, have been identified as a valid reason for the unilateral termination of employment at the wish of the employer and in the exclusive interest of the enterprise. The worker’s absence on grounds of illness has become a valid reason for dismissal.
- 81.** The two confederations maintain that there are two main changes in section 52(d) of the Workers’ Statute regarding the calculation of absences. Firstly, as regards absences that total 20 per cent of working days in two consecutive months, there is a new requirement: that “total absences in the previous 12 months account for 5 per cent of working days”. In applying this criterion to the calculation of absences, account is taken not only of absences during two consecutive months (20 per cent) but also of absences during the previous 12 months (5 per cent). This reference to the previous year does not apply if the dismissal is justified according to the 25 per cent criterion for absences in four non-consecutive months within a 12-month period.

- 82.** Secondly, the two confederations indicate that specific scenarios were established in which absences related to temporary incapacity are not counted, such as absences “resulting from medical treatment for cancer or a serious disease or illness”. Hence, beside occupational risks that are never calculated, absences arising from non-occupational ailments are excluded from the calculation of absenteeism according to the following terms: (a) if the worker is absent in order to receive medical treatment, without requiring the worker to take official sick leave, since it is sufficient that he/she has to receive medical care in connection with a serious disease or illness. The above poses the problem of absences from work that are not for actual medical treatment but stem from limitations arising from the medical condition. According to the two confederations, Act No. 3/2012 provides for days of medical treatment but not for mere absence resulting from the worker’s physical or psychological limitations; (b) as regards the classification of illnesses provided for in Act No. 3/2012, it is not any type of ailment that is admitted but only cancer or a serious disease or illness. The foregoing poses a problem in that a serious deterioration to health is not sufficient; such deterioration must also originate from an illness, which excludes cases deriving from non-occupational accidents. This is an unreasonable situation.
- 83.** Furthermore, the two confederations indicate that new difficulties arise when attempts are made to define “serious diseases or illnesses”, which makes it necessary to exclude pathologies that have a limited impact on health but does not make it possible to identify the point when a condition has become serious enough to be excluded from the calculation of absenteeism. The seriousness of the illness should be assessed in terms of both the condition itself and its expected evolution further to the corresponding medical care. Logically, the seriousness should be assessed when the results of the medical care are known, without any obligation imposed by the new regulations to weigh up the need for medical treatment. With regard to cancer, Act No. 3/2012 has made the assessment of seriousness automatic for all cases, in such a way that, once it has been diagnosed, all duly justified absences, including logically those that predate the diagnosis but have led up to it, are excluded from the calculation.
- 84.** The two confederations express their concern at the situation created by the labour reform in limiting the worker’s right to privacy inasmuch as the enterprise has to be informed of the diagnosis of the worker’s condition, including any reference to cancer or another serious disease or illness.
- 85.** The two confederations recall that the 1944 Declaration of Philadelphia states that “labour is not a commodity” and that “the war against want” translates into “the solemn obligation” to further the extension of “social security measures” and provide “adequate protection for the life and health of workers in all occupations”. Moreover, the preamble to the ILO Constitution denounces conditions of work that entail “injustice, hardship and privation” for large numbers of workers, and expressly includes in the objectives of the Organization the urgent improvement of such conditions, with specific mention of “protection of the worker against sickness, disease and injury arising out of his employment”.
- 86.** The two confederations indicate that Article 6 of Convention No. 158 imposes a binding obligation on ratifying countries to ensure protection for workers against sickness, not only providing them with medical assistance and social protection during absences from work but also protecting them from any arbitrariness on the part of the employer who, in view of the potential reduction in usefulness of a worker who is absent owing to illness or a non-occupational accident, may take the decision out of pure economic interest to dispense with the worker by means of dismissal.
- 87.** According to the two confederations, the Committee of Experts shared this concern in explaining that the purpose of Article 6 of the Convention is “to protect a worker's

employment at a time when, for reasons of force majeure, he is unable to carry out his obligations.”<sup>8</sup> Convention No. 158 does not define the concept of temporary absence but states that the duration of a temporary absence from work because of illness must be reasonable and be substantiated by a medical certificate, since this “should be compatible with the aim of the Article”,<sup>9</sup> namely the protection of employment and of the sick worker. In certain countries, temporary absence for illness varies from several months to several years, though many countries have adopted a period of six months. Temporary absence generally results in suspension of the employment contract for a specified period, with benefits maintained by the employer or the social security scheme, either wholly or partially in the case of the latter, and termination of the employment relationship during this period or another specified period is prohibited.

- 88.** The two confederations understand that Article 6(2) of Convention No. 158 allows national law and practice to define the meaning of temporary absence (as opposed to permanent absence), the possible requirement of a medical certificate and the possible limitations to paragraph 1. National law cannot see a temporary absence in terms of authorization to depart totally from the principle of Article 6. National law should merely modify its scope in specified cases, such as when the frequency of the absences points to the incapacity of the worker. Spanish law previously regulated the impact of specific absences from work exceeding six months and 18 months, but always from the perspective of incapacity for work.
- 89.** The two confederations emphasize that Royal Decree-Law No. 3/2012 has provided justification for considering illness as a valid reason for dismissal. Under Convention No. 158, the focus should have been on the illness of the worker, not on the burden for the enterprise or on the incapacity of the worker, for which dismissal is justified. The two confederations refuse to accept that the length of the absence – nine days in two months on average – constitutes an economic imbalance for the employer, with no consideration given to any fault on the part of the worker, his seniority or past career. It is incompatible with the values and principles of the Organization and the provisions of Article 6 of Convention No. 158 that, as a result of the reform introduced by Act No. 3/2012, it is possible to justify dismissal simply and solely on the grounds of the worker’s illness.
- 90.** In their communication of May 2013, the two confederations again denounce the amendment made by the 2012 labour reform to section 52(d) of the Workers’ Statute, which has resulted in dissociation of individual worker absences from general absenteeism in the enterprise. Under the previous wording, the employer could not dismiss the worker for absences, even those that were justified, if the total absence rate for the workforce did not exceed 5 per cent for the same periods of time. This condition linked termination of the individual contract to the negative consequences for the enterprise of a specified level of absenteeism in the workforce, and this was justified by the resulting financial losses. This condition also placed major restrictions on the employer’s capacity to dismiss on the grounds of absenteeism since termination depended not only on the worker’s individual absences but also on this other requirement. With the disappearance of the latter requirement, which is neither secondary nor trivial, the content of this principle changes substantially, to the point that the employer is granted powers that did not previously exist. Hence the possibility of including justified absences for illness in the calculation, including those of less than 20 days certified by the official medical services, now takes on another relevance and must be examined from a different perspective, since this is now being used on its own as a reason for dismissal, which contravenes the terms of Article 6(1) of Convention No. 158.

<sup>8</sup> ILO: *Protection against unjustified dismissal*, op. cit., para. 137.

<sup>9</sup> *ibid.*

**Impact of the 2012 labour reform**

- 91.** In a communication received in May 2013, the two confederations submitted additional information including an evaluation of the impact of the 2012 labour reform more than a year after its introduction by the Government. The two confederations refer to the 2013 National Reform Programme for Spain (PNR-2013) submitted by the Government to the European institutions, which stated, *inter alia*, that monitoring “the degree of application of the regulations and also the evaluation of their impact is essential for establishing whether the reform fulfils its stated objectives”. The Government announced “the drawing up of new monitoring indicators (such as statistics on company opt-outs or improved statistics on agreements), the improvement of employment statistics and the monitoring of case law relating to labour reform, with rectifications at an early stage. Consequently, **monitoring of the reform will continue in 2013 via the established groups and committees and an initial evaluation report on its impact** in the first year of application will be produced, to be published once the data from the Labour Force Survey (EPA) for the first quarter of 2013 have been analysed (CSR 5.1.5). The evaluation report which analyses the impact of the reform on the main labour market indicators, job creation and reduction in the rate of unemployment and temporary work, will be verified by a reputed independent body before July 2013. The report will help to define future action in this area.”
- 92.** The two confederations recall that the stated objectives of the 2012 labour reform were “to establish a clear framework contributing to the effective management of labour relations and facilitating job creation and the employment stability that our country needs”. With a view to achieving the objective of “flexicurity”, the measures adopted by the 2012 labour reform were said to be designed to promote the employability of workers, open-ended contracts and other forms of work, with special emphasis on promoting recruitment by small and medium-sized enterprises (SMEs) and for young people, stimulating internal flexibility in the enterprise as an alternative to shedding jobs, promoting market efficiency in connection with reducing labour duality, with measures mainly affecting the termination of contracts.
- 93.** In order to verify how far these objectives have been achieved, the two confederations present their analysis of the data for the first quarter of 2013 from the EPA (published by the National Institute of Statistics on 25 April 2013). According to the EPA, the number of persons in employment has been falling since the start of the labour reform (in the first quarter of 2012).
- The number of employed persons fell by 5 per cent (800,000 persons) in one year (from the first quarter of 2012 to the first quarter of 2013).
  - According to the EPA, the number of unemployed continues to rise each quarter, with a 10 per cent rise from the beginning of 2012 to the beginning of 2013. This has resulted in record unemployment levels in Spain (more than 27 per cent of the active population).
- 94. With regard to contracts**, considering the statistics relating to all types of contract (except the new CAE contract, which will be discussed in more detail below) published by the State Public Employment Service (SEPE), the two confederations observe that:
- **From March 2012 to March 2013** (compared with the equivalent period one year earlier, March 2011 to March 2012) **recruitment fell by 3.1 per cent**, with a 3.4 per cent drop in initial contracts and a 4.2 per cent drop in temporary contracts (works and services, casual work, interim contracts and work experience). The number of

contracts related to retirement/handover and the number of training contracts increased. Initial open-ended contracts increased by 14.6 per cent.

- Contracts for the promotion of open-ended recruitment *nominally* disappeared with the reform, since in reality all standard contracts of unlimited duration acquired the features of this promotion contract (with less compensation for dismissal). Conversions into open-ended contracts rose by 8.8 per cent, while recruitment of persons with disabilities fell (10.3 per cent for open-ended contracts and 3.9 per cent for temporary contracts).
- No disaggregated data concerning the new CAE contracts have been provided; these appear to have been included among the standard open-ended contracts and so it is not possible to know how many of these are the new type of contract.
- According to the limited information provided, from February to May a total of 30,400 CAE contracts were signed, accounting for 14.1 per cent of standard open-ended contracts (in which category CAEs are included); in August, the accumulated figure was 50,232 contracts (13.9 per cent of standard open-ended contracts); and in December, the figure was 77,260 (12.2 per cent of all open-ended contracts). As can be seen, this percentage decreases as time goes on.
- In 2012, no tax incentives were paid in respect of 82 per cent of these new contracts. The two confederations claim that, for the enterprises signing these contracts, the one-year trial period was more significant than the obligation to maintain the post for three years.
- **The effect of replacing temporary contracts** (work placements, works and services, training, etc.) **with CAEs can be seen in the fall in the number of temporary contracts.** For example, the number of placement contracts fell by 18.4 per cent during the March 2012–March 2013 period, compared with the equivalent period one year earlier.
- On the basis of the limited periodic data relating to **the new CAE contracts** (precise monthly figures are unknown, nor is any information available on those qualifying for discounts or tax incentives), the **two confederations indicate that there has been limited use of CAEs in the period analysed:**
  - They constitute only 0.6 per cent of all signed contracts;
  - They account for 7.6 per cent of all open-ended contracts;
  - They represent 12.2 per cent of standard open-ended contracts (in which category they are included);
  - Over the period, there has been a decrease in the use of this type of contract in conjunction with support measures.
- **Recruitment on temporary contracts** continues to account for some 90 per cent of total recruitment and **stands at 22.1 per cent**, despite jobs losses and the drop in recruitment.

95. The two confederations state that **the labour reform has favoured the use of dismissals when in theory the aim was to favour other forms of flexible working arrangements in the face of the crisis**, such as temporary lay-offs or reduced working hours, which have also increased. In addition to the analysis of employment termination flows, the two confederations affirm that there has been a considerable increase in the seniority of

workers on open-ended contracts who were dismissed in 2012 by comparison with previous years, which is directly related to effecting dismissals more cheaply. While the average seniority of a worker on an open-ended contract who was dismissed in 2009 was 66 months, in 2010 it was 69 months, almost 74 months in 2011, and in the fourth quarter of 2012 the figure stood at nearly 80 months (79.8 months).

**96.** Between January 2012 and February 2013 **there was a 22 per cent increase in the number of files dealing with the regulation of employment (EREs)**, which are now called collective dismissal proceedings. The number of non-agreed files increased by 78 per cent (with a rise from 5 per cent in January 2012 to 7 per cent in February 2012), while agreed files increased by 19 per cent, a clear effect of the reform's abolition of the need for administrative authorization. The number of files communicated since the beginning of the labour reform has increased considerably. In January 2013, **the number of files handled was 32 per cent higher than for the same month in 2012.**

**97.** Taking account of the data on claims for **contributory benefits**,<sup>10</sup> **according to the various grounds for entitlement**, even though the data are incomplete since many of the claims for benefits are related to unemployment subsidies or (non-contributory) care allowances, there has been a visible trend since the introduction of the labour reform. Analysing the data relating to claims for contributory benefits throughout 2012, two phenomena based on the labour reform can be observed: firstly, from February 2012 to February 2013, initial claims for contributory benefits increased in the various categories:

- in cases of voluntary termination: the main reason for this increase was changes to conditions of work and, to a lesser extent, geographical mobility;
- in cases of objective dismissal;
- in cases of fair collective dismissals, mainly related to reduced working hours.

The biggest increases are found in voluntary terminations (77 per cent), EREs or collective dismissals (62.2 per cent) and dismissals for objective reasons (49.2 per cent). In addition, for **individual dismissals**, there is an increase in conciliations involving compromise, which reflects workers' hesitation with regard to initiating court proceedings in the face of regulations that facilitate adoption of the employer's decision.

**98.** The two confederations highlight the number of **labour disputes** revealed by the data published by the Ministry of Employment and Social Security: 2012 saw a **significant increase in disputes in the form of strikes**, in the number of disputes (almost 13 per cent more than in 2011) and in their impact in labour and financial terms (49.5 per cent more participants and 16.6 per cent more days not worked). There was also a 43 per cent increase, by comparison with 2011, in the number of disputes submitted by the parties to autonomous settlement proceedings, which are mechanisms based on collective autonomy, handled by the Inter-Confederation Mediation and Arbitration Service (SIMA).

**99.** The two confederations indicate that there was a 5 per cent increase in 2012, compared with the previous year, in actions undertaken by the **Labour and Social Security Inspectorate**, according to data supplied by the latter.

<sup>10</sup> This State Public Employment Service (SEPE) information is based on information supplied by workers entitled to unemployment benefit who, when submitting claims for payment, are asked the reason for their dismissal. Although this does not enable precise measurement of levels of dismissal, since not every worker whose contract is terminated is entitled to this benefit, it does reflect trends and the extent to which each means of contract termination is used.

- 100.** The two confederations also indicate that the volume of **cases processed by labour courts and tribunals** increased by 6 per cent in 2012 compared with 2011. These figures are higher than those of 2009, the year which had shown the biggest increase hitherto. Individual disputes increased by 5 per cent by comparison with 2011 and those relating to dismissals increased by 10 per cent.
- 101.** The two confederations refer to rulings that deal with a number of relevant aspects of the 2012 labour reform.<sup>11</sup> Initial judicial rulings on collective dismissals have been **declaring dismissals to be null and void mainly because of the employer's failure to comply** with the consultation procedure that must be held with representatives of the workers (no doubt such a flexible regulation of dismissal by the labour reform fostered the belief among many Spanish employers that it was not even necessary to complete the legal formalities). There have also been various rulings in which the alleged grounds were considered to be present (economic, technical, organizational or production-related) and the dismissal was declared lawful, given the utmost scope for discretionary decisions established by the labour reform in this area to the detriment of the workers. It is in opposition to the above situation that this representation for violation of Convention No. 158 has been brought.
- 102. To sum up, the two confederations argue that the labour reform has neither created employment nor succeeded in curbing job losses. What it has done is to increase unemployment, facilitate individual and collective dismissals, worsen conditions of work for all employees, and increase labour disputes and the trend towards legal action in labour relations.**<sup>12</sup>

### ***Pleas of unconstitutionality***

- 103.** In its communication of May 2013, the two confederations point out that the plea of unconstitutionality submitted by the Socialist and "Plural Left" groups in Parliament against specific aspects of the labour reform, including those covered by this representation, is pending, having been received by the Constitutional Court.
- 104.** The two confederations stated in their communications of May 2013 and 2014 that the Constitutional Court will take several years to rule on these appeals and insist on obtaining a pronouncement from the International Labour Organization that would make it possible to verify that the regulations currently in force do not duly fulfil the international commitments entered into by Spain.

### ***The Government's observations***

#### Context of the 2012 labour reform

- 105.** In its communication of December 2012, the Government stated that the unprecedented economic and financial crisis that Spain has been experiencing since 2008 has highlighted the weaknesses in labour market institutions. Data from the Labour Force Survey (EPA) at the date of adoption of Royal Decree-Law No. 3/2012 indicated that the total number of

<sup>11</sup> Rulings of the Labour Division of the National High Court and of the High Courts of Justice of various Autonomous Communities, as well as the recent Supreme Court ruling of 13 March 2013, which upheld the ruling of 30 May 2012 of the High Court of Justice in Madrid.

<sup>12</sup> The Economic and Social Council of the State of the Kingdom of Spain, at its plenary session of 29 May 2013, approved the Socio-Economic and Labour Report for Spain for 2012. The information incorporated in the present claims can be confirmed through data from Chapter II of that report, which covers the labour market, employment policies and labour relations.

unemployed persons stood at 5,273,600, with an increase of 295,300 in the fourth quarter of 2011 and of 577,000 in relation to the fourth quarter of 2010. In the same period the unemployment rate rose by 1.33 points compared to the third quarter, reaching the figure of 22.85 per cent.

- 106.** The Government indicated that more than 3.2 million jobs had been lost since the start of the crisis and almost 100,000 jobs had been lost each month in the last quarter of 2011. At the end of 2011, the landmark figure was reached of more than 1.5 million families all of whose members were unemployed. From the first quarter of 2008 to the last quarter of 2011 a total of 11 per cent of jobs were lost in Spain, compared with 2.5 per cent for the whole euro zone. The crisis had a profound impact on all the countries of Europe but in Spain more jobs were lost over a shorter period of time than in the leading European economies.
- 107.** The Government explains that the crisis experienced by Spain has highlighted the highly seasonal characteristics of employment in relation to the economic cycle, an unusual situation in the context of developed countries. Since the start of the crisis, and unlike what happened in other European countries, Spanish enterprises effected dismissals in most cases rather than making greater use of internal flexibility measures. Opting for dismissal is neither fortuitous nor arbitrary but is a response to the weaknesses of the labour market in Spain, which is hampered not only by a high rate of temporary contracts – with less investment in training and more possibilities for the worker to be dismissed – but also by a legal framework which has not done enough to promote mechanisms for internal flexibility and collective bargaining that would give enterprises more scope for adjusting conditions of work in the light of changes occurring in the economic and productive sphere. The labour market is characterized by acute duality: on the one hand, many workers have an open-ended employment contract, generally with wage increases agreed upon in collective bargaining that may be higher than productivity and inflation and include substantial protection against dismissal; on the other hand, there is a large group of workers on temporary contracts who do not enjoy the same protection against dismissal and who constitute the main adjustment mechanism for enterprises.
- 108.** The Government indicates that the previous situation was manifestly negative in terms of fairness and had given rise to a particularly serious deterioration in the youth employment market. It was no coincidence that 27 per cent of jobs lost in year-on-year terms in the fourth quarter of 2011 corresponded to workers under 25 years of age, and the figure was more than 50 per cent if workers up to 29 years of age were included. More than 82.3 per cent of young workers are on temporary contracts, whether they like it or not. The first workers dismissed are those on temporary contracts and, more than likely, young workers are the first to be dismissed among workers on open-ended contracts. According to the Government, this situation is unrelated to possibly lower productivity on the part of young workers but is simply because the latter are the last to be hired and dismissing them therefore costs the enterprise less in terms of compensation. The duality is so pronounced that the enterprise prefers to dismiss workers who cost less in terms of compensation than those who are less productive. As a result, by the end of 2011 virtually one in every two young jobseekers was unable to find work.
- 109.** The Government indicates that the 2012 labour reform seeks solely to create suitable conditions to enable a rapid improvement in the situation described above. The first objective of the labour reform is to bring greater internal flexibility into enterprises so that when they undergo changes or experience difficulties they are able to adapt to the new conditions, with the objective of maintaining employment rather than having recourse to dismissals. The other objective is to lay the foundations for overcoming the traditional duality of the labour market, with a clear focus on open-ended contracts.

