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Report of the Director-General

Third supplementary report: Report of the committee set up to examine the representation alleging non-observance by France of the Termination of Employment Convention, 1982 (No. 158)

▶ Contents

▶ I. Introduction

1. By a communication dated 31 January 2017, the General Confederation of Labour (CGT) and the General Confederation of Labour-Force Ouvrière (CGT–FO) presented to the Office a representation under article 24 of the Constitution of the International Labour Organisation alleging non-observance by France of the Termination of Employment Convention, 1982 (No. 158). On 1 February 2019, the two confederations sent additional allegations.

2. The Termination of Employment Convention, 1982 (No. 158), was ratified by France on 16 March 1989, and remains in force in that country.

3. The provisions of the ILO Constitution concerning the submission of representations are as follows:

> *Article 24*
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> *Representations of non-observance of Conventions*
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> 1. 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.
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> *Article 25*
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> *Publication of representation*
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> 1. 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 France accordingly. At its 329th Session (March 2017), the Governing Body issued a decision on the receivability of the representation and appointed a tripartite committee to examine the allegations that related to Convention No. 158. The Governing Body appointed Mr Diego Cano Soler (Government member, Spain) as a member of the tripartite committee set up to examine the representation, jointly with Ms Renate Hornung-Draus (Employer member, Germany) and Mr Kelly Ross (Worker member, United States of America). As Spain no longer holds a seat on the Governing Body following the elections of June 2017, and in accordance with the decision taken by the Governing Body at its 332nd Session (March 2018), Mr Khalid Atlassi (Government member, Morocco) was appointed by the Government group in replacement of Mr Cano Soler. On 12 February 2019, Mr Khalid Dahbi was appointed as the Government representative of Morocco, in replacement of Mr Atlassi.

5. The Government of France sent its observations in two communications dated 24 November 2017 and 30 July 2019.

6. The tripartite committee met formally on 21 March and 4 November 2019 and on 12 January, 20 January, 12 February, 18 February, 12 March, 31 March, 17 May, 29 September, 1 December, 14 December 2021 and 3 February 2022 to examine the representation and adopt its report.

▶ II. Examination of the representation

A. Complainants' allegations

1. Agreements to preserve or expand employment

7. The complainants consider that Act No. 2016-1088 of 8 August 2016 on work, the modernization of social dialogue and the safeguarding of career progression ("the Labour Act") does not comply with Articles 4, 8 and 9 of Convention No. 158. In their view, agreements to preserve or expand employment (APDEs) lead to terminations for reasons that are left unclear, preventing effective judicial review.

8. According to the complainants, the specific type of termination provided for under article L. 2254-2 of the Labour Code is not based on a valid reason within the meaning of Article 4 of Convention No. 158. They explain that section 22 of the Labour Act of 8 August 2016, which inserted that provision into the Labour Code, establishes a mechanism allowing collective agreements known as APDEs to be concluded. Since these agreements may contain provisions amending the employment contracts of an enterprise's employees, each employee may refuse to have his or her employment contract amended. If the employee refuses, the Act authorizes the employer to terminate the worker's employment on "specific grounds constituting real and serious justification". The two confederations take the view that these grounds for termination of employment grant the employer wide latitude