- 110.** The Government states that the labour reform received a positive evaluation from the international organizations and refers in this respect to an International Monetary Fund report on Spain dated 27 July 2012, which included the following passage:

On labour market policy, a profound labour reform was introduced in February with measures to reduce labour market duality (by lowering the dismissal costs of permanent workers for unfair dismissals) and wage rigidity and to increase firms' internal inflexibility (by giving priority to firm-level agreements over wider collective agreements).

Directors underlined the urgency of additional progress in boosting competitiveness and jobs, given the high level of unemployment in particular among the youth. They welcomed the recent labour market measures, aimed at reducing market duality and wage rigidity, and increasing firms' internal flexibility. These efforts should be complemented with further steps to improve the product and service markets, and the business environment. More broadly, Directors encouraged a rapid implementation of the Government's organizational reform agenda.

- 111.** The Government also referred to draft conclusions for the OECD Economic Survey of Spain, which stated that the 2012 labour reform had made considerable progress with regard to clarification of the grounds for dismissal, reduction in compensation for dismissal, and the greater capacity of enterprises to adapt wages and working hours to the changes in the economic climate.

***Fixing a one-year trial period as part of the new  
“open-ended entrepreneur-support contract” (CAE)***

- 112.** In the observations sent in December 2012, the Government indicates that Article 2 of Convention No. 158 contains provisions that permit adjustments or exceptions in specific cases to the reasons for termination of contracts. The Government refers to the full text of section 4 of Act No. 3/2012 establishing the “open-ended entrepreneur-support contract” (CAE).<sup>13</sup>
- 113.** The Government also emphasizes that the ninth transitional provision of Act No. 3/2012 establishes that the new type of contract will be maintained “until the unemployment rate in our country is below 15 per cent”, which it considers to be fundamental when examining whether the CAE contract is fully in line with Convention No. 158. In its communication of August 2013, the Government underlines the transitional character of the new type of contract.
- 114.** The Government argues that the relative importance of the decisions of the Supreme Court referred to by the two confederations should be qualified. The Government recognizes that the Supreme Court described clauses in collective agreements that included trial periods of two years and one year as unreasonable and therefore null and void. However, the legal doctrine established in the rulings of 12 November 2007 and 20 July 2011 by the ordinary courts cannot be made to appear more substantial than it really is. According to the Government, the two rulings provide a limited view of the purpose of the trial period, whose usefulness would be restricted to “enabling reciprocal acquaintance of the parties to the contract in such a way that the employer can evaluate the abilities of the worker and the desirability of maintaining the employment contract”. The Government maintains that the trial period in the CAE fulfils more extensive functions.
- 115.** Accordingly, the Government indicates that Convention No. 158 covers the possibilities of exceptions to the obligation of a valid reason for dismissal, specifically including the

<sup>13</sup> The text of section 4 of Act No. 3/2012 is reproduced in the appendix to the present document.

scenario of workers undergoing a trial period, though the trial period must fulfil the requirements of Article 2(2)(b), namely that it is determined in advance and of reasonable duration. In its communications of December 2012 and August 2013 the Government emphasizes that **Convention No. 158 does not define the concept of “reasonable duration”** applicable to the trial period for workers, **so it is for each country to determine the periods that are considered reasonable**, provided that this is done in good faith.

**116.** The Government refers to the decision of the ILO Governing Body when adopting the report of the tripartite committee responsible for examining the representation submitted by a French trade union confederation alleging non-observance of Article 2(b) of Convention No. 158 in relation to the establishment in France in August 2005 of the “new employment contract” (*contrat nouvelle embauche* – CNE). The Government recalls that the defining feature of the CNE contract was that for the first two years it could be terminated by either party, without any justification required or any dismissal formalities to be completed. On that occasion the French Government argued that the two-year period was a specific period of employment consolidation, aimed at enabling the employer “to measure the economic viability and development prospects of their enterprise”.<sup>14</sup>

**117.** The Government refers in its communications to paragraph 71 of the report of the tripartite committee, which contains the following conclusion:

... the underlying policy considerations referred to above, as well as measures taken to counterbalance the exclusion from protection or to limit the scope of the exclusion, could help to justify a relatively long period of exclusion. However, the main concern should be to ensure that the duration of the period of exclusion from the benefits of the Convention is limited to what can reasonably be considered as necessary in the light of the purposes for which this qualifying period was established, namely “in particular, [to enable] employers to measure the economic viability and development prospects of their enterprise” and to enable the workers concerned to acquire skills or experience. The Committee notes that the length that is normally considered reasonable in France for qualifying periods of employment does not exceed six months. The Committee would not exclude the possibility that a longer period might be justified to enable employers to measure economic viability and development, but finds itself unable to conclude, from the considerations which were apparently taken into account by the Government in determining the duration, that a period as long as two years was reasonable (emphasis added by the Government of Spain).

**118.** The Government observes and underlines the importance of the tripartite committee’s reasoning since, as it understands it, this conclusion does not reject outright the fixing of a trial period longer than six months but indicates that the validity thereof would depend on sufficient justification that would make its duration reasonable. The Government considers that the tripartite committee acknowledged not only that a reasonable trial period is one that establishes a certain duration but that its reasonableness is also connected with policy considerations and the other features of the contract type which is under challenge, and this can justify relatively long trial periods.

**119.** Moreover, in its communication of August 2013, the Government considers that account must be taken of the fact that the reasonableness of the duration of the trial period must be seen in the light of the objectives of this period of “exchange of labour”, so that the worker not only has his abilities tested but is also given the opportunity to acquire occupational skills and experience. The trial period also has to enable the employer to measure the economic viability and development prospects of the enterprise. All these objectives have to be located within a specific economic, employment and structural context.

<sup>14</sup> Para. 71 of GB.300/20/6, Nov. 2007.

120. The Government accepts that there may be some perplexity, as also indicated by ruling No. 1210 of 1 July 2008 of the Labour Division of the French Court of Cassation, regarding the fact that national law seeks to promote employment by giving incentives for contract termination without reason and without monetary compensation. However, the Government emphasizes the flexibility in the application of Article 2(b) of Convention No. 58, as seen in the following extract from the final report of the tripartite meeting of experts to examine the Termination of Employment Convention, 1982 (No. 158), and the Termination of Employment Recommendation, 1982 (No. 166), which was adopted by the Government experts and Worker experts:<sup>15</sup>
- Convention No. 158 provides a basis on which workers are to be afforded protection in the event of termination at the initiative of the employer and is able to be implemented by member States through a range of mechanisms including collective agreements, arbitration awards or court decisions, or in such other manner as may be consistent with national practice, as well as laws and regulations;
  - the Convention contains a number of flexibility clauses and also provides for flexibility in its implementation, including through:
    - (a) exclusion from some or all provisions of the Convention for certain categories of employees either at any time (Article 2(2)) or as listed in the first report, due two years after ratification (Article 2(4) and (5)) ...
121. The Government indicates that even though Article 2(2)(b) of the Convention requires the period of probation to be of “reasonable duration”, an indeterminate legal concept must be made more specific through national law, on the understanding that it must be the national courts that determine in each specific instance whether or not there has been a violation of the Convention in terms of reasonableness.
122. The Government maintains that the CAE contract is fully in line with the Convention on the basis of three criteria. First, **under the CAE, the trial period not only seeks to assess the suitability of the worker for the job but also verifies whether the creation and maintenance thereof is viable**. In the preamble to Act No. 3/2012, reference is made to measures to promote open-ended contracts for persons who are particularly affected by the adverse impact of the economic crisis: namely, unemployed young persons and – in so far as it is relevant here – small and medium-sized enterprises (SMEs). CAE contracts can only be used by enterprises with fewer than 50 workers, and it is these which are hardest hit by the effects of the crisis. The legislator’s intention was affirmed in the preamble to Act No. 3/2012 in stating that it was these enterprises which, despite the economic crisis, are pursuing the creation of employment. The term “pursuing” is clearly linked to the second objective of the trial period, namely to establish the viability of creating and maintaining the job in question.
123. The Government affirms that the aim of the 2012 labour reform is to promote recruitment, which explains why the trial period has a wider purpose than that traditionally assigned to it. In the case of the CAE, the objective of the trial period is not only to ensure mutual acquaintance for both parties but also to verify that the job is economically sustainable and can be maintained over a period of time, giving the employer a reasonable period to confirm his expectations and ultimately facilitating the recruitment of workers for an indefinite period. In its communication of August 2013 the Government stresses that the above makes more sense when the measure is seen in conjunction with the ninth transitional provision of Act No. 3/2012, which establishes its transitory quality, linking the CAE to the situation of the labour market and, by extension, of the economy in general.

<sup>15</sup> Para. 127 of TMEE/C.158-R.166/2011/2, Final report, Tripartite Meeting of Experts to Examine the Termination of Employment Convention, 1982 (No. 158), and the Termination of Employment Recommendation, 1982 (No. 166), Geneva, 18–21 April 2011.

124. Secondly, the Government stresses the significant difference between the CAE contract and the French CNE contract. To avoid running together the Spanish CAE and the French CNE, the Government points out that instead of the two years laid down in the CNE, section 4(3) of Act No. 3/2012 establishes a one-year trial period. Spanish legislation has opted for a “relatively long” rather than an “excessively long” trial period. The one-year trial period is much closer to the six-month period normally considered reasonable in France than to the two-year period under the CNE, which the tripartite committee was unable to consider reasonable.
125. Thirdly, the Government highlights the fact that the report of the tripartite committee that examined the claim against the CNE contract stated that “the underlying policy considerations ... could help to justify a relatively long period of exclusion”. Accordingly, the Government reiterates that **the trial period under the CAE contract must be understood in the context of the purpose of that type of contract in the overall labour reform**. The 2012 labour reform seeks to promote entrepreneurship and, above all, the creation of employment through open-ended contracts. According to the Government, this first aim is clear and derives from the *nomen iuris* given to the new contract and from the statements contained in the preamble to Act No. 3/2012: the contract “seeks to assist the recruitment of workers by these enterprises ...” with the aim of “providing stable employment” (section 4(1) of Act No. 3/2012). The CAE is closely linked to employment policy, both in view of its main target groups (section 4(1) of Act No. 3/2012 as regards the workers and section 4(6) and (7) as regards the enterprises) and the transitional nature of this type of contract, which will only be valid until the unemployment rate in Spain falls below 15 per cent (ninth transitional provision of Act No. 3/2012).
126. The Government points to the subsidies and discounts that enterprises receive when they hire workers under a CAE contract. Section 4(4) and (5) of Act No. 3/2012 provide significant tax incentives and reductions in social security contributions over three years (which also increase every year) for enterprises hiring certain categories of workers under this type of contract, but always on condition that the employer continues to employ those workers for at least three years from the start date of the employment relationship; otherwise he will be required to repay the abovementioned incentives and discounts (section 4(7) of Act No. 3/2012).
127. In its communication of August 2013, the Government points to the advantages that workers have under the new type of contract (such as being able, in certain cases, in addition to being paid their wages, to claim 25 per cent of the unemployment benefits that they were receiving at the time of recruitment), and refers to the obligation on employers to meet a number of criteria in order to use this type of contract (such as maintaining the enterprise’s level of employment, as well as the CAE contracts that have been signed, for at least three years). Regarding the repayment of benefits derived from this type of contract in the event of failure to meet the regulatory requirements, the Government recalls that this is common practice for any type of contract aimed at promoting employment that is accompanied by financial assistance or tax or social security reductions; such repayment provides guarantees in terms of protecting the workers, sustaining the enterprise’s activity, promoting recruitment and maintaining employment levels.
128. The Government states that, contrary to the substantive argument put forward by the two confederations in their representation, claiming that the regulations are simply a pretext to allow dismissals without a reason or compensation, it should be noted that the CAE contract offers two tax incentives, one for corporate taxpayers and another on personal income tax for individuals conducting economic activities, as an incentive for this type of contract. Section 4(7) of Act No. 3/2012 (reproduced in the appendix) specifies that in order to benefit from these incentives, the enterprise must continue to **employ workers for at least three years from the start date of the employment relationship**.

- 129.** The Government indicates that other provisions prevent misuse of the CAE contract, as follows: (a) the trial period does not apply to temporary workers who were previously hired by the enterprise; (b) the CAE cannot be used by enterprises that, in the six months prior to recruitment, carried out dismissals on objective grounds which were declared unfair by a court ruling, or carried out collective dismissals – apart from the fact that some cases may fall under general clauses of common law to combat fraudulent use.
- 130.** The Government adds that the purpose of the 2012 labour reform was to create a new type of open-ended employment contract that can only be used by enterprises with fewer than 50 workers which, despite the economic crisis, are pursuing the creation of employment. In comparison with other types of contract, the difference in the length of the trial period is due to the crisis and the uncertainty created by the current situation.
- 131.** The Government observes that other European countries have adopted similar measures through different approaches. The Government points out that under Act No. 92 of 28 June 2012, Italy adopted a series of measures to reform its labour market in order to stimulate growth.<sup>16</sup> One such measure was the introduction of a new section 1(1)bis in Legislative Decree No. 368 of 6 September 2001 transposing Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.<sup>17</sup> The new provision introduced by the Italian labour reform of June 2012 provides as follows:

1bis. The requirement under section 1 (obligation to specify grounds for dismissal in the contract) is not obligatory in the case of a first fixed-term contract, not exceeding 12 months, between an employer or a user enterprise (contract through an employment agency) and a worker for the performance of any type of work, either under a fixed-term contract or in the case of the first employment of a worker under a staffing services contract. Collective agreements between the most representative workers' and employers' organizations at the national level can establish, either directly in inter-confederation or sectoral agreements, or indirectly where a delegation exists for lower-level agreements, that the provision made in the first paragraph (obligation to state grounds for dismissal in the contract) is not required in cases where the fixed-term contract or the staffing services contract takes place under a restructuring process for the reasons established in section 5(3) (launch of a new activity, product or service, introduction of a relevant technological change, research projects or the renewal of a relevant order), always within a maximum of 6 per cent of the total number of workers in a production unit.

- 132.** The Government indicates that the Italian labour reform of June 2012 also sought to make hiring easier. However, the abovementioned provision in practice removes the obligation to provide a reason for dismissal in the case of temporary contracts where workers are hired by an enterprise for the first time for less than 12 months, and also in certain cases permitted by collective bargaining and limited to a percentage of the total number of workers. The Government acknowledges that, contrary to the approach adopted by Italy, the Spanish labour reform, while pursuing the same objective, has opted for the creation of a new type of open-ended contract with strong fiscal and social security incentives.
- 133.** The Government reports that from the date of entry into force of the labour market reform until 31 October 2012, a total of 54,541 new CAE contracts were signed, with the attendant social security registrations. Given that young people are one of the groups most

<sup>16</sup> Act No. 92 of 28 June 2012 adopting provisions for growth-oriented labour market reform, *Official Journal* No. 153 of 3 July 2012, Ordinary Supplement No. 136.

<sup>17</sup> Legislative Decree No. 368 of 6 September 2001 transposing Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, *Official Journal* No. 235 of 8 October 2001.

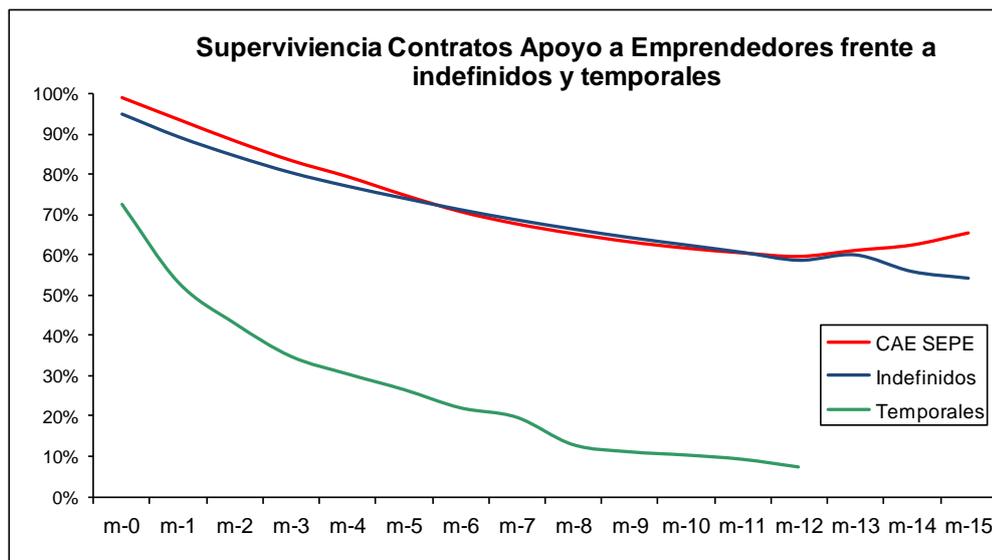
affected by the economic crisis, the Government highlights that **29,453 of all CAE contracts were signed with workers under 30 years of age** (54.1 per cent).

- 134.** According to the Government, the use of the word *emprededor* (entrepreneur) rather than *empresario* (employer) in Act No. 3/2012 is purely terminological, as the legislation makes it perfectly clear that only enterprises with fewer than 50 workers can use CAE contracts.
- 135.** In its communication of August 2013, the Government provides the following clarifications regarding these hiring incentives:
- All but one of the provisions under Act No. 3/2012, regarding both contracts and incentives, are exclusively aimed at recruiting young people under the age of 30. The exception to this, recruitment for new youth entrepreneur projects, does not impose an upper age limit on the workers recruited (who must be at least 45) but on the independent employers, who must be under 30, the incentive only being granted if contracts are open-ended.
  - One of the new incentives provides for a 100 per cent reduction in the employer's social security contributions for common contingencies in respect of the hired worker, which is exclusively directed at very small enterprises (with up to nine workers) and, more importantly, only applies to open-ended contracts.
  - Regarding the incentive relating to first jobs for young people, which is only directed at young people under 30 with less than three months' work experience or none at all, specifically aiming to provide them with their first professional experience, the Government emphasizes that the regulations provide an incentive to change such contracts into open-ended contracts in order to qualify for reduced social security contributions.
- 136.** The Government also addresses the concern expressed by the two confederations regarding the possibility of the reform resulting in job rotation and the replacement of older workers with younger and cheaper workers. The Government refers to section 4(6) of Act No. 3/2012 and adds that, in the light of available data, there is nothing to suggest that worker rotation or replacement is occurring.<sup>18</sup>
- 137.** Likewise, the Government addresses the misgivings of the two confederations that, as a result of discounts and incentives, employers do not wait until the end of the year to terminate a CAE contract. The two confederations indicated that, as a result of the one-year trial period established in Act No. 3/2012, workers hired under this type of contract will be dismissed just before the end of that period and replaced with other workers.
- 138.** The Government presents its analysis of the data made available by the Ministry of Employment and Social Security (MEYSS) in order to dismiss the concern that employers will terminate CAE contracts before the end of the first year. The Government concedes that, after only 17 months since the entry into force of the legislation, any assessment must be treated with caution, given that only a limited number of those contracts have been in force for more than a year. However, according to the analysis carried out by the MEYSS, it appears that CAEs have not been used for intensive rotation of workers and that their continuity rate beyond the first year after their start date is very similar to that of open-ended contracts and much higher than for temporary contracts starting at the same time.

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<sup>18</sup> The Government indicates that recruitment figures are available on the website of the SEPE. The analysis provided by the Government is part of the report evaluating the labour reform carried out in accordance with the legal provisions in that regard.

### Continuity rate of CAE contracts compared to open-ended and temporary contracts



Source: MEYSS, based on the SEPE recruitment register and social security affiliation.

**139.** The monitoring carried out by the Government is based on the number of social security registrations corresponding to recruitments notified to the SEPE. A small number of the recruitments notified as CAE contracts do not lead to social security registrations in the month of notification. This can occur if, for example, it transpires that the conditions for formalizing this type of contract are not met. The contracts subject to monitoring have been reviewed in order to remove inconsistencies and errors such as duplications, incorrect coding or dates that do not correspond to the period of analysis.

**140.** The Government explains the methodology followed in the abovementioned analysis:

- The total number of social security registrations corresponding to CAE contracts notified to the SEPE was identified and they were attributed to the month in which the CAEs were notified from February 2013 onwards.
- The number of social security contributions continued under the same type of contract and by the same contributing body (contribution account code in the social security system), without intervening contribution cancellations, was verified at the end of each month.
- The weighted average of continuation in employment for each month after the start of the contract was calculated.
- The percentage of persons recruited in the same month of the same year under open-ended contracts of a similar nature (i.e. first full-time contracts not resulting from a conversion) was compared. No distinction was made on the basis of the size of the recruiting enterprise. On account of their specific characteristics, contracts for persons with disabilities, for home-based employees or permanent seasonal workers were not included.
- A comparison was also drawn with recruitments over a similar month under temporary contracts. Continuity in employment was calculated in terms of the percentage of persons for whom contributions continued to be paid at the end of each month compared to this figure at the end of the reference month (March 2012 for the first contracts) under a temporary contract.

**141.** The Government concludes that, according to this preliminary analysis, the behaviour of the CAE contract follows that of open-ended contracts rather than temporary contracts. The results indicate that to date:

- Of the CAE contracts signed over 12 months ago, 59.4 per cent have been maintained. This level is on a par with other first full-time open-ended contracts signed at the same time (58 per cent).
- As the CAE contracts signed in the summer start reaching the 12 – month mark, the average of continuation in employment may fall slightly, while staying close to current levels. So far, the rate of continuation in employment varies for contracts signed at different times of the year and, in particular, is lower for contracts starting in spring and summer, as the table shows. This trend also explains a recovery in the continuation in employment curves after the twelfth month. This is a “composition” effect: only the averages for contracts signed in February-March-April are higher than those in subsequent months.
- The rate of cancellations for social security contributions is similar to the rate for first full-time open-ended contracts: around 4–5 percentage points in the first months, then settling at around 1–2 percentage points on reaching the twelfth month.
- Rather than any increase in the rate of unemployment becoming visible after the twelfth month, there is a stabilization in the rate of continuation in employment. Hence there is no cliff in the rate of continuation in employment for these contracts linked to completion of the trial year. The change in the rate of continuation in employment between the twelfth and thirteenth month stands between -1.2 and -2.1 percentage points, less than the average monthly decrease of -3.2 percentage points (for open-ended contracts the average is 2.9 percentage points).

**Rate of continuation in employment (percentage)**

	At 12 months	At 13 months	Percentage point difference
February 2012	72.0	69.9	-2.13
March 2012	69.9	67.9	-1.99
April 2012	61.5	60.2	-1.25

- The rate of continuation in employment is much higher than the rate for temporary contracts signed at the same time, which stands at 7.5 per cent a year after recruitment. The rate of continuation in employment for contracts that do not qualify for discounts stands 10 percentage points below qualifying contracts (53.5 per cent compared to 64.5 per cent), but it is nevertheless high enough to warrant consideration that their behaviour follows that of open-ended contracts. There is no significant difference in these rates with respect to contracts for young people under 30.

**142.** The Government also considers that the claim made by the two confederations regarding the reduction in the use of CAE contracts has been refuted. Between the adoption of the labour reform and June 2013, a total of 118,917 CAEs were registered (with an average of more than 7,400 per month since March 2012), 40.1 per cent with young people under 30, who were the prime target of the incentives, and 39.0 per cent with women. Reductions in contributions and tax deductions applied to 42.4 per cent of the contracts.

**143.** The Government adds that the total number of registered contracts is equivalent to 24.0 per cent of full-time open-ended first contracts registered since March 2012. This percentage is

calculated on the basis of contracts signed by all types of enterprises, so that their percentage of the total number of new contracts in small and medium-sized enterprises (SMEs) is probably much higher. This recruitment, which in many cases would not have taken place or would have taken the form of temporary contracts, helps explain the change in the open-ended recruitment trend since the labour reform.

- 144.** As regards **seasonal trends**, the Government observes that the contract's impact decreased between the end of the summer of 2012 and March 2013, after which it recovered. In fact, **June 2013 was the month in which the highest number of CAE contracts as a proportion of all similar contracts was recorded.** CAEs continue to account for approximately one in every four first full-time open-ended contracts, and this proportion further increased in the first quarter of 2013, contributing to an upward trend in open-ended recruitment and helping to reduce duality.
- 145.** The Government also rejects the two confederations' claim that in 2012 a total of 82 per cent of enterprises that used CAE contracts did not apply for tax incentives. According to the two confederations, 82 per cent of enterprises that used CAEs seem to have attached more importance to the freedom provided by the one-year trial period than to benefiting from incentives that would bind them to the worker for at least three years. In response, the Government states that the information provided is evidently incomplete as it refers only to enterprises availing themselves of tax incentives, not to those receiving reductions in social security contributions. The Government indicates that these two types of incentive are independent of each other and are subject to different requirements (one of the tax incentives only applies if it is the first time that a worker has been hired by that enterprise and is under 30, and the other incentive depends on a worker being eligible for unemployment benefits, which is not the case for the discounts, which are only subject to the worker's age). This means that a contract can create eligibility for either of the two incentives, for neither or for both. Both incentives are subject to workers being employed by the enterprise for at least three years. Therefore, regarding the two confederations' claim, the Government argues that both forms of incentive should be taken into account, rather than just the tax incentive. Accordingly, if both the tax incentive and the reduction in social security contributions are taken into account, of the 77,260 CAE contracts signed in 2012, a total of 34,793 **involved one of the abovementioned benefits.** This would amount to **45.03 per cent of the total**, which, as the Government indicates, is nowhere near the figure provided by the trade unions.
- 146.** In short, the Government maintains that CAE contracts have **provided access to stable open-ended employment.** In the general context, where recruitment has been significantly affected by uncertainty and the prolonged recession, CAE contracts have brought nearly 120,000 people into the labour market, 40 per cent of which are young people, accounting for 24 per cent of first full-time open-ended contracts since March 2012.

***New regulations on economic, technological, organizational or production-related reasons for dismissal***

- 147.** The Government indicates that the amendment to section 51(1) of the Workers' Statute under Act No. 3/2012 has not altered the reasons for dismissal established in previous legal texts. The 2012 labour reform merely redefines the criteria used to determine the existence of economic, technological, organizational or production-related reasons for dismissal, although it does change the form that they were given in the Workers' Statute by Royal Decree-Law No. 10/2010 of 16 June 2010 and Act No. 35/2010 of 17 September 2010. Until the 2010 labour reform, the courts were free to establish the criteria for determining the existence of grounds for collective dismissals, without this being out of line with Article 4 of Convention No. 158.

**148.** In its communication of August 2013 the Government states that the reasonableness and proportionality required for the termination of contracts under Convention No. 158 has two consequences:

- It requires countries that have ratified the Convention to establish in law reasons for dismissal based on the operational needs of an enterprise, establishment or service (Article 4 of Convention No. 158 requires that there be a “valid reason”). In this regard, the Government observes that the grounds for dismissal in Spanish labour law are restricted, a kind of *numerus clausus*, under sections 51 ff of the Workers’ Statute.
- Once these reasons, along with the elements that define them and enable their identification, have been established in national law, Convention No. 158 requires the practical enforcement of such regulations to be subject to review by the bodies referred to in Article 8 of Convention No. 158 (“... impartial body, such as a court, labour tribunal, arbitration committee or arbitrator”), responsible for checking whether the termination of the contract was actually for the reasons or grounds established by law. As regards the competence of those bodies to determine whether the reasons are sufficient to justify the termination of the contract, Article 9(3) of the Convention indicates that such competence “shall be determined by the methods of implementation referred to in Article 1 of this Convention”.

**149.** The Government indicates that the 2012 labour reform establishes three procedures for contesting contract terminations under collective dismissals:

- (1) Actions brought by workers’ representatives. In the interest of duly expediting the resolution of labour proceedings, this new procedure is given priority and urgent treatment. Actions against collective dismissals brought by workers’ representatives are heard by the High Courts [of the Autonomous Communities] and the National High Court (*Audiencia Nacional*) in first instance and, where applicable, subsequently on appeal, with a view to avoiding delays. Filing collective actions suspends any individual actions pending a final ruling on the former, which will then apply to the individual action.
- (2) Individual actions. Individual actions against contract termination in the context of collective dismissals continue to be heard by the labour courts under the procedure for cases of dismissal for objective reasons. Individual actions follow the procedure for objective dismissal under the special regime established in amended section 124(13) of Act No. 36/2011 of 10 October 2011 regulating labour jurisdiction.
- (3) Actions filed by the labour authority. Although the 2012 labour reform revoked the obligation to obtain administrative authorization, the labour authority may still challenge agreements reached during the consultation period if it considers that those agreements have entailed fraud, wilful misconduct, coercion or misuse of law (including the evaluation of the proportionality of the measure), or on being advised by the social benefits administration that there are no grounds for lawful dismissal. Act No. 3/2012 has introduced specific rules for coordination between collective actions and proceedings initiated by the labour authority, which are suspended until a decision is issued in relation to the collective action. This regulation is supplemented by allowing the Government to be a party in collective actions. The final ruling on the collective appeal proceedings is applicable to any pending action filed by the labour authority.

**150.** The Government indicates that appeals against the suspension of contracts and the introduction of shorter working hours for economic, technological, organizational or production-related reasons or for reasons of force majeure must observe the procedural provisions laid down in sections 138 and 153–162 of the Act regulating labour jurisdiction

as regards the individual or collective nature of employers' decisions. Consequently, the Government states that it is the courts, on the basis of case law and the provisions of the Act regulating labour jurisdiction, that decide whether there are valid reasons for the adopted measure, without this giving rise to a violation of Article 9 of Convention No. 158.

- 151.** In response to the concern expressed by the two complainant confederations regarding the abolition of the requirement for a reasonable link or correspondence between the invoked reason and the dismissal of the worker or workers, the Government indicates in its communications that if a reason or cause is demonstrated and this is confirmed by the judge, the cause exists and produces effects. The Royal Spanish Academy dictionary defines a cause as “that which is considered to be the basis or origin of something”. In addition, according to the Royal Spanish Academy, the verb to cause is “said of a cause: to produce its effect”. Accordingly, the Government understands that ascertaining the existence of a reason or cause requires it to be substantiated or demonstrated, given that the cause provides the basis for its effects. If, on the contrary, the reason or cause is not substantiated, it is the judge who has competence to rule that it does not exist, thereby invalidating the dismissal and giving rise to the corresponding legal consequences regarding the contracts. Dismissals are also invalid where the employer fails to indicate the reason for the dismissal or does not provide adequate documentary evidence to demonstrate the reason for dismissal. The Government insists that the **2012 labour reform is not concerned with the reasons for dismissal but aims to increase the objectiveness of judicial review.**
- 152.** The Government indicates that the other major change under the 2012 labour reform concerns the **abolition of the administrative authorization** for termination when the number of employment contracts exceeds the total provided under section 51(1), first subparagraph, of the Workers' Statute, except in the case of dismissals on grounds of force majeure. The Government explains that the change introduced by the 2012 labour reform has a clear aim, called for by both the social partners and by legal doctrine: to prevent the indiscriminate use of disciplinary dismissals as established by the 2010 labour reform, which was recognized as unfair by the employers themselves – the so-called “express dismissal” – and was used to deal with situations where employment relationships were clearly terminated for economic, technological, organizational or production-related reasons.
- 153.** The Government recalls that the preamble to Act No. 35/2010 states that: “(...) new wording is introduced for economic, technological, organizational or production-related reasons for dismissal (...) (following) (...) experience (that) has highlighted (...) certain shortcomings in the operation of the termination procedures set out in sections 51 and 52(c) (of the Workers' Statute) (...) resulting in a shift from the termination of open-ended contracts for economic or production-related reasons towards unfair dismissal for disciplinary reasons”, considering “that a new wording of these reasons is needed (...) to provide greater certainty (...)”. According to the legal review of the 2010 labour reform, the “express dismissal” procedure that it introduced had “blocked” dismissals for economic, technological, organizational and production-related reasons. The 2012 labour reform sought to resolve the difficulties that had been subject to review and confirmed in practice by abolishing the “express dismissal” procedure.
- 154.** The Government maintains that the 2012 labour reform of collective dismissals has, to a certain extent, reintroduced the obligation to justify dismissals. The 2010 labour reform had been denounced for the poor and only theoretical control that it granted workers' representatives and the administrative authorities over reasons for dismissal. Under the 2010 labour reform, negotiations during the consultation period mainly focused on compensating workers as the safest means of reaching an agreement and thereby receiving

administrative authorization. By contrast, according to the Government, the changes brought about by the 2012 labour reform facilitate the conclusion of agreements with workers' representatives during the consultation period, as has occurred in approximately 90 per cent of recent cases.

- 155.** The Government maintains that since the approval of the revised text of the Workers' Statute in March 1995, legislative texts have progressively established clearer limits to the reasons for dismissal related to an enterprise's operation. Previously, the grounds for collective dismissal could not really be justified at the start of the proceedings, and were at best foreseen. Collective dismissals were justified by the effects that the measure could reasonably have on the future of the enterprise's activities. In the event of disputes arising between the enterprise and the workers during the consultation period, the labour authorities were called upon to determine whether the reason for dismissal really existed and whether it could affect the enterprise's future. The 2010 labour reform sought to provide a more extensive definition of the reasons for collective dismissals and eliminated the administrative authorization, leaving unaltered and even increasing the number of cases in which the enterprise's decision could be reviewed by the courts. Under the 2010 labour reform, the courts could review "whether the dismissal was reasonable in terms of preserving [the enterprise's] competitive market position". The 2012 labour reform considers that a solution has been found to the issue of the "functional link" between dismissals and the reasons established by law, which were problematic, being based on future projections that were impossible to prove and giving rise to ambivalent interpretations.
- 156.** The Government indicates that its reasoning has been upheld by a ruling of 27 June 2012 of the Labour Court of Madrid, which states as follows:

The new regulations do not invalidate the doctrine on collective dismissals required by enterprises on economic grounds, as set out in the Supreme Court ruling of 27 April 2010, which determines criteria established by this body regarding the validity – or fairness – of dismissals in crisis situations, which can be summarized as follows:

- (a) **in the event of significant losses**, dismissals may be justified on the grounds that "such a measure directly reduces the enterprise's operating costs, thereby increasing its chances of overcoming the negative situation" (Supreme Court rulings 14/06/96 (RJ 1996, 5162) – rcud 3099/95 –; 29/05/01 (RJ 2001, 5452) – rcud 2022/00–; 30/09/02 (RJ 2002, 10679) – rcud 3828/01 –; and 29/09/08 (RJ 2008, 5536) – rcud 1659/07 –);
- (b) **"if these losses are sustained and considerable** it is assumed, unless there is evidence to the contrary, ...that terminating surplus jobs is a measure that contributes to surmounting the aforementioned negative situation", because the termination of surplus jobs results in an automatic decrease in personnel costs, thereby improving the overall financial balance (Supreme Court rulings 15/10/96 (RJ 1996, 8176) – rcud 3352/95 –; 15/10/03 (RJ 2003, 4093) – rcud 1205/03 –; 30/09/02 – rcud 3828/01 –; and 29/09/08 – rcud 1659/07 –);
- (c) however, the connection between the termination of the contract and overcoming a crisis must be demonstrated as being sufficiently reasonable and must be consistent with past experience (Supreme Court rulings 14/06/96 – rcud 3099/95 –; and 29/09/08 – rcud 1659/07 –), **because "neither can it be taken for granted that the enterprise is able, solely on the basis of losses on its balance sheet, to dispense with all or some of its workers, nor should the enterprise be required to provide evidence of a future event, which, by definition, is unlikely to be demonstrable.** This would also apply to demonstrating the contribution that dismissals may make to overcoming the enterprise's negative economic situation. Sufficient evidence and arguments must instead be provided to enable the court to carry out the examination needed in each case to reach a reasonable conclusion regarding the existence of a connection between the crisis situation and the dismissals" (Supreme Court rulings 29/09/08 – rcud 1659/07 –);

- (d) in order to conduct collective dismissals, an enterprise's negative economic situation need not be irreversible; on the contrary, such cases are invariably not final, recovery being possible, and it is precisely by adopting redundancy measures that an enterprise may seek to overcome a negative situation and recover sufficient operational capability (Supreme Court rulings 24/04/96 (RJ 1996, 5297) – rcud 3543/95–); and
- (e) in view of the wording of section 52(c) of the Workers' Statute, an agreed dismissal can be justified by simply demonstrating that it contributes to resolving the crisis, without needing to demonstrate that dismissals alone are an adequate solution, or that such a solution, together with other measures, will be definitive (Supreme Court rulings 11/06/08 (RJ 2008, 3468) – rcud 730/07 –).

**157.** The Government therefore emphasizes that the 2012 labour reform enables the courts to decide whether the enterprise's decision is appropriate and legitimate. The Act regulating labour jurisdiction, as amended by Act No. 3/2012, and the Workers' Statute state that the judge will decide on the fairness, unfairness or invalidity of a dismissal, according to the circumstances of the case and the proven facts. Therefore, collective dismissals in Spain were and continue to be **formal** dismissals, requiring the interested parties and their representatives to be notified in writing (section 51(2) and (4) of the Workers' Statute); and they are **reasoned**, the 2012 labour reform providing a more detailed definition of reasons for dismissal than in the past. Lastly, if an enterprise decides to undertake collective dismissals, the workers concerned can either file collective legal actions through their representatives and file actions individually. Any individual action will be suspended until a ruling is issued in respect of any intervening collective legal proceedings. In addition, the labour authority may also challenge the decisions through the courts. The Government therefore considers that this provides a **judicial review** of employers' decisions in accordance with section 51(6) of the Workers' Statute and section 124 of the Act regulating labour jurisdiction and that the 2012 labour reform cannot be construed as removing the obligation to justify dismissals.

**158.** In response to the claims made by the two confederations, the Government asserts that **section 51 of the Workers' Statute, as amended, indicates that both the conditions established in Convention No. 158 are maintained**: consultations with the workers' representatives and the intervention of the labour administrative authority in the event of collective dismissals. The beginning of section 51(2) of the Workers' Statute states that: "Collective dismissals must be preceded by a period of consultations with the workers' legal representatives lasting ...". As regards monitoring by the administrative authority, the announcement of the beginning of the consultation period will be notified to the labour authority, which will request, among other things, a report from the Labour and Social Security Inspectorate on the implementation of the consultation period. Moreover, "during the consultation period, the parties shall negotiate in good faith, with a view to reaching an agreement" (section 51(2), eighth subparagraph). "The labour authority will monitor the effectiveness of the consultation period, where necessary issuing warnings and recommendations to the parties without, however, blocking or suspending the proceedings. Likewise, and without prejudice to the previous subparagraph, the labour authority may conduct the following mediation action during the consultation period and at the request of the parties ... (and) provide assistance at the request of either of the parties or on its own initiative." (section 51(2), eleventh subparagraph). Likewise, section 51(6), second subparagraph, of the Workers' Statute provides that: "The labour authority may challenge the agreements adopted during the consultation period if it considers that these have been reached through fraud, wilful misconduct, coercion or misuse of law with a view to their possible annulment, or if it is advised by the unemployment benefits administration that the enterprise's decision to undertake dismissals may be motivated by the unlawful receipt of payments by the workers concerned, where there are no grounds for lawful dismissal".

**159.** Regarding the claims made by the two confederations in relation to the abolition of the judicial review of employers' decisions to terminate contracts and the alleged violation of

Article 9(1) and (3) of the Convention, the Government reiterates in its communications that, **under the Spanish legal system, dismissals were and continue to be subject to judicial review, enabling the courts to verify the lawfulness and legitimacy of such measures.**

**160.** In particular, the Government refers to section 124(2) of the Act regulating labour jurisdiction, which establishes that:

Legal actions may be filed for the following reasons:

- (a) **Absence** of the legal grounds specified in the written communication.
- (b) **Failure to provide a consultation period or the documentation established** under section 51(2) of the Workers' Statute or non-observance of the procedure established in section 51(7) of that text.
- (c) The dismissal decision has been adopted on the basis of fraud, deceit, coercion or misuse of law.
- (d) The dismissal decision has been adopted in violation of fundamental rights and civil liberties.

Section 124(11) of the Act regulating labour jurisdiction stipulates that:

... The dismissal decision shall be declared lawful when the employer, having complied with the provisions of section 51(2) or 51(7) of the Workers' Statute, provides evidence of the cited legal grounds.

The ruling shall declare the dismissal decision unlawful if the employer has not demonstrated the legal grounds cited in the notification of dismissal.

The ruling shall declare the dismissal decision null and void where the employer has not conducted the period of consultation or submitted the documentation specified in section 51(2) of the Workers' Statute or has not followed the procedure established in section 51(7) of the Workers' Statute or has not obtained confirmation of the existence of the legal grounds from the judge, or when the measures adopted by the employer constitute a violation of fundamental rights or civil liberties. Should the aforementioned circumstances apply, the ruling shall declare the dismissed workers' right to reinstatement, in accordance with the provisions of section 123(2) and (3) of this Act.

**161.** As regards the two confederations' claim relating to the provision added by the 2012 labour reform to section 51(1), second subparagraph, of the Workers' Statute, the Government refers to the beginning of that subparagraph, which reads as follows: "Economic reasons shall be deemed to exist where the results of the enterprise indicate a negative economic situation, (...)". The Government explains that this provision cannot be understood to mean that a persistent decrease in the ordinary revenue or sales of the enterprise justifies collective dismissals. The legislator clarified the criteria by introducing the stipulation of "three consecutive quarters" during which the level of ordinary revenue or sales [for each quarter] was lower than that recorded for the same quarter of the previous year. According to the Government, the legislator **sought to introduce greater legal certainty through a criterion that establishes an objective definition of the word "persistent"** when determining that a decrease in revenue or sales constitutes a "negative economic situation", which is the first definition of an economic reason for dismissal. The Government considers that the above does not prejudice the assessment that the judge must make to identify a decrease in revenue as a negative economic situation. For example, a decrease of 50 euros in an enterprise's revenue, even if it continued for three consecutive months, cannot justify the dismissal of workers, since it cannot reasonably be described as a negative economic situation. The Government states that nine consecutive months of negligible losses do not give an enterprise grounds for dismissing its whole workforce. According to the Government, the "three quarters" criterion is quantitative and not qualitative, and does not provide an automatic justification of dismissal.

- 162.** The Government explains that the 2012 labour reform did away with scenarios that were poorly defined in the previous legislation (the expression “overcome the negative economic situation” was replaced by “preserve and promote the enterprise’s competitive [market] position”) without removing the functional connection. **The negative economic situation and its impact on employment contracts must be concurrent and dismissals are the means of dealing – also concurrently – with that impact.** The aim is not to meet future objectives, but to adjust the workforce in the light of difficulties in the enterprise’s operation. The Government insists that dismissal is fair if it aims to correct an imbalance in the workforce, requiring the employer to demonstrate that the contracts to be terminated no longer serve their economic and productive purpose.
- 163.** The Government considers that there is a need to dispel misunderstandings regarding the intention of the 2012 labour reform. The 2012 labour reform requires a **logical coherence of cause and effect between a demonstrated reason and intended dismissals, whereby the reason effectively justifies dispensing with certain workers.** The new regulations simply require the demonstration of the reason for dismissal, making its validation subject to the general criteria of behaviour based on good faith and precluding any misuse of law. According to these regulations, a judge may reject any misuse of the right to dismiss, either on account of its excessive scale in relation to the demonstrated economic reason or because of any other improper use in specific cases. The same applies to the other reasons, whether technological, organizational or production-related. In line with the internal limits of the power of dismissal, which require that such procedures be carried out in good faith and exclude the misuse of law, only workers whose services are not needed as a result of a demonstrated technological, organizational or production-related change can be dismissed, requiring coherence between the changes introduced by the enterprise and the decision to dismiss, thereby also ensuring scrutiny of any arbitrary decision by the employer when choosing the worker or workers to be dismissed.
- 164.** The Government emphasizes that the 2012 labour reform requires **enterprises to follow three steps in order to justify dismissals for economic reasons:**
- demonstrate the existence of a negative economic situation or, where applicable, of changes in the demand for products and services that the enterprise wishes to place on the market;
  - **establish how the situations described affect the employment contracts that are to be terminated** and the extent to which there is a need to terminate all or some of those jobs; and
  - **demonstrate that the dismissal decisions are appropriate** for responding to that need.
- 165.** The Government further indicates that the above was affirmed by ruling No. 0142/2012 of 21 November 2012 of the Labour Division of the National High Court,<sup>19</sup> the sixth legal ground of which states as follows:
- ... As can be seen, the justification required under the previous regulations has been abolished. This required the enterprise, in the case of economic reasons for dismissal, to demonstrate that its decision to dismiss was reasonable in terms of preserving its competitive market position; and where the reason was technological, organizational or production-related, to help prevent a negative trend in the enterprise or improve its situation through a more

<sup>19</sup> The Government indicates that in ruling No. 166/2012 of 18 December 2012 the Labour Division of the National High Court reiterated the position it had adopted in ruling No. 0142/2012.

appropriate organization of resources designed to boost its competitive market position or ensure a better response to demand.

- 166.** The Government recognizes that the functional connection is the prerequisite for compliance with Article 4 of Convention No. 158, which categorically excludes the termination of an employment relationship unless there is a valid reason connected with the worker's capacity or conduct or **based on the operational requirements of the undertaking, establishment or service**. Consequently, the Government indicates that the 2012 labour reform has not eliminated the functional connection, given that a reasonable link must be established between negative economic situations or changes in the demand for products or services that the enterprise wishes to place on the market, and the employment contracts to be terminated.
- 167.** The Government also insists that the 2012 labour reform has provided a more precise definition of what constitutes valid reasons for the termination of employment contracts and it refers to the preamble to Act No. 3/2012, which states that: *"The Act now merely defines the economic, technical, organizational or production-related reasons that justify these dismissals, removing other legal references which had given rise to uncertainty."* It adds: *"(...) such references incorporated projections relating to the future, which were impossible to prove ..."* Consequently, the Government stresses that Act No. 3/2012 does not alter the reasons for the decision to terminate employment contracts in cases related to the operational requirements of the enterprise, establishment or services. The amendments only seek to define more clearly the criteria for determining whether such reasons exist, which does not contradict the requirement of reasonableness established by Article 4 of Convention No. 158, which firstly requires reasons for dismissal to be valid and, secondly, requires the existence of bodies to verify the existence of the alleged reason for the employer's decision to undertake dismissals.
- 168.** The Government indicates that the 2012 labour reform, by means of section 51(1), first subparagraph, of the Workers' Statute, continues to require employers to demonstrate that the dismissal is fair by proving the existence of the economic and production-related reasons for dismissal and providing proportionate arguments. Once the employer has demonstrated the existence of an economic and/or production-related reason, both being present in most cases, he must prove that the contract has become economically superfluous because it has lost its economic relevance for the employer. If the purpose and the reason for an employment contract no longer exist, then both the conditions for its termination are met, in accordance with section 1261 of the Civil Code.<sup>20</sup> This is the case if a service has lost its economic utility for the employer for objective reasons that have arisen, just as workers are justified in terminating their employment contracts when an employer is no longer able to provide actual work or remunerate their work.
- 169.** Consequently, the Government reiterates that the 2012 labour reform is in conformity with Articles 4, 8 and 9 of Convention No. 158, in particular since Article 9(3) of the Convention allows national law and practice to determine the scope of action of the bodies competent to hear appeals against dismissal. Likewise, the Government recalls the explanations provided by the Committee of Experts in paragraph 214 of the 1995 General Survey, which reads as follows:

From the outset of the preparatory work, it was considered that it would be best to leave each country to determine the question whether the bodies to which dismissals may be appealed should be authorized to review the sufficiency of reasons related to the operational

<sup>20</sup> Section 1261 of the Civil Code. There can be no contract unless the following requirements are met: (1) The contracting parties must give their consent. (2) The subject of the contract must be clearly defined. (3) Reasons must be given for the obligations established by the contract.

requirements of the undertaking. This provision therefore affords a certain amount of flexibility by allowing each member State to determine to what extent the competent bodies should be authorized to review the employer's judgement as to the sufficiency of reasons based on operational requirements. Where workforce reductions are concerned, the employer must therefore clearly have a valid reason within the meaning of Article 4 of the Convention. But it is left to each country to determine the extent to which the impartial bodies before which appeals may be brought against termination of employment should be empowered to review the employer's judgement as to operational requirements, that is, the extent to which they are to be empowered to decide whether these reasons, which are valid by their nature, are sufficiently important to justify the termination of employment. The text therefore allows each country to restrict the power of the competent body, when investigating whether termination of employment was justified, to review the employer's judgement in relation to workforce numbers.

- 170.** In conclusion, the Government states that the 2012 labour reform regulates the economic, technical, organizational and production-related reasons for dismissal and establishes, as was the case in the preceding regulations but in different terms, the need for the employer to demonstrate the existence of a reason and of a negative situation requiring the adoption of a decision, the need for that reason to be the basis for the impact of the situation on the employment contracts – in so far as the situation requires the loss of some or all of the jobs concerned – and lastly, the need for the measures adopted to be appropriate for meeting that requirement. The process must include consultations with the workers and, in any case, the employer's decision continues to be subject to judicial review.
- 171.** In its communication of August 2013, the Government adds that it **categorically denies the claim that the judicial review of such dismissals is purely theoretical**. Since the entry into force of the labour reform, the labour courts have heard the cases submitted to them in this regard and their rulings have comprised all possible outcomes, from annulment of the dismissal owing to the enterprise's non-compliance with obligations regarding the period of consultation and the provision of required information, to ruling that the dismissal was lawful since the alleged reason for dismissal was found to be valid and due process had been observed, and also including cases where the dismissal was declared unlawful because the enterprise had failed to substantiate the reason for dismissal.
- 172.** In relation to the judicial review of collective dismissals, the Government indicates that a number of rulings have been issued by the National High Court (the body responsible for "employment regulation" [dismissal] cases affecting two or more Autonomous Communities in Spain) and by the High Courts [of the Autonomous Communities] (in cases affecting one Autonomous Community) that have outlined the legal criteria for the interpretation and implementation of the new regulatory framework introduced by the 2012 labour reform. It may be concluded from the Government's examination of the rulings that the courts are strictly enforcing the formal requirements for processing "employment regulation" appeals, in particular regarding the period of consultation and negotiation with the workers' representatives, and more specifically regarding the obligations to provide information and negotiate in good faith, apart from the verification of the reasons for collective dismissal established by law.
- 173.** The Government makes specific reference, in relation to the obligation to negotiate in good faith, to ruling No. 13/2012 of 23 May 2013 of the High Court of Cataluña, which annulled a collective dismissal because it considered that the enterprise had acted in bad faith by maintaining an entrenched position in proposing only the minimum legal compensation but subsequently offering 45 days' wages per year of service once the legal proceedings had begun. The ruling indicates that the duty to enter into negotiations in good faith has been established in legal doctrine, whereby declaring a consultation period open and holding meetings without any real content is not enough to constitute good faith, and that entering into negotiations with final and irrevocable offers, only to end the negotiation process

when such offers are rejected, constitutes bad faith, since good faith implies a sincere effort to find a middle ground between the positions of the parties.

**174.** As proof of the existence of a genuine judicial review in this matter, the Government also cites the following rulings by way of example:

- Ruling of 26 February 2013 of the High Court of the Canary Islands, Las Palmas (Labour Division, First Section). The ruling declares the dismissal of 15 workers from establishments in the province of Las Palmas for economic and production-related reasons to be lawful, and the dismissal of workers from establishments in the province of Las Palmas to be unlawful where that number is exceeded. This is because the Court finds that “the decision to terminate 24 contracts in Las Palmas is disproportionate, given that, over the course of the consultations, the enterprise itself recognized that 15 dismissals would be sufficient to restore the balance and the correlation between the workload and the workforce required to handle it”. The Court explains that “the rejected proposals made by the enterprise in the spirit of negotiation during the consultations are not subsequently binding but undoubtedly constitute an important element to be taken into account by the courts when determining whether the functional link between the objective reason and the specified contract terminations exists, and whether such a measure is reasonable”.

- Ruling of 4 February 2013 of the High Court of Castilla y León, Valladolid (Labour Division, First Section). While the ruling declares the termination decision null and void for other reasons, the Court proceeds to assess the organizational and production-related reasons cited by the enterprise, stating as follows:

This Division also finds that these organizational and production-related reasons have not been fully justified. Firstly, we must state that these reasons lack substance, since both what is stated in the record of proceedings and what may be deduced from the appended documentation only provide us with generalities [...] Seven persons were recruited [...] This disproves the theory that there was a surplus of workers in the enterprise.

- Ruling of 12 March 2013 of the High Court of the Comunidad Valenciana (Labour Division, First Section). While it declares the termination decision null and void for other reasons, the third legal ground of the ruling states as follows:

... it should be pointed out that quantifying the number of workers affected by the enterprise’s decision has a bearing on justification of the reason for their dismissal, given that, in order for the termination measure to be justified, it must serve to resolve, in reasonable terms, the crisis situation within the enterprise caused by the existence of the reasons on which that measure is based.

- Ruling of 2 May 2013 of the High Court of Galicia (Labour Division, First Section). The ruling declares the decision to terminate 25 employment contracts unlawful. The eighth legal ground states as follows:

In the present case ... the existence of a negative economic situation of budgetary deficit or a situation of budgetary deficit according to the terms of section 35(3) of RD No. 1483/2012 has not been duly demonstrated ... .

If there is no situation of budgetary deficit, it is not feasible for the economic situation to affect employment contracts, and so the need to cut all the posts is not justified. It would only be fair to terminate all the employment contracts if the imbalance in the workforce was the driving factor behind a negative economic situation, but this is not the case ... .

- Ruling of 9 April 2013 of the High Court of Madrid (Labour Division, Fourth Section). The ruling declares the enterprise’s decision to terminate 925 employment contracts unlawful. The twelfth legal ground states as follows:

There are three criteria that must be met to justify the dismissal: (1) demonstrate the existence of a negative economic situation; (2) establish how the situations described affect the employment contracts that are to be terminated and the extent to which there is a need to terminate all or some of those jobs; (3) demonstrate that the dismissal decisions are proportionate as regards responding to that need ... .

It is the third criterion that the enterprise has not met by failing to prove to and convince this Division that the termination measures adopted correspond fully to the need used to justify them.

We must agree on the bearing that all types of criteria may have on the final outcome, which has been submitted for a judicial review that can and should only take into account legal criteria.

While the justification remains complex, the dismissal could only be considered fair if it were carried out to correct an imbalance in the workforce triggered by a negative economic situation; hence the termination measures are justified only where they correspond to the need to cut staff ... .

- 175.** In its communication of May 2014, the Government refers to a ruling of the Constitutional Court sitting in plenary session which confirms that in the 2012 labour reform there was “no obstacle” ... “preventing workers from exercising legal actions in case of dismissal before a court and obtain a ruling stating ... the consequences prescribed by the legislation according to the qualification of the dismissal”.<sup>21</sup>

***Abolition of accrued wages relating to dismissal proceedings in cases where the employer opts to terminate the contract further to a ruling of unfair dismissal***

- 176.** The Government indicates that it is necessary to recapitulate the arguments of the two confederations in their representation in relation to Article 10 of Convention No. 158, the competence of the judge to determine the amount of compensation to be paid, and also the option of either compensating or reinstating the worker. With regard to the 2012 labour reform, the Government presents the following two preliminary considerations:

- (1) The amount of compensation is determined by national law. The decision as to what is considered adequate compensation depends on whether or not there is a valid reason for an objective dismissal, with domestic legislation determining the amount of compensation to be paid and the parameters used in doing so. The Government indicates that, as yet, no judicial complaints such as those referred to by the two confederations in their representation have been filed.
- (2) With regard to the judicial decision to reinstate the worker, Article 10 of the Convention includes the qualifying clause: “if [the bodies referred to in Article 8] are not empowered or do not find it practicable, in accordance with national law and practice”, for which reason this provision cannot be considered to have been violated in any way.

- 177.** The Government indicates that the 2012 labour reform has not altered the previous situation in which the employer also had the option to either reinstate the worker or pay compensation, and this has not given rise to any legal complaints either.

<sup>21</sup> Ruling No. 43/2014 of 12 February 2014.

**178.** The Government recognizes that the 2012 labour reform eliminates the payment of accrued wages should an employer decide to terminate the contract and pay the worker compensation. The current wording of section 56 of the Workers' Statute provides that:

1. When the dismissal is declared unlawful, the employer may decide, within five days of being notified of the ruling, to either reinstate the worker or pay him compensation equal to 33 days' wages for each year of service or on a pro-rata basis for each month of service for periods of less than one year, not exceeding 24 monthly payments. If the employer decides to pay the worker compensation, this shall terminate the employment contract, which shall be understood as taking effect from the date on which the employee actually ceases work.
2. If the employer decides to reinstate the worker, the worker shall be entitled to wages that have accrued in relation to the dismissal proceedings. These wages shall be equal to the total of the outstanding wages from the date of dismissal until the notification of the ruling of unfair dismissal, or until the worker finds another job, if he/she is recruited prior to the ruling and the employer provides proof of the worker's earnings so that they may be deducted from the accrued wages.
3. If the employer does not opt for either reinstating or compensating the worker, it is understood that the worker shall be reinstated.
4. The above option shall rest with the dismissed person if the latter is a workers' legal representative or a trade union delegate. If no choice is made, it shall be understood as opting for reinstatement. When a decision is taken in favour of reinstatement, be it express or implied, reinstatement shall be mandatory. Regardless of whether compensation or reinstatement is chosen, the worker shall be entitled to the accrued wages relating to the proceedings referred to in point 2.

**179.** In the light of section 56 of the Workers' Statute, the Government maintains that the 2012 labour reform unquestionably abolished the obligation to pay accrued wages relating to the proceedings in cases where the dismissal is declared unfair and in which the employer opts for termination of the employment contract and payment of statutory compensation, except in cases involving the dismissal of workers' representatives.

**180.** The Government explains that this situation is **not an innovation** in Spanish labour legislation. As recalled by the two complainant confederations, the abolition of accrued wages relating to dismissal proceedings in the cases referred to above was already covered by the amendment made to section 56 of the Workers' Statute by Royal Decree-Law No. 5/2002 of 24 May 2002 establishing urgent measures to reform protection against unemployment and improve employability, which also provided that the payment of compensation would terminate the employment contract, which would be understood as taking effect from the date on which the employee ceased work. The Government recognizes that this wording was only in force for a few months. Indeed, the adoption of Act No. 45/2002 of 12 December 2002 establishing urgent measures to provide protection against unemployment and improve employability served to repeal Royal Decree-Law No. 5/2002, reintroducing the obligation to pay accrued wages in cases where the employment contract is terminated by the payment of compensation, and also introducing the possibility that this obligation would disappear in practice, since the enterprise was exempt from honouring it simply by recognizing the unfair nature of the dismissal and depositing the corresponding compensation within 48 hours following the dismissal. This possibility became known as "express dismissal" and has disappeared in the wake of the 2012 labour reform.

**181.** The Government recalls that Royal Decree-Law No. 5/2002, having already been repealed by Act No. 45/2002, was declared unconstitutional and invalid by Constitutional Court ruling No. 68/2007 (Plenary) of 28 March 2007. The Government explains that the Act was declared unconstitutional because it failed to comply with the constitutional requirements for regulations such as royal decree-laws set out in article 86(1) of the

Spanish Constitution. The Constitutional Court understood that the existence of a situation of “extraordinary and urgent need” had not been established, without examining the content of the regulation.

- 182.** The Government considers that the amendment concerning accrued wages introduced by the 2012 labour reform complies fully with the provisions of Article 10 of Convention No. 158. Firstly, the issues raised by the two confederations only concerns cases where contract terminations are declared unfair and not to cases where terminations are declared null and void. The Government indicates that, under current Spanish labour legislation, the latter applies to numerous cases that the legislator has considered to warrant special protection, such as termination decisions involving discrimination or the violation of the fundamental rights and civil liberties of the worker; termination decisions on the grounds of pregnancy or maternity or the enjoyment of related rights; and, in the case of collective dismissals, cases involving fraud, deceit, coercion or misuse of law, or the enterprise’s failure to fulfil its obligation to hold a period of consultations and provide adequate information to the legal representatives of the workers. In all such cases, the Government maintains that **any ruling declaring a contract termination null and void automatically entails the reinstatement of the worker and the payment of accrued wages relating to the dismissal proceedings**, in accordance with section 55(6) of the Workers’ Statute. Therefore, the Government explains that, in such cases, it is not that there is a preference for reinstatement but that reinstatement is compulsory for the enterprise.
- 183.** Regarding cases of unfair dismissal as referred to in section 56 of the Workers’ Statute, the Government indicates that the reasoning of the two confederations is based on an **incorrect assumption, inasmuch as they consider that the two options** (reinstatement of the worker or termination of the contract with payment of statutory compensation) **are the same and should be afforded equal treatment, i.e. wages that have accrued in relation to the proceedings should be paid in both cases**. The Government recalls that the Constitutional Court has handed down a number of rulings that consider the two scenarios to be different. One of these is ruling No. 122/2008 of 20 October 2008 of the Constitutional Court, Second Section, handed down in response to a request for constitutional protection, which argued that the amendment introduced by Royal Decree-Law No. 5/2002 to the provisions governing wages that have accrued in relation to the proceedings – which resembled the provisions currently in force – was unconstitutional. When the request was submitted, it was argued that the underlying fundamental rights in the amended provision had been violated, on the basis that such a violation stems from the fact that only in cases where the employer opts for reinstatement of the worker or where the dismissal has been declared null and void is the worker entitled to receive “accrued wages relating to dismissal proceedings” but not when the employer decides to terminate the contract with payment of compensation, in contrast to the situation that existed prior to the 2002 legal reform. The ruling in question reads as follows:

... Firstly, the individual requesting protection argues that the provisions of section 2(3) of Royal Decree-Law No. 5/2002 violate the right to equality before the law (article 14 of the Spanish Constitution) by affording unequal treatment to workers who are in the same situation – namely, workers dismissed for disciplinary reasons whose dismissal has been declared unjustified by the competent legal body – depending on whether the dismissal has been declared null and void or unfair and, in cases where the dismissal has been declared unfair, depending on whether the employer has opted for reinstatement of the dismissed worker or for termination of the contract with payment of compensation. In cases where the dismissal has been declared null and void or unfair, resulting in reinstatement of the workers, they are entitled to receive “accrued wages relating to dismissal proceedings”, in accordance with the previous legislation; in cases of unfair dismissal involving termination of the contract with payment of compensation, that right has been abolished, thereby giving rise to this unequal treatment, which is unjustified and arbitrary, inasmuch as reinstatement and compensation should be equivalent options and the harm suffered by the worker is invariably the same. Consequently, what the law is actually doing is lowering the cost of dismissals and

encouraging the employer to opt for termination of the contract with payment of compensation ...

... Both cases stem from the same situation. Both cases involve workers dismissed for disciplinary reasons whose dismissal has been declared null and void or unfair by the courts or recognized as such in a conciliation settlement. Such a declaration or act of recognition obliges the employer, in the case of a dismissal being declared null and void, to reinstate the worker whereas, in the case of a dismissal being declared unfair, the employer can decide – except in specific cases where it is up to the worker to decide and which do not affect the subject of the request for constitutional protection – to either reinstate the worker or to terminate the contract with payment of compensation, a termination which, according to the law, shall be understood as having taken effect on the date on which the employee actually ceases work. If the worker is reinstated – regardless of whether the dismissal has been declared null and void or unfair and the employer has chosen this course of action – the employer must pay the worker the outstanding wages for the period from the date of dismissal until the date of notification of the ruling. Consequently, the situation of the workers, which stemmed from identical circumstances, may give rise to two very different contingencies: in the first, the worker is reinstated in the enterprise, thereby overturning the dismissal. It is in this situation that the difference in treatment under the law occurs, by recognizing in the first contingency but not in the second the right to wages that have accrued from the date of dismissal until the date of notification of the ruling.

**As can easily be deduced from the above, the two situations being compared are in no way homogeneous but, on the contrary, radically different.** In one of the cases, the employment relationship between the enterprise and the worker is maintained, on the understanding that, from the time when the dismissal is declared unfair and the employer opts for reinstatement of the worker or the dismissal is declared null and void, the employment relationship has continued without interruption between the date of dismissal and the date of reinstatement. In the second case, the employment relationship is irrevocably terminated from the date of dismissal ...

... **Making the right to receive accrued wages contingent on the ongoing nature of the employment relationship** – namely, that workers who are reinstated are entitled to those wages because they are deemed to have maintained their employment relationship with the enterprise at all times, since they were not responsible for their absence from work, whereas workers whose employment contracts were irrevocably terminated on the date of dismissal do not have this entitlement – **is a legitimate option for the legislator which does not violate the principle of equality, inasmuch as these situations are clearly different in terms of their respective objectives**, and regardless of conceptions of the legal, remunerative or compensatory nature of “accrued wages relating to dismissal proceedings”, an issue which has traditionally been controversial in terms of doctrine and jurisprudence and which, in any case, lies outside the scope of this jurisdiction relating to constitutional protection ...

... The crucial element of the legal provisions under examination is the consideration that the employment contract is fully terminated on the date of dismissal, except where it is declared null and void or the employer subsequently opts for reinstatement. Consequently, the act of contesting the dismissal will make it possible to decide whether it is fair or unfair (or, where applicable, null and void), with the attendant consequences after the enterprise exercises its right to decide to either compensate or reinstate the worker, but without altering the date of dismissal in the first of these cases.

What is clear is that the decision to consider the employment contract fully terminated on the date of dismissal, regardless of whether it is contested or not, in cases where the employer has decided not to reinstate the worker, cannot be construed as violating the right to equality before the law (article 14 of the Spanish Constitution). In the case of reinstated workers, the very essence of reinstatement would be incompatible with an effect of this nature, and for this reason we are once again confronted with situations that are heterogeneous and not comparable, for which the legislator’s solution is coherent and proportionate to the difference between them ...

**184.** The Government indicates that the Constitutional Court used similar terms in rulings Nos 84/2008 of 21 July 2008 and 85/2009 of 18 February 2009.

185. The Government suggests that the two confederations have misread Article 10 of Convention No. 158, as that Article does not specifically refer to accrued wages or any similar concept. In addition, the preference for reinstatement, which could be literally derived from Article 10 of the Convention, does not prevent national legislation from providing alternative solutions. The text of Article 10 of the Convention leaves no room for doubt regarding the fact that **the bodies that review dismissals** – judges in the case of Spain – **may or may not be empowered under national law to order reinstatement**. The only obligation, if they are not empowered to order reinstatement or reinstatement is not possible, is that they must have the power to order the payment of compensation.

186. The Government refers to the explanations contained in paragraph 222 of the 1995 General Survey, where the Committee of Experts makes a single mention of accrued wages in relation to cases where reinstatement is ordered, which reads as follows:

**Where reinstatement is ordered**, the worker generally also has the right to the remuneration that he would have received between the date of termination of employment and the date of the decision, or of the actual reinstatement. Sometimes a deduction is made from this amount of a sum corresponding to any wages the worker may have received in the meantime if he has been able to find alternative employment. The competent bodies may frequently also provide that the employment relationship shall be considered to be uninterrupted, enabling the worker to retain his acquired rights, such as pension entitlements and qualifying periods for various purposes ...

187. The Government also recognizes that, as indicated by the two confederations, in paragraph 219 of the 1995 General Survey, the Committee of Experts explains that: “[t]he 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”. The Government indicates that the same paragraph of the 1995 General Survey adds that: “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”.

188. The Government stresses that, following the 2012 labour reform, the Workers’ Statute provides, in cases of unfair dismissal where the employer decides not to reinstate the worker, for the payment of compensation equal to 33 days’ wages per year of service or on a pro-rata basis for each month of service for periods of less than one year, not exceeding 24 monthly payments. Hence **the current Spanish system does indeed provide for “the payment of adequate compensation”** to the worker in cases where the termination of employment is unjustified. The Government recalls that, despite the fact that the 2012 labour reform reduced the amount of compensation, it continues to be greater than that provided for by the systems of neighbouring countries.

189. Furthermore, the Government indicates that the **preference for declaring the termination invalid and reinstating the worker**, as established in Article 10 of the Convention, is also present in the Spanish legal system, given that:

- in cases where the termination of employment is declared null and void, reinstatement of the worker is mandatory;
- in cases where the termination of employment is declared unfair and where this affects workers’ legal representatives or trade union delegates, it is up to those individuals to decide between reinstatement and termination of the contract with payment of compensation. Section 56(4) of the Workers’ Statute expressly states that if no choice is made, the worker shall be deemed to have opted for reinstatement;

- lastly, according to section 56(3) of the Workers’ Statute, when it is up to the employer to decide and no decision is taken, reinstatement shall be deemed to be the option chosen.

**190.** Contrary to the statements of the two confederations, the Government emphasizes in its communications that accrued wages are not “part of the compensation” in cases where the worker is reinstated. The Government recalls that, in the case of reinstatement, the worker is not entitled to any compensation, which is not the case when the contract is terminated. Furthermore, since reinstatement must entail the same conditions as those that existed prior to the unjustified termination of employment, it follows that, in this case, the worker’s right to receive accrued wages should be recognized, given that the aim is to achieve a result equivalent to that which would have existed if the unjustified termination had not taken place.

**191.** The Government indicates in its communication of August 2013 that Royal Decree-Law No. 3/2012 amended the wording of section 209(4) of the revised text of the Social Security Act (LGSS), which refers to official unemployment (unemployment as defined by law) in the event of dismissal or termination of employment, to read as follows:

In the event of dismissal or termination of employment, the employer’s decision to terminate the relationship shall, in and of itself and without the need for an appeal, be understood to be the cause of official unemployment. Taking action against the dismissal or termination shall not prevent the worker from being entitled to the benefit.

**192.** The Government recalls that the preamble to Act No. 3/2012 explains that the abolition of accrued wages in cases of unfair dismissal without reinstatement may stem from the fact that the worker can claim unemployment benefits as soon as the decision to terminate the contract takes effect. Furthermore, in cases where accrued wages are paid, the employer is obliged to register the worker and pay retroactive social security contributions on his/her behalf (obligations that are not applicable in cases involving compensation). According to section 209(6) of the Social Security Act, receiving accrued wages is incompatible with receiving unemployment benefits.

**193.** In short, the Government indicates that the abolition of accrued wages in cases of unfair dismissal (except where the dismissed person is a legal representative of the workers or a trade union representative, in which case payment shall apply regardless of whether or not the worker is reinstated) does not constitute non-compliance with the guarantees established in Convention No.158, as there is a compensation scheme for such cases, which is compatible with official unemployment and the system of protection against this contingency.

**194.** As regards the two confederations’ allegations that the abolition of accrued wages is an incentive to the employer to terminate the contract rather than reinstate the worker, since compensation costs the employer less, the Government suggests that such a general statement is unfounded, as it would be necessary to look at specific cases to calculate the cost of either option to the employer, given that certain costs are determined by a number of variables (for example, the worker’s seniority). Hence there can be cases where the amount of compensation greatly exceeds the wage and social security costs incurred in reinstatement and, conversely, cases where the dismissal is declared unfair and the compensation to be paid is much lower than the cost of reinstatement, especially if the worker has only been with the enterprise for a short time.

**195.** Lastly, the Government states that it makes no economic sense, in cases of contract termination where workers have completed only a short period of service, for those workers to receive a greater amount in the form of accrued wages than in the form of compensation, which would have occurred if the regulations in question had not been

amended by the 2012 labour reform. It is not reasonable to have to use the length of the proceedings as one of the criteria for determining the amount to be paid by the enterprise or by the State, in keeping with section 57 of the Workers' Statute, once 90 working days have elapsed since the date on which the appeal was made. The Government states that during this period dismissed workers may, if they fulfil the relevant criteria relating to contributions, claim unemployment benefits from the date when the termination decision takes effect and are also free to seek and accept other employment which, in addition, they would only be obliged to leave, should they wish to do so, if the enterprise decided to reinstate them. If the employer decides to pay compensation, the worker could receive this compensation and continue working in the new enterprise.

#### Dismissal on the grounds of absenteeism

**196.** The Government states that the new wording of section 52(d) of the Workers' Statute does not violate the provisions of Article 6(1) of Convention No. 158 precisely because it does not consider absence from work due to illness resulting from common contingencies to be a valid reason for dismissal. The Government maintains that the 2012 legal reform has increased the level of protection afforded to workers by adding absences that, without exceeding 20 consecutive days, may be due to treatment for cancer or any other serious disease (a concept to be defined by national legislation or case law) to the contingencies that are not included in the calculation.

**197.** The Government recalls and emphasizes in its communication of August 2013 that the initial wording of the Workers' Statute, adopted by Act No. 8/1980 of 10 March, contained the following version of section 52(d):

Intermittent absences from work, even where justified, which total 20 per cent of working days in two consecutive months, or 25 per cent of working days in four non-consecutive months within a 12-month period, provided that the **rate of absenteeism of the total workforce of the enterprise is more than 5 per cent** over the same period of time. For the purposes of the previous paragraph, absences for the reasons listed below shall not be counted as absences from work: a legal strike and its duration; activities concerning the legal representation of workers; occupational accidents; maternity; leave or holidays; **illness or non-occupational accident where sick leave has been certified by the official health authorities and exceeds 20 consecutive days** [emphasis added by the Government of Spain].

**198.** The Government underlines the fact that the new wording given to section 52(d) of the Workers' Statute by Act No. 3/2012, far from increasing the number of cases of temporary absence that may be used to justify dismissals for objective reasons, actually introduces two types of temporary absence which cannot be counted with a view to terminating employment, and which greatly increase the protection afforded to workers. These two new cases are absences resulting from medical treatment for cancer and those resulting from a serious illness or disease.

**199.** The Government recalls that the 2010 labour reform, through Act No. 35/2010 of 17 September 2010 establishing urgent measures for reform of the labour market, amended the revised text of the Workers' Statute and **set the rate of absenteeism of the total workforce in an enterprise at 2.5 per cent as a point of reference**. The Government notes in its communication of August 2013 that while the 2010 labour reform reduced the overall percentage of absenteeism among the total workforce of the enterprise, it did not give the two confederations cause to submit a representation alleging non-observation of Convention No. 158.

**200.** The Government indicates that while Act No. 3/2012 was in the process of adoption, the existence of potential problems regarding its application was detected and two significant improvements were made thereto: firstly, the requirement that the total number of absences

from work during the previous 12 months must amount to 5 per cent of working days was applied to cases where a contract is terminated on the grounds of absences from work, even when these are justified, but which remain intermittent and amount to 20 per cent of working days in two consecutive months; secondly, for the purpose of facilitating the calculation of absences from work, absences due to medical treatment for cancer or a serious illness or disease were excluded.

- 201.** The Government emphasizes that prior to the adoption of Royal Decree-Law No. 3/2012, the justified absences of a worker were linked to the rate of absenteeism of the total workforce of the enterprise, in particular to whether or not it exceeded 5 per cent over the same period of time. As from 21 September 2010, the rate was set at 2.5 per cent. Act No. 35/2010 reduced the benchmark for the total workforce, which nevertheless proved insufficient to prevent those who were most often absent from work in workforces with a low rate of absenteeism, even when those absences were justified, from benefiting. This situation serves to highlight that dismissals based on the rate of absenteeism were rare, which was more attributable to the double requirement (individual and collective) relating to the reason than to the lack of intermittent absences from work, even where these were justified.
- 202.** The Government indicates that a ruling handed down by the High Court of Cataluña (Labour Division, ruling No. 4242/2012 of 7 June 2012) contains an example of the situation described above. In a case involving the termination of a contract on the grounds of justified absences from work, the ruling describes in the established facts how there had been no precedent for dismissal based on section 52 of the Workers' Statute in the enterprise prior to the case involving the complainant. However, such a precedent was set in another major enterprise with regard to the same dates. The Government wonders whether it is for this reason that the two confederations attach importance to the possibility of the absence of a worker owing to illness becoming a valid reason for termination of employment.
- 203.** The Government explains that Royal Decree-Law No. 3/2012 removed the condition that required a certain level of absenteeism among the total workforce in addition to the absences of an individual worker. Following the parliamentary debate, Act No. 3/2012 returned to the practice of linking a worker's justified absences from work at a given time to a reference period. In order to prevent workers who are absent from work, even when such absences are justified, from benefiting from those who attend work faithfully, the way in which these absences are linked also takes into account the absences from work of the individual worker in question. Act No. 3/2012 considers as a potential reason for objective dismissal **absences from work by a worker over a short period** (two consecutive months or four non-consecutive months) – or, in the words of the two confederations, short-term individual absenteeism – **together with the worker's absences over a longer period of time, namely the previous 12 months.**
- 204.** The Government reiterates that absences from work due to illness or a non-occupational accident lasting less than 20 days or without sick leave certified by the official health authorities have been counted since 1980 as absences from work that may constitute grounds for objective dismissal. None of the reasons for termination of employment applies automatically. Firstly, one of the reasons provided for by law must be present, be it for an individual dismissal, a dismissal on disciplinary grounds, an objective dismissal or a collective dismissal, and secondly, the employer must unambiguously express his wish to terminate the employment relationship for precisely the same reason.
- 205.** The Government maintains that the above situation is compatible with international labour standards, both with Article 6 of Convention No. 158 and with the situation provided for in the Termination of Employment Recommendation, 1963 (No. 119), which does not refer to

absences from work. According to the Government's communication of August 2013, this means that the Convention allows the limits of temporary absences due to illness or injury to be modulated or made more precise, for example through national law.

206. The Government also recalls the explanations contained in paragraph 137 of the 1995 General Survey relating to Article 6 of the Convention, in which the Committee of Experts said that the Convention allows for certain restrictions that can be determined by national methods of implementation. The Government states that the Convention does not define the concept of illness or injury. Nor does it define the concept of temporary absence. The term "temporary" implies in itself that the protection may be restricted to a certain length of absence. In the same paragraph, the Committee of Experts goes on to say that: "Moreover, the Convention does not specify what sort of restrictions might be established. One of the restrictions could be related to repeated absences as a result of illness. It should also be mentioned that breach of contract following extended leave due to illness ... should be seen as a termination that would normally give rise to severance allowances and other similar benefits, and not as a breach of contract by the employed person". The Government reiterates that, according to the Committee of Experts, the Convention allows the concept of temporary absence to be defined by national methods of implementation.
207. The Government explains that, under the Spanish system, temporary absences due to illness or injury lasting for 20 days or more which are certified by the official health authorities can in no way give grounds for termination of an employment contract, in accordance with the current wording of section 52(d) of the Workers' Statute. However, permanent incapacity, which is when the illness or accident prevents the worker from returning to work on a permanent basis, as opposed to temporary incapacity, is in fact a reason for dismissal, although not under section 52 of the Workers' Statute.
208. The Government reiterates that there is no conflict between the concept of temporary absence, which is referred to in the Workers' Statute, and the provisions of the Convention. According to the Government, the 2012 labour reform served to amend the wording of the text by including expressly, although perhaps not exhaustively, types of absences that may be brief or intermittent but cannot be considered as reasons for objective dismissal, that is to say, they shall not count as absenteeism. The Government explains that this is how absences have been handled which are due to: **risk during pregnancy and nursing (breastfeeding); illnesses caused by pregnancy, childbirth or nursing (breastfeeding); paternity; illnesses resulting from the physical or psychological effects of certified gender-based violence; and medical treatment for cancer or a serious disease or illness.**
209. The Government indicates that intermittent absences from work, even when these are justified, due to an illness other than those mentioned above or a non-occupational accident, remain a reason for objective dismissal where sick leave has not been certified by the official health authorities or, even if it has, where the duration of the absence is less than 20 consecutive days and the total sick leave taken amounts to 20 per cent of working days in two consecutive months, provided that the total number of absences from work over the last 12 months amounts to 5 per cent of working days therein, or to 25 per cent of working days in four non-consecutive months within a 12-month period.
210. The Government recalls that the current provisions governing temporary absences from work use the criterion of offsetting absences during a specific period against those recorded over a period greater than one year for the same worker. This principle notwithstanding, the consideration given to the absences in these two situations is applicable to 20 per cent in two consecutive months and to 25 per cent in four non-consecutive months.

***Pleas of unconstitutionality***

**211.** In its communications of June and August 2013, the Government of Spain noted that the representation submitted by the two confederations on aspects of the 2012 labour reform and a plea of unconstitutionality before the Constitutional Court submitted by two parliamentary groups of the Congress of Deputies had points in common. The Government indicates that, in a ruling handed down on 30 October 2012,<sup>22</sup> the plenary of the Constitutional Court declared admissible plea of unconstitutionality No. 5610-2012 submitted by the socialist and left-wing coalition parliamentary groups against sections 4(3), 12(1), 14(1) and (2), 18(3) and (8), and 23(1), the third additional provision and final provision 4(2) of Act No. 3/2012 of 6 July 2012 establishing urgent measures for reform of the labour market. Furthermore, the Government noted that another plea of unconstitutionality, No. 5603-2012<sup>23</sup> from the parliament of Navarra, had been submitted against sections 4, 14(1) and 14(3), and, by extension, against section 14(2) and the fifth additional provision of Act No. 3/2012 and had been declared admissible on the same date as plea No. 5610-2012.

**212.** The Government states that a number of the points included in both pleas of unconstitutionality bear some similarity to the representation submitted by the two confederations in relation to Convention No. 158. The Government has followed the order of the sections in Act No. 3/2012 and has commented on the claims made in the plea of unconstitutionality, indicating whether or not a similar allegation has been made in the representation submitted in relation to Convention No. 158:

- Unconstitutionality of section 4.3 of Act No. 3/2012 for violation of articles 35(1), 37(1) and 24(1) of the Spanish Constitution. By providing for the incorporation of a trial period of “one year in all cases” in the CAE contract, this article, according to the plea of unconstitutionality, violates three constitutional principles: the right to work (article 35(1) of the Spanish Constitution, interpreted in the light of the international treaties and agreements ratified by Spain in accordance with article 10(2) of the Spanish Constitution); the right to collective bargaining (article 37(1) of the Spanish Constitution); and the right to effective legal protection (article 24(1) of the Spanish Constitution). The Government indicates that section 4(3) of Act No. 3/2012, which regulates the CAE, features in the representation in so far as the two confederations consider the one-year trial period the equivalent of free dismissal, which is contrary to the provisions of Convention No. 158.
- Unconstitutionality of section 18(3) of Act No. 3/2012 for violation of articles 35(1) and 24(1) of the Spanish Constitution, following the amendment of several aspects of section 51(1) of the Workers’ Statute, and by extension section 52(c). More specifically, the plea of unconstitutionality questions the new terms for defining the economic, technical, organizational and production-related reasons that justify the collective and objective termination measures covered by the abovementioned provisions. It is stated that the amended provisions dispense with the need to justify dismissals carried out on operational grounds. As a result, there can be no judicial review of such grounds for dismissal. The Government indicates that the two confederations have used similar terms in their representation to assert that the new regulations governing economic, technical, organizational or production-related reasons can lead to workers being dismissed without sufficient or proportionate reason and without any genuine judicial review, which would be contrary to the provisions of Convention No. 158. Moreover, the representation also refers to the

<sup>22</sup> *Official Gazette*, 9 Nov. 2012, Section I, p. 78332.

<sup>23</sup> *Official Gazette*, 9 Nov. 2012, Section I, p. 78331.

inclusion of absences from work due to illness or injury, even when such absences are duly justified, as a reason for objective dismissal.

- Unconstitutionality of sections 18(8) and 23 of Act No. 3/2012, which amend section 56(2) of the Workers' Statute and section 110(1) of the Act regulating labour jurisdiction, respectively, relating to the effects of dismissals declared to be unfair. In particular, the plea of unconstitutionality before the Constitutional Court challenges the provision according to which, in cases of unfair dismissal, if the employer opts for reinstatement, the worker shall be entitled to accrued wages relating to the dismissal proceedings, while this right is not recognized when the employer decides to pay compensation. The plea of unconstitutionality considers articles 35(1) and 14 of the Spanish Constitution to have been violated. The Government indicates that the abolition of accrued wages relating to dismissal proceedings is also one of the reasons behind the representation, as being contrary to the provisions of Convention No. 158.

**213.** The Government states that article 10(2) of the Spanish Constitution establishes as a criterion for interpretation that “regulations relating to fundamental rights and freedoms recognized by the Constitution shall be interpreted in accordance with the Universal Declaration of Human Rights and the international treaties and agreements on the same matters ratified by Spain”. Furthermore, the rulings handed down by the Constitutional Court and the judicial bodies established by the international treaties and agreements on human rights and fundamental freedoms (for example, the European Court of Human Rights), serve as contrastive rulings in appeal cases. The effects of the ruling are limited to granting or denying protection for the right or freedom invoked.<sup>24</sup>

**214.** In its communications of August 2013 and May 2014, the Government refers to point 29 of the document entitled “Special procedures for the examination in the International Labour Organization of complaints alleging violations of freedom of association”, which states that: “When a case is being examined by an independent national jurisdiction whose procedures offer appropriate guarantees, and the Committee considers that the decision to be taken could provide additional information, it will suspend its examination of the case for a reasonable time to await this decision, provided that the delay thus encountered does not risk prejudicing the party whose rights have allegedly been infringed”.

### ***Impact of the 2012 labour reform***

**215.** In its communication of August 2013, the Government states that the 2012 labour reform is driving profound changes to the employment culture of Spain. The aim of the reform is to move towards “flexicurity” by striking a new balance between protection for workers and flexibility in the functioning of a labour market that offers more and better employment opportunities. In particular, to address the duality of the labour market, the reform is not targeting a single area, with action only in relation to recruitment, but is overseeing the adoption of a wide range of measures targeting the root of the problem: the rigidity of working conditions and variations in the costs of terminating contracts, depending on whether or not they are open-ended. In this context, the Government recalls that the 2012 labour reform introduced a new type of contract that favours stable recruitment, the CAE, and reinstated the ban on extending temporary contracts beyond two years. Moreover, the labour reform is encouraging internal flexibility, rationalizing and clarifying the rules governing objective dismissal and promoting collective bargaining that is more dynamic and better tailored to the needs of each enterprise. In other words, duality is being tackled in a systematic manner.

<sup>24</sup> The Government demonstrates the application of the abovementioned criterion for interpretation through Constitutional Court ruling No. 236/2007.

**216.** The Government indicates that the 2012 labour reform has yielded six main results:

- (1) **For the first time during the crisis, a major decrease in gross domestic product (GDP) has not exacerbated the downturn in employment.** According to the Government, the data on private-sector wage employment show that, for the first time during the crisis, acceleration in the economic downturn has not caused the rate of job losses to increase, given that the rate is in fact levelling off. A comparison of the first quarter (Q1) 2012-Q1 2013 period and Q1 2011-Q1 2012 shows that job losses in private-sector wage employment over that period have fallen from 5.26 per cent of the total number of employees to 4.78 per cent, despite the increased downturn in economic activity. It is in the area of open-ended employment where the slowing rate of job losses has levelled off the most, standing at -3.2 per cent compared with the previous -4.2 per cent.
- (2) **If the labour reform had not taken place, more jobs would have been lost.** The study carried out by the Ministry of the Economy and Competitiveness estimates that the reform helped prevent the loss of 225,800 jobs the year before it was introduced. Despite the more pronounced economic downturn in 2012 and the impact on employment of the fiscal consolidation process and the financial crisis, there were significantly fewer job losses in the private sector during the 12 months following the labour reform than during the 12 months preceding it.
- (3) **The evolution of self-employment has been more favourable following the labour reform, compared with the sharp downturn in the sector at the beginning of the crisis.** Between Q1 2008 and Q1 2012, almost 560,000 independent jobs were lost, the equivalent of 16 per cent. The trend in self-employment during the four quarters following the labour reform was more positive than during the four quarters preceding it, despite the deterioration of the economic situation. During the first half of 2013, there was an increase of almost 23,000 in the number of self-employed persons, a much healthier figure than that recorded during the other years of the crisis.
- (4) **Recent trends in the labour market have contributed significantly to improving the competitiveness of Spanish products.** During the last quarter of 2012, the greatest drop in unit labour costs of the crisis was recorded (-5.9 per cent) and efforts to regain lost competitiveness were stepped up. Owing to the progress made since the adoption of the reform, the level of unit labour costs is already lower than it was in 2007 and their evolution since 2005 has been more favourable than in Germany, France or Italy, where they are higher than the euro zone average.
- (5) **The Spanish economy will be able to create jobs despite lower GDP growth rates.** The Ministry of the Economy and Competitiveness has made an initial estimate that the Spanish economy will be able to generate employment on the basis of a growth rate of between 1 and 1.2 per cent, a rate which has fallen significantly since the reform, when it stood at around 2 per cent.
- (6) **The rise in the unemployment rate has levelled off since the labour reform.** The year-on-year rate of increase in unemployment, which reached almost 18 per cent during the first period following the labour reform (second quarter (Q2) 2012), has levelled off, currently standing at 5 per cent (Q2 2013).

**217.** The Government also points out that the specific objectives of the labour reform have been achieved: (1) to promote internal flexibility in enterprises as a real alternative to job losses; (2) to modernize collective bargaining in order to tailor it to the specific needs of enterprises and workers, and to encourage ongoing dialogue within enterprises; (3) to improve the employability of workers through training and efficient job placement; (4) to promote the creation of stable, high-quality employment and reduce duality in the labour market; and (5) to combat unjustified absenteeism in the workplace.

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## The Committee's conclusions

### Context of the 2012 labour reform

- 218.** The Committee notes that the economic crisis and unemployment, affecting all categories of the population, especially young people, and globalization which is pushing companies to be competitive, have forced most ILO member States to review their labour rules. Governments have often changed their labour market legislation, and some other reforms were obtained through collective bargaining, which has led to greater flexibility particularly in case of dismissal and less constraints for businesses.
- 219.** The Committee notes that a broad debate is ongoing between those who believe that labour law must evolve to cope with the crisis and unemployment and those who, on the contrary, believe that the causes of these serious problems and the solutions are quite different. Moreover, some believe that evoking the economic and financial crisis is a mere excuse to redesign the balance of power in the enterprise.
- 220.** The Committee notes that, whichever theory may be close to reality, the protection afforded by international instruments has become much more important. The ILO Conventions thus prevent increasingly frequent initiatives aimed at reducing the protection of workers. International labour Conventions, which are minimum standards accepted internationally, protect the fundamental rights of workers. The Committee notes that, although the primary function of international labour standards remains the same, their provisions must be applied in the light of different historical contexts and economic cycles.
- 221.** In this case, the Committee considered at the request of the two confederations (CC.OO. and UGT) whether the 2012 labour market reform, in regard to dismissals, adopted in Spain due to the serious unemployment situation and in order to address it, is compatible with the principles contained in the Termination of Employment Convention, 1982 (No. 158).
- 222.** The two confederations note that, since the beginning of the economic crisis and, in particular, as a result of the 2010 labour reform, the scenarios allowing fair dismissal by the employer on economic or similar grounds have been expanded. The negative trends that were already apparent in the 2010 labour reform were fully developed during the 2012 legislative reform, in clear violation of the dismissal model established in the Spanish Constitution and in direct opposition to the provisions of Convention No. 158. The two confederations recall that the termination of employment instruments adopted in 1982 by the International Labour Conference (Convention No. 158 and Recommendation No. 166) sought to reinforce guarantees for workers against dismissal, protecting them against arbitrary and unjustified termination of employment by the employer and against the economic and social problems resulting from loss of employment, thereby fostering job security, which is a key aspect of the right to work. The two confederations refer to the General Survey of 1995, in which the Committee of Experts indicated that a valid reason for termination was the cornerstone of the Convention.<sup>25</sup>
- 223.** The two confederations recall that the objectives of the 2012 labour reform were “to establish a clear framework contributing to the effective management of labour relations and facilitating job creation and the employment stability that our country needs”. With a

<sup>25</sup> ILO: *Protection against unjustified dismissal*, General Survey of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 4B), International Labour Conference, 82nd Session, Geneva, 1995, para. 76.

view to achieving the objective of “flexicurity”, the Government maintained that the measures adopted by the 2012 labour reform were designed to promote the employability of workers, open-ended contracts and other forms of work, with special emphasis on promoting recruitment by small and medium-sized enterprises (SMEs) and the hiring of young people, stimulating internal flexibility in the enterprise as an alternative to shedding jobs, and promoting market efficiency in connection with reducing labour duality, with measures mainly affecting the termination of employment contracts. The two confederations submit the data for the first quarter of 2013, published in the Labour Force Survey (EPA), and state that the number of unemployed continues to rise each quarter, with a 10 per cent rise from the beginning of 2012 to the beginning of 2013. This has resulted in record unemployment levels (more than 27 per cent of the active population). The 2012 labour reform has neither created employment nor curbed job losses. According to the Socio-Economic and Labour Report for Spain for 2012, published by the Economic and Social Council of the State, the 2012 labour reform has increased unemployment, facilitated individual and collective dismissals, worsened conditions of work for all employees and increased labour disputes and the trend towards legal action in labour relations.<sup>26</sup>

- 224.** The Government maintains that the crisis experienced in Spain in 2012 has highlighted the highly seasonal characteristics of employment in relation to the economic cycle. Since the start of the crisis, and unlike what happened in other European countries, Spanish enterprises effected dismissals in most cases rather than making greater use of internal flexibility measures. Opting for dismissal is a response to the weaknesses of the labour market in Spain, where there is less investment in training and more possibilities for certain categories of workers to be dismissed. Spain’s legal framework does not promote mechanisms for internal flexibility and collective bargaining that would give enterprises more scope for adjusting conditions of work in the light of changes occurring in the economic and productive sphere. The Government notes that there is a large group of workers on temporary contracts who do not enjoy the same protection against dismissal and who constitute the main adjustment mechanism for enterprises. The first workers dismissed are those on temporary contracts and, more than likely, young workers are the first to be dismissed among workers on open-ended contracts.
- 225.** The Government maintains that the 2012 labour reform has yielded six main results: (1) for the first time since the beginning of the crisis, a major decrease in gross domestic product (GDP) has not exacerbated the downturn in employment; (2) if the labour reform had not taken place, more jobs would have been lost; (3) the evolution of self-employment has been more favourable following the labour reform, compared with the sharp downturn in the sector at the beginning of the crisis; (4) recent trends in the labour market have contributed significantly to improving the competitiveness of Spanish products; (5) the Spanish economy will be able to create jobs despite lower GDP growth rates; and (6) the rise in the unemployment rate has levelled off since the labour reform.
- 226.** *The Committee notes the importance attached to international labour standards in Spain, as shown, in particular, by the ratification of numerous international labour Conventions (of which 84 are currently in force). It is clear from the tripartite discussion on the Employment Policy Convention, 1964 (No. 122), held in June 2013 at the International Labour Conference, that, since the beginning of the economic recession in 2008 and in light of the difficulty of overcoming the debt crisis in the Eurozone, there have been serious challenges in the application*

<sup>26</sup> See Chapter II of the *Socio-Economic and Labour Report for Spain for 2012*, adopted by the State Economic and Social Council of the Kingdom of Spain at its plenary session of 29 May 2013. The chapter covers the labour market, employment policies and labour relations.

of some Conventions.<sup>27</sup> In addition, the Committee on Freedom of Association, in its consideration of Case No. 2947, took due note of the need to respond urgently to an extremely serious and complex economic crisis and to address the serious unemployment problem (the highest in the European Union).<sup>28</sup> Like the Conference Committee and the Committee on Freedom of Association, the Committee stresses the importance of ensuring that the rules governing important aspects of labour relations are shared by the social partners and therefore urges the Government to increase its efforts to strengthen social dialogue and, in consultation with the social partners, to seek solutions to economic problems that are consistent with Convention No. 158.

### Establishment of a one-year period of probation under the “open-ended entrepreneur-support contract”

227. The two confederations maintain that the one-year period of probation under the “open-ended entrepreneur-support contract” (CAE), established in section 4(3) of Act No. 3/2012 of 6 July 2012, does not meet the criteria for exceptions allowed by Article 2(2)(b) of Convention No. 158. The challenged provision of national law states:

[CAE] contracts and the rights and obligations deriving from them shall be governed, as a general rule, by the provisions of the amended text of the Workers’ Statute, adopted by Royal Legislative Decree No. 1/1995 of 24 March 1995, and by the provisions of collective agreements regarding open-ended contracts, with the sole exception of the duration of the period of probation referred to in section 14 of the Workers’ Statute, which shall be one year in all cases. A period of probation may not be prescribed when the worker has previously performed the same duties in the enterprise, regardless of the type of contract.

228. The two confederations claim that the requirement that the length of the period of probation must be reasonable is an essential part of Spain’s legal system. In order to establish the meaning of “reasonable”, it is necessary to examine the criteria set out in Spanish law, case law and doctrine. Section 14 of the Workers’ Statute, which regulates the period of probation, sets a maximum period reflecting the training of the worker who signs a probationary agreement: **six months** for qualified technicians and **two months** for other workers. The two confederations maintain that the CAE departs from the criteria and principles laid down in the Spanish legal system since the **one-year** period of probation is not connected, either directly or indirectly, with the worker’s vocational qualifications or training, career experience, level of responsibility associated with the job or degree of difficulty of the duties involved.

229. The two confederations draw attention to the words “in all cases” in section 4(3) of Act No. 3/2012, which imply that the period of probation cannot be adapted to the specific situation of each worker. The two confederations maintain that such lengthy periods of probation cover, or may cover, situations equivalent to those involving temporary contracts but without the rules and guarantees laid down by the latter.

230. The two confederations state that they endorse the conclusions of the tripartite committee set up to examine the representation concerning France’s “new employment contract” (*contrat nouvelle embauche* – CNE), in which the committee expressed doubts as to

<sup>27</sup> Provisional Record No. 16, Part II (Rev.), International Labour Conference, 102nd Session, Geneva, June 2013, pp 109–116.

<sup>28</sup> 371st Report of the Committee on Freedom of Association, March 2014, para. 462.

whether a period of probation as long as two years under such contracts was reasonable.<sup>29</sup> The CNE would make it possible to avoid the application of some of the protections established in the Labour Code in the event of individual or collective termination of employment within two years of the conclusion of a CNE.

- 231.** The two confederations also indicate that the period of probation envisaged in Spain's legal system was designed to allow the employer to test the worker's vocational qualifications and suitability to the job at the beginning of the employment contract. On at least two occasions, the Supreme Court has considered the question of a period of probation longer than the six months established in the Workers' Statute and has stressed that the sole purpose of the period of probation was to ensure mutual acquaintance of the parties to the contract in such a way that the employer can evaluate the abilities of the worker and the desirability of maintaining the employment contract.<sup>30</sup>
- 232.** The two confederations cannot accept that the CAE can be justified as an employment policy measure. The fact that the CAE is linked to employment policy does not justify violation of the worker's rights with respect to termination of an employment contract, and labour rights cannot be sacrificed in the pursuit of specific macro-economic objectives. If exceptions such as those envisaged in the CAE were allowed, the binding provisions of international law enshrined in the Convention would be relegated to the status of mere guidelines subordinated to trends in economic policy.
- 233.** The Government stresses that the Convention does not define the concept of "reasonable duration" and maintains that it is for each country to determine the periods that are considered reasonable. It explains that the word "reasonable" as used in the Convention is an indeterminate legal concept that has been made more specific through national law for the sole purpose of the CAE, on the understanding that it must be the national courts that determine in each specific instance whether or not there has been a violation of the Convention in that regard.
- 234.** The Government also refers to the report of the tripartite committee set up to examine the representation concerning the CNE, in which the committee did not exclude the possibility that a period longer than six months might be justified to enable employers to measure the economic viability and development prospects of their enterprise, but found itself unable to conclude, from the considerations which were apparently taken into account by the French Government in determining the duration, that a period as long as two years was reasonable. The Government emphasizes the importance of this reasoning of the tripartite committee

<sup>29</sup> ILO: *Report of the committee set up to examine the representation alleging non-observance by France of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) and the Termination of Employment Convention, 1982 (No. 158), made under article 24 of the ILO Constitution by the Confédération générale du travail – Force ouvrière, Governing Body, 300th Session, Geneva, Nov. 2007, GB.300/20/6.*

<sup>30</sup> The two confederations refer to the Supreme Court ruling of 12 November 2007, in Case No. 4341/2006, which considered that "it would appear unreasonable to accept that the employer requires such a long period of probation [two years] for evaluation of work of this nature" (acquiring clients for inclusion in a telephone directory). The Supreme Court ruling of 20 July 2011, in Case No. 152/2010, referred to the previous decision and upheld its reasoning, namely that if the plaintiff was hired as a sales promoter, her work involving the sale of "Yellow Pages" directories and other products, "being subject to a one-year probationary period appears excessive by any standards, since the objective of the period of probation can be amply fulfilled in a much shorter period of time".

and stresses its understanding that the establishment of a period of probation longer than six months cannot be said to violate the Convention.<sup>31</sup>

- 235.** The Government maintains that the relative importance of the decisions of the Supreme Court referred to by the two confederations should be qualified because they provide a limited view of the purpose of the probationary period. The Government also recalls that there is flexibility in the application of Convention No. 158, particularly Article 2(2)(b) thereof, as seen from the final report of the Tripartite Meeting of Experts to Examine the Termination of Employment Convention, 1982 (No. 158), and the Termination of Employment Recommendation, 1982 (No. 166), which was adopted by the Government experts and Worker experts.<sup>32</sup>
- 236.** The Government maintains that the period of probation under the CAE fulfils more extensive functions; its objective is not only to ensure mutual acquaintance for both parties, but also to verify that the job is economically sustainable and can be maintained over a period of time, giving the employer a reasonable period to confirm his expectations and ultimately facilitating the recruitment of workers for an indefinite period. The Government explains that the length of the period of probation is justified by the crisis and the uncertainty of the economic climate and emphasizes that the period of probation under the CAE contract must be understood in the context of the purpose of the overall 2012 labour reform.
- 237.** The Government emphasizes that Act No. 3/2012 provides significant tax incentives and reductions in social security contributions over three years for enterprises hiring under a CAE contract, but always on condition that the employer continues to employ those workers for at least three years from the start date of the employment relationship; otherwise he will be required to repay the abovementioned incentives and reductions.
- 238.** The Committee notes that the CAE contract can only be used by enterprises with fewer than 50 workers which, despite the economic crisis, are pursuing the creation of employment (section 4(1) of Act No. 3/2012). Enterprises with fewer than 50 workers account for 99.23 per cent of Spain's enterprises (Part III, paragraph 4, of the Preamble to Act No. 3/2012).
- 239.** The Committee also notes that two specific provisions were included in order to prevent misuse of the period of probation established in the CAE. First, the period of probation does not apply to temporary workers who were previously hired by the enterprise section 4(3) of Act No. 3/2012); and, second, the CAE cannot be used by enterprises that, in the six months prior to recruitment, carried out dismissals on objective grounds which were declared unfair by a court ruling, or carried out collective dismissals (section 4(6) of Act No. 3/2012).
- 240.** The Committee also notes the temporary nature of the type of contract established in section 4 of Act No. 3/2012 since it is stipulated that it will remain in use "until the unemployment rate in our country falls below 15 per cent" (ninth transitional provision of Act No. 3/2012).

<sup>31</sup> GB.300/20/6, op. cit., paras 70–71.

<sup>32</sup> Final report of the Tripartite Meeting of Experts to Examine the Termination of Employment Convention, 1982 (No. 158), and the Termination of Employment Recommendation, 1982 (No. 166), Geneva, 18–21 April 2011 (TMEE/C.158-R.166/2011/2), para. 127.

**241.** According to Article 2(2) of Convention No. 158:

A Member may exclude the following categories of employed persons from all or some of the provisions of this Convention:

- (a) workers engaged under a contract of employment for a specified period of time or a specified task;
- (b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration;
- (c) workers engaged on a casual basis for a short period.

This Article must be read in conjunction with Article 4 of the Convention, which states:

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.

**242.** The Committee observes that Article 2(2)(b) of the Convention does not include a definition of the term “period of probation”, nor does it explain what constitutes a “reasonable duration”. In paragraph 40 of the 1995 General Survey on Convention No. 158, the Committee of Experts states that it is for each country to determine the periods that are considered reasonable, provided that this is done in good faith. The Committee of Experts indicates that the only condition established in the Convention is that the duration of the period be determined in advance, in particular so that the worker is aware of the conditions under which he is engaged and so that the period cannot be unduly prolonged.

**243.** The Committee also observes that, in the report of the tripartite committee set up to examine the representation concerning the CNE, adopted by the Governing Body in November 2007, the possibility that a period longer than six months might be justified to enable employers to measure the economic viability and development prospects of their enterprise is not excluded.<sup>33</sup>

**244.** The Committee also notes that the background paper prepared by the Office for the Tripartite Meeting of Experts to Examine Convention No. 158 and Recommendation No. 166, held in April 2011, refers to the 1995 General Survey and reiterates the statement by the Committee of Experts that it is for each country to determine the periods considered to be reasonable, subject to the requirement that this determination is made in good faith.<sup>34</sup> On that occasion, during the tripartite debate on the scope of the exclusions envisaged in Article 2 of the Convention, the Office suggested that three important principles applied to the flexibility framework: (1) it could only be applied through tripartite consultation; (2) it must be a transparent, good-faith process; and (3) governments must be accountable by reporting the flexibility that was exercised.<sup>35</sup>

**245.** *The Committee observes that Article 2(2) of the Convention provides that some categories of workers may be excluded from all or some of its provisions;*

<sup>33</sup> GB.300/20/6, op. cit., para. 71.

<sup>34</sup> Background paper for the Tripartite Meeting of Experts to Examine the Termination of Employment Convention, 1982 (No. 158), and the Termination of Employment Recommendation, 1982 (No. 166), Geneva, 18–21 April 2011 (TMEE/C.158-R.166/2011), para. 45.

<sup>35</sup> Final report of the Tripartite Meeting of Experts to Examine the Termination of Employment Convention, 1982 (No. 158), and the Termination of Employment Recommendation, 1982 (No. 166), op. cit., para. 56.

*however, it considers that the widespread use of such exclusions would be contrary to the purpose of the Convention, which is to provide a balance between the interests of employers and the interests of workers by promoting social dialogue as a means of achieving this balance. The Committee also considers that no direct link between the facilitation of dismissals and job creation has been demonstrated.*

- 246.** *The Committee observes that, according to the complainant organizations, the “entrepreneur-support contract” was established without social dialogue. The Committee finds that it lacks sufficient basis to consider that the extension to one year of the exclusion from the scope of the Convention may be considered reasonable, especially as this extension was not the result of social dialogue and was introduced in this type of employment contract which is of a general nature.*
- 247.** *Consequently, the Committee invites the Government to provide information on the evolution of the “open-ended entrepreneur-support contract” and, in light of the information available, to examine the possibility of adopting measures, in consultation with the social partners, to ensure that this contractual arrangement is not terminated at the initiative of the employer in order to avoid in an abusive manner the protection provided for in the Convention.*

#### **New regulations concerning economic, technical, organizational or production-related reasons for dismissal**

- 248.** The two confederations maintain that the amendments to section 51(1) of the Workers’ Statute introduced through Act No. 3/2012 do not allow judges to “examine the reasons given for the termination and the other circumstances relating to the case” and to “determine whether the termination was indeed for these reasons” (Article 9(1) and (3) of Convention No. 158). The challenged provision of national law reads:

Economic reasons shall be deemed to exist where the results of the enterprise indicate a negative economic situation, such as the existence of current or forecast losses, or a persistent drop in the level of ordinary revenue or sales. In any case, the drop shall be deemed to be persistent if, over a period of three consecutive quarters, the level of ordinary revenue or sales for each quarter is lower than that recorded for the same quarter of the previous year.

- 249.** The two confederations assert that the preamble to Royal Decree-Law No. 3/2012 of 10 February 2012 and of Act No. 3/2012 of 6 July 2012 reflects the Government’s wish to exclude the assessment of whether or not the dismissal is a reasonable or proportionate measure from judicial review.
- 250.** Furthermore, Act No. 3/2012 brought in other adjustments to the way of calculating an enterprise’s drop in sales, which, in itself, can be a reason for dismissal. The 2012 labour reform reinforces the impression that dismissal can be an automatic measure justified solely by changes in the ordinary revenue figures of the enterprise. Such negative trends, as well as a drop in revenue compared with the corresponding quarter of the previous year, are sufficient grounds for dismissing the worker, quite apart from the impact that such factors might have on the operation of the enterprise, and without allowing the judicial or administrative bodies to verify whether the dismissal is reasonable, justified and proportionate.

- 251.** The two confederations observe that the courts have already had occasion to take strong corrective action in interpreting the scope of the 2012 labour reform. They have found it necessary to continue to prescribe that the termination must be reasonable and to require a full judicial review of the reasons for dismissal, including directly applying Convention No. 158. However, the Supreme Court has only ruled on one case of collective dismissal in relation to the 2012 labour reform and has merely emphasized the need to supply sufficient documentation to workers' representatives during the consultation period.<sup>36</sup>
- 252.** The Government maintains that the amendment to section 51(1) of the Workers' Statute, adopted in July 2012 through Act No. 3/2012, has provided a more precise definition of what constitutes valid economic, technical, organizational or production-related reasons for dismissal. The grounds for dismissal in Spanish labour law are restricted, a kind of *numerus clausus*, under sections 51 ff. of the Workers' Statute. The Government stresses that the 2012 labour reform is in conformity with Articles 4, 8 and 9 of Convention No. 158, in particular since Article 9(3) of the Convention allows national law and practice to determine the scope of action of the bodies competent to hear appeals against dismissal.
- 253.** The Government explains that, as a result of the parliamentary debate on the 2012 labour reform, more specific criteria for assessing economic reasons for dismissal have been established: the stipulation of "three consecutive quarters" during which the level of ordinary revenue or sales [for each quarter] was lower than that recorded for the same quarter of the previous year. According to the Government, the 2012 labour reform introduced greater legal certainty through a criterion that establishes an objective definition of the word "persistent" when determining that a decrease in revenue or sales constitutes a "negative economic situation", which is the first definition of an economic reason for dismissal. The Government considers that the above does not prejudice the assessment that the judge must make to identify a decrease in revenue as a negative economic situation. The "three quarters" criterion is quantitative and not qualitative, and does not provide an automatic justification of dismissal.
- 254.** The Government recalls the explanations provided by the Committee of Experts in paragraph 214 of the 1995 General Survey, which reads as follows: "... it is left to each country to determine the extent to which the impartial bodies before which appeals may be brought against termination of employment should be empowered to review the employer's judgement as to operational requirements, that is, the extent to which they are to be empowered to decide whether these reasons, which are valid by their nature, are sufficiently important to justify the termination of employment".
- 255.** The Government maintains that if a reason or cause is demonstrated, and this is confirmed by the judge, the cause exists and produces effects. If the reason or cause is not substantiated, it is the judge who has competence to rule that it does not exist, thereby invalidating the dismissal.
- 256.** The Government adds that the Act regulating labour jurisdiction, as amended by Act No. 3/2012, and the Workers' Statute state that the judge will decide on the fairness, unfairness or invalidity of a dismissal, according to the circumstances of the case and the proven facts. Therefore, collective dismissals in Spain were and continue to be formal dismissals subject to judicial review; thus, the courts may review the correctness or legitimacy of the measure.
- 257.** The Government indicates that the case law of the Labour Division of the National High Court and of the High Courts of Justice are consistent with Convention No. 158. It

<sup>36</sup> Supreme Court ruling of 20 March 2013 in Case No. 81/2012.

maintains that it may be concluded from an examination of the rulings that the courts are strictly enforcing verification of the reasons for collective dismissal established by law.

- 258.** The Government refers to five rulings of the Higher Courts of Justice of the respective Autonomous Communities, which upheld the organizational or production-related reasons put forward by the enterprise and overturned collective dismissals, considering that the negotiations had been conducted in bad faith and/or that the decision was disproportionate. Particularly noteworthy is the 9 April 2013 ruling of the High Court of Madrid (Labour Division), which declared the enterprise's decision to terminate 925 employment contracts unlawful and stated: "There are three criteria that must be met to justify the dismissal: (1) demonstrate the existence of a negative economic situation; (2) establish how the situations described affect the employment contracts that are to be terminated and the extent to which there is a need to terminate all or some of those jobs; (3) demonstrate that the dismissal decisions are proportionate as regards responding to that need ...".
- 259.** Also worthy of note is the Government's reference to another illustrative ruling that confirms the foregoing. This ruling, issued by the Labour Court of Madrid on 27 June 2012, states: "The new regulations do not invalidate the doctrine on collective dismissals required by enterprises on economic grounds, as set out in the Supreme Court ruling of 27 April 2010, which determines criteria established by this body regarding the validity – or fairness – of dismissals in crisis situations ..." and establishes that "[s]ufficient evidence and arguments must ... be provided to enable the court to carry out the examination needed in each case to reach a reasonable conclusion regarding the existence of a connection between the crisis situation and the dismissals".
- 260.** Article 1 of Convention No. 158 states:

The provisions of this Convention shall, in so far as they are not otherwise made effective by means of collective agreements, arbitration awards or court decisions or in such other manner as may be consistent with national practice, be given effect by laws or regulations.

The Committee also notes that, with respect to appeals against termination (section C of the Convention), the relevant provisions are as follows:

*Article 8(1)*

A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator.

...

*Article 9*

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

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

- (a) the burden of proving the existence of a valid reason for the termination as defined in Article 4 of this Convention shall rest on the employer;
- (b) the bodies referred to in Article 8 of this Convention shall be empowered to reach a conclusion on the reason for the termination having regard to the evidence provided by the parties and according to procedures provided for by national law and practice.

3. In cases of termination stated to be for reasons based on the operational requirements of the undertaking, establishment or service, the bodies referred to in Article 8 of

this Convention shall be empowered to determine whether the termination was indeed for these reasons, but the extent to which they shall also be empowered to decide whether these reasons are sufficient to justify that termination shall be determined by the methods of implementation referred to in Article 1 of this Convention.

- 261.** The Committee notes that Article 9(3) of the Convention establishes that in cases of termination stated to be for reasons based on the operational requirements of the undertaking, establishment or service, the bodies referred to in Article 8 of the Convention, such as a labour court, shall be empowered to determine whether the termination was indeed for these reasons, but the extent to which they shall also be empowered to decide whether these reasons are sufficient to justify that termination shall be determined by the methods of implementation referred to in Article 1 of Convention No. 158; in other words, in the case of Spain, by national law and court rulings.
- 262.** The Committee notes that, according to the two confederations, the new wording of section 51 of the Workers' Statute omits any reference to the reasonableness of collective dismissal for economic, technical, organizational or production-related reasons. The two confederations therefore allege that judges are prevented from examining the reasons given for the dismissal and the other circumstances relating to the case and from determining whether the termination was indeed for those reasons.
- 263.** The Committee notes that paragraph V of the preamble to the Royal Decree-Law and subsequent Act No. 3/2012 states: "It is now clear that the judicial review of these dismissals must restrict itself to the consideration of certain factors, namely the reasons for dismissal". The Committee observes that the new wording of section 51(1) of the Workers' Statute and the practice of the courts still allow judges to consider not only the validity of the reasons for dismissal, but also the circumstances of the dismissals and to determine whether the dismissals were really for the reasons put forward by the employer.
- 264.** The Committee is aware of the rulings of 2012 and 2013, transmitted by the two confederations and by the Government, in which the courts applied section 51 of the Workers' Statute, as amended; considered the economic, organizational or production-related reasons put forward by the enterprise and the circumstances of the case; and determined whether the termination had really been for those reasons. The Committee notes that this situation confirms the existence of a genuine judicial review of dismissals for economic reasons.
- 265.** *The Committee considers that the changes in the economic, technical, organizational or production-related reasons for dismissal resulting from the amendments to the Workers' Statute, adopted during the 2012 legislative reform, do not violate the provisions of Articles 1, 8 and 9 of Convention No. 158.*
- 266.** *The Committee considers that the Government should continue to submit information on the manner in which the new regulations on the economic, technical, organizational or production-related reasons for dismissal have been applied in practice, including statistics on the number of appeals lodged, the outcome of these appeals and the number of terminations for economic or similar reasons.*

**Abolition of *salarios de tramitación* in cases where the employer opts for termination of the employment contract further to a judicial ruling of unfair dismissal**

**267.** The two confederations maintain that the amendments to section 56 of the Workers' Statute adopted through Act No. 3/2012, whereby the obligation in respect of sums payable by way of remuneration during proceedings challenging dismissal (*salarios de tramitación*) was abolished, deprives workers of real and effective protection against unlawful or unjustified dismissals since the workers in question do not receive the adequate compensation prescribed by Article 10 of the Convention. In its current wording, the challenged provision of section 56 of the Workers' Statute provides that:

1. When the dismissal is declared unlawful, the employer may decide, within five days of being notified of the ruling, to either reinstate the worker or pay him compensation equal to 33 days' wages for each year of service or on a pro-rata basis for each month of service for periods of less than one year, not exceeding 24 monthly payments. If the employer decides to pay the worker compensation, this shall terminate the employment contract, which shall be understood as taking effect from the date on which the employee actually ceases work.

2. If the employer decides to reinstate the worker, the worker shall be entitled to wages that have accrued in relation to the dismissal proceedings. These wages shall be equal to the total of the outstanding wages from the date of dismissal until the notification of the ruling of unfair dismissal, or until the worker finds another job, if he/she is recruited prior to the ruling and the employer provides proof of the worker's earnings so that they may be deducted from the *salarios de tramitación*.

3. If the employer does not opt for either reinstating or compensating the worker, it is understood that the worker shall be reinstated.

4. The above option shall rest with the dismissed person if the latter is a workers' legal representative or a trade union delegate. If no choice is made, it shall be understood as opting for reinstatement. When a decision is taken in favour of reinstatement, be it express or implied, reinstatement shall be mandatory. Regardless of whether compensation or reinstatement is chosen, the worker shall be entitled to the *salarios de tramitación* relating to the proceedings referred to in point 2.

**268.** The two confederations refer to section 56(1) of the Workers' Statute and explain that the abolition of *salarios de tramitación* creates an irrational and arbitrary financial incentive in favour of dismissal and against stability of employment, in direct opposition to the right to work.

**269.** The two confederations emphasize that, in order to ensure compliance with Article 10 of Convention No. 158, which expressly provides that in the event of dismissal without a valid reason judges "shall be empowered to order payment of adequate compensation", workers must be afforded protection in the event of any judicial delay in the settlement of the proceedings relating to unfair dismissal.

**270.** The Government suggests that the two confederations have misread Article 10 of Convention No. 158, as that Article does not specifically refer to *salarios de tramitación* or any similar concept. The text of Article 10 of the Convention leaves no room for doubt regarding the fact that the bodies that review dismissals – the courts in the case of Spain – may or may not be empowered under national law to order reinstatement. The only obligation, if they are not empowered to order reinstatement or reinstatement is not possible, is that they must have the power to order the payment of compensation.

**271.** The Government refers to the explanations contained in paragraph 222 of the 1995 General Survey, where the Committee of Experts makes a single mention of *salarios de tramitación* in relation to cases where reinstatement is ordered, which reads as follows:

Where reinstatement is ordered, the worker generally also has the right to the remuneration that he would have received between the date of termination of employment and the date of the decision, or of the actual reinstatement. Sometimes a deduction is made from this amount of a sum corresponding to any wages the worker may have received in the meantime if he has been able to find alternative employment. The competent bodies may frequently also provide that the employment relationship shall be considered to be uninterrupted, enabling the worker to retain his acquired rights, such as pension entitlements and qualifying periods for various purposes ... .

**272.** The Government also recognizes that, as indicated by the two confederations, in paragraph 219 of the 1995 General Survey, the Committee of Experts explains that: “[t]he 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”. The Government indicates that the same paragraph of the 1995 General Survey adds that the Convention: “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”.

**273.** The Government adds that receiving *salarios de tramitación* is incompatible with receiving unemployment benefits since section 209(4) of the revised text of the Social Security Act states that the worker can claim unemployment benefits as soon as the decision to terminate the contract takes effect.

**274.** The Government explains that the issues raised by the two confederations concern only cases where contract terminations are declared unfair, not cases where they are declared null and void.

**275.** Article 10 of Convention No. 158 states that:

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.

**276.** The Committee notes that in cases of unlawful dismissal, section 56(1) of the Workers’ Statute, as amended by the 2012 labour reform, requires either reinstatement of the worker or compensation equal to 33 days’ wages for each year of service or on a pro-rata basis for each month of service for periods of less than one year, not exceeding 24 monthly payments. The Committee also observes that the worker can claim unemployment benefits as soon as the decision to terminate the contract takes effect (section 209(4) of the revised text of the Social Security Act).

**277.** The Committee notes that where a dismissal is declared null and void – for example, if the dismissal is invalidated on the grounds that the worker’s fundamental rights and freedoms have been violated – the worker’s reinstatement with payment of *salarios de tramitación* is ordered automatically. In addition, the Committee took note that the Constitutional Court, in ruling No. 43/2014 of 14 February 2014,<sup>37</sup> confirmed its earlier case law on the

<sup>37</sup> Ruling No. 43/2014 of 14 February 2014 of the Constitutional Court sitting in plenary session declared non-receivable the question of unconstitutionality 3801-2013 raised in the ruling of the Labour Court No. 34 of Madrid in relation to the various provisions of the Royal Decree Law No. 3/2012 of 10 February 2012 establishing urgent measures for reform of the labour market, published in the *Boletín Oficial del Estado*, No. 60, 11 March 2014, Sec. TC., pages 130 and following.

constitutionality of legislative changes introduced to the *salarios de tramitación* in the Workers' Statute.

- 278.** The Committee notes that Article 10 of the Convention refers to the payment of “adequate compensation or such other relief as may be deemed appropriate”, without specifically mentioning the institution of *salarios de tramitación*.
- 279.** *The Committee considers that, while the changes introduced through the 2012 legislative reform have abolished the sums payable by way of remuneration during proceedings challenging dismissal (salarios de tramitación) in cases where the employer opts for termination of the employment contract further to a judicial ruling of unfair dismissal, the payment of compensation for termination of the employment relationship, required by Article 10 of Convention No. 158, has not been abolished. The Spanish courts are still empowered to order the payment of adequate compensation or such other relief as may be deemed appropriate where it is concluded that termination of the employment relationship was unjustified.*
- 280.** *The Committee considers that the Government should continue to provide information on the type of compensation awarded where the courts have ruled that termination of the employment relationship was unjustified.*

### **Changes in the regulations on absenteeism because of duly certified illness or accident: Dismissal for absenteeism**

- 281.** The two confederations claim that the new wording of section 52(d) of the Workers' Statute, which regulates termination of a contract for objective reasons, introduces the concept of dismissal for absenteeism, which is contrary to Article 6(1) of Convention No. 158. The contested provisions of national law read as follows:

Section 52. Termination of the contract for objective reasons. The contract may be terminated on the following grounds:

...

- (d) Intermittent absences from work, even if justified, which total 20 per cent of working days in two consecutive months, provided that the total absences in the previous 12 months account for 5 per cent of working days, or 25 per cent of working days in four non-consecutive months within a 12-month period.

For the purposes of the previous paragraph, absences for the reasons listed below shall not be counted as absences from work: a legal strike and its duration; activities concerning the legal representation of workers; occupational accidents; maternity; risks during pregnancy and nursing (breastfeeding); illnesses resulting from pregnancy, childbirth or nursing (breastfeeding); paternity; leave or holidays; illness or non-occupational accident where sick leave has been certified by the official health authorities and exceeds 20 consecutive days; absences resulting from the physical or psychological effects of gender-based violence which has been certified by the social welfare or health authorities, as the case may be.

In addition, for the purposes described in the first paragraph above, absences resulting from medical treatment for cancer or a serious disease or illness shall not be counted as absences from work.

- 282.** The two confederations indicate that what has changed in the new rules is that individual absences of short duration, even those on grounds of illness or accident, have been identified as a valid reason for the unilateral termination of employment at the wish of the

employer and in the exclusive interest of the enterprise. The two confederations consider that the worker's absence on grounds of illness has become a valid reason for dismissal; this is contrary to Article 6(1) of Convention No. 158.

- 283.** The two confederations recall that Article 6 of the Convention establishes that temporary absence from work because of illness or injury shall not constitute a valid reason for termination. They maintain that, although paragraph 2 of Article 6 provides that the definition of what constitutes temporary absence from work, the extent to which medical certification shall be required and possible limitations to the application of paragraph 1 of this Article shall be determined in accordance with national law, they consider that national law cannot see a temporary absence in terms of authorization to depart totally from the principle of Article 6.
- 284.** The two confederations refuse to accept that the length of the absence – nine days in two months on average – constitutes an economic imbalance for the employer, with no consideration given to any fault on the part of the worker, his seniority or past career. They maintain that it is incompatible with the values and principles of the Organization and the provisions of Article 6 of Convention No. 158 that, as a result of the reform introduced by Act No. 3/2012, it is possible to justify dismissal simply and solely on the grounds of the worker's illness.
- 285.** The two confederations also point out that the amendment to section 52(d) of the Workers' Statute made by the 2012 labour reform has resulted in dissociation of individual worker absences from general absenteeism in the enterprise. They explain that, under the previous wording, the employer could not dismiss the worker for absences, even those that were justified, if the total absence rate for the workforce did not exceed 5 per cent for the same periods of time. With the disappearance of the latter requirement, the employer is granted powers that did not previously exist.
- 286.** The Government considers that the new wording of section 52(d) of the Workers' Statute does not constitute a violation of Article 6(1) of the Convention. It maintains that the Convention allows the limits of temporary absences due to illness or injury to be modulated or made more precise, for example through national law, and it explains that the new wording, far from increasing the number of cases of temporary absence that may be used to justify dismissals for objective reasons, actually introduces two types of temporary absence which cannot be counted with a view to terminating employment and which greatly increase the protection afforded to workers. These two new cases are absences resulting from medical treatment for cancer and those resulting from a serious illness or disease (a concept to be defined by national legislation or case law).
- 287.** The Government explains that, since the adoption of the Workers' Statute in 1980, absences from work due to illness or a non-occupational accident lasting less than 20 days or without sick leave certified by the official health authorities have been counted as absences from work that may constitute grounds for objective dismissal. None of the reasons for termination of employment applies automatically. First, one of the reasons provided for by law must be present, be it for an individual dismissal, a dismissal on disciplinary grounds, an objective dismissal or a collective dismissal, and second, the employer must unambiguously express his wish to terminate the employment relationship for that very reason.
- 288.** The Government recalls that the 2010 labour reform had already amended the revised text of the Workers' Statute and set the rate of absenteeism of the total workforce in an enterprise at 2.5 per cent as a point of reference. The Government notes that this did not give rise to any dispute concerning the application of Convention No. 158.

289. The Government explains that in order to prevent workers who are absent from work, even when such absences are justified, from benefiting from those who attend work faithfully, the way in which these absences are linked also takes into account the absences from work of the individual worker in question. Act No. 3/2012 considers as a potential reason for objective dismissal absences from work by a worker over a short period (two consecutive months or four non-consecutive months), together with the worker's absences over a longer period of time, namely the previous 12 months. Thus, the 2012 labour reform eliminates the requirement that not only the worker's absences, but the rate of absenteeism of the total workforce, must be taken into account.
290. Article 6 of Convention No. 158 states that:
1. Temporary absence from work because of illness or injury shall not constitute a valid reason for termination.
  2. The definition of what constitutes temporary absence from work, the extent to which medical certification shall be required and possible limitations to the application of paragraph 1 of this Article shall be determined in accordance with the methods of implementation referred to in Article 1 of this Convention.
291. The Committee observes that, according to Article 6(2) of the Convention, the definition of what constitutes temporary absence from work because of illness or injury "shall be determined in accordance with the methods of implementation referred to in Article 1 of this Convention"; in other words, in the case of Spain, national law and court rulings.
292. The Committee notes that the wording of section 52(d) of the Workers' Statute, adopted through Act No. 8/1980 of 10 March 1980, had already established that absences because of illness or non-occupational accident where sick leave had been certified by the official health authorities and exceeded 20 consecutive days would not be counted as absences from work.
293. The Committee notes that the amendments to section 52(d) of the Workers' Statute, introduced through Act No. 3/2012, stipulate that the total number of absences from work during the previous 12 months must amount to 5 per cent of working days. The new wording has dissolved the link between the individual worker's absences and the rate of absenteeism of the enterprise as a whole. Under the previous wording, the employer could not dismiss the worker for absences, including those that were justified, if the total absence rate for the workforce did not exceed 5 per cent for the same periods of time.
294. The Committee observes that, under the new wording, absences resulting from medical treatment for cancer and those resulting from a serious illness or disease (a concept to be defined by national legislation or case law) cannot be counted.
295. *The Committee considers that the definitions of and restrictions on what constitutes temporary absence from work, introduced through the 2012 legislative reform, have been established in a manner consistent with Article 6 of the Convention and in accordance with the methods of implementation referred to in Article 1.*
296. *The Committee considers that the Government should continue to provide information on the manner in which absences resulting from temporary incapacity, particularly as a result of medical treatment for cancer or a serious illness, are counted.*

**The Committee's recommendations**

**297. *In the light of the conclusions set out above concerning the issues raised in the representation, the Committee recommends to the Governing Body:***

- (a) that it approve the present report;***
- (b) that it invite the Government, in consultation with its social partners, to take such measures as may be necessary to seek solutions to economic problems that are consistent with Convention No. 158 (paragraph 226);***
- (c) that it invite the Government to provide information on the evolution of the “open-ended entrepreneur-support contract” and, in light of the information available, to examine the possibility of adopting measures, in consultation with the social partners, to ensure that this contractual arrangement is not terminated at the initiative of the employer in order to avoid in an abusive manner the protection provided for in the Convention (paragraphs 245, 246, and 247);***
- (d) that it invite the Government to submit information on the manner in which the new regulations on economic, technical, organizational or production-related reasons for dismissal, introduced through the 2012 labour reform, have been applied in practice, including statistics on the number of appeals lodged, the outcome of these appeals and the number of terminations for economic or similar reasons (paragraphs 265 and 266); the type of compensation awarded where the courts have ruled that termination of the employment relationship was unjustified (paragraphs 279 and 280); and the manner in which absences resulting from temporary incapacity, particularly as a result of medical treatment for cancer or a serious illness, are counted (paragraphs 295 and 296);***
- (e) that it entrust the Committee of Experts on the Application of Conventions and Recommendations with following up the questions raised in this report with respect to the application of the Termination of Employment Convention, 1982 (No. 158); and***
- (f) that it make this report publicly available and close the procedure initiated by the representation of the Trade Union Confederation of Workers' Committees (CC.OO.) and the General Union of Workers (UGT), alleging non-observance by Spain of Convention No. 158.***

Geneva, 11 June 2014

*(Signed)* Raffaele De Luca Tamajo  
Yves Veyrier  
Alberto Echavarría Saldarriaga

*Point for decision:*

Paragraph 297

## Appendix

### Section 4. Open-ended entrepreneur-support contract (CAE)

1. With a view to creating stable employment while promoting entrepreneurship, enterprises with fewer than 50 workers may conclude open-ended entrepreneur support contracts (CAE contracts), in accordance with the terms of the present section 4.

2. CAE contracts shall be concluded for an unlimited period of time and on a full-time basis, and shall be formalized in writing according to the appropriate model.

3. CAE contracts and the rights and obligations deriving from them shall be governed, as a general rule, by the provisions of the revised text of the Workers' Statute, adopted by Royal Legislative Decree No. 1/1995 of 24 March 1995, and by the provisions of collective agreements regarding open-ended contracts, with the sole exception of the duration of the trial period referred to in section 14 of the Workers' Statute, which shall be one year in all cases. A trial period may not be prescribed when the worker has previously performed the same duties in the enterprise, regardless of the type of contract.

4. CAE contracts shall qualify for the fiscal incentives provided for in section 43 of the revised text of the Corporate Taxation Act, adopted by Royal Legislative Decree No. /2004 of 5 March 2004 (RCL 2004, 640, 801).

Any worker employed under this type of contract who would have received contributory unemployment benefit for at least three months from the date of conclusion of the contract may choose to receive, in addition to his wages, 25 per cent of the total benefit to which he would have been entitled, in accordance with the provisions of title III of the revised text of the Social Security Act, which was adopted by Royal Legislative Decree No. 1/1994 of 20 June 1994.

The right to receive unemployment benefit in addition to wages shall come into effect from the start date of the employment relationship, provided that it is requested within 15 days of this date. Once this deadline has expired, the workers will no longer be able to claim the additional benefit.

The abovementioned arrangement shall only be maintained for as long as the contract is valid, not exceeding the period of eligibility for outstanding benefit. Should the cessation of employment cause the worker to be deemed officially unemployed, the beneficiary may choose either to request new unemployment benefit or to continue receiving the outstanding benefit to which he is entitled. In this case, only 25 per cent of the time during which the worker received benefit in addition to wages shall be considered as having elapsed.

The administrative body concerned and the beneficiary shall be exempt from making social security contributions during the period of payment of 25 per cent benefit in addition to wages.

If the worker does not claim the payment of benefit in addition to wages according to the terms of this paragraph, he retains the right to the unemployment benefit to which he would have been entitled at the time of recruitment, the provisions of sections 212(1)(d) and 213(1)(d) of the revised text of the Social Security Act, adopted by Royal Legislative Decree No. 1/1994 of 20 June 1994, applying in this case.

5. Regardless of the tax incentives provided for in section 43 of the revised text of the Corporate Taxation Act, adopted by Royal Legislative Decree No. 4/2004 of 5 March 2004, enterprises recruiting registered unemployed persons under this type of contract shall be entitled to the following discounts, provided that the persons recruited belong to one of the following categories: (a) Young people between 16 and 30 years of age: the enterprise shall be entitled to a discount on its social security contributions for three years, which will be €83.33 per month (€1,000 per year) for the first year; €91.67 per month (€1,100 per year) for the second year; and €100 per month (€1,200 per year) for the third year. When these contracts are concluded with women in occupations in which they are underrepresented, the abovementioned amounts will be increased by €8.33 per month (€100 per year). (b) Persons over 45 years of age: the enterprise shall be entitled to a discount on its social security contributions, which will be €108.33 per month (€1,300 per year) for three years. When these

contracts are concluded with women in occupations in which they are underrepresented, the abovementioned discount will be €125 per month (€1,500 per year). These discounts may be combined with other public funds designed for a similar purpose, with the proviso that the total applicable discounts shall under no circumstances exceed 100 per cent of the enterprise's social security contribution.

6. Any enterprise that has carried out unfair dismissals in the six months prior to the conclusion of a CAE contract as referred to in the present section shall be precluded from concluding such a contract. This limitation shall only affect dismissals carried out after the entry into force of this law and only relate to vacant posts formerly held by the dismissed persons in the same workplace or workplaces.

7. In order to avail itself of the incentives linked to the CAE contract, the enterprise must employ the worker for at least three years from the start date of the employment relationship. Furthermore, the enterprise must maintain the level of employment achieved by means of the CAE contract for at least one year following the conclusion of the contract. In the event of non-compliance with these obligations, the enterprise shall be obliged to refund the incentive payments. The enterprise shall not be considered to have failed to comply with its obligation to maintain previous levels of employment when an employment contract is terminated for objective reasons or on disciplinary grounds, where either of these scenarios is declared or recognized as fair. The same applies to terminations of employment due to: resignation; death; retirement; total or absolute permanent incapacity or severe disability; expiry of the agreed time period; or completion of the work or services forming the basis of the contract.

8. For the purposes of this section, the number of workers in the enterprise shall be taken into account at the time recruitment is carried out.

9. Any matters not covered by the present section 4, with the exception of the exclusions governed by the provisions of section 6(2), shall be governed by the provisions of section 1 of chapter 1 of Act No. 43/2006 of 29 December 2006 establishing measures to promote growth and employment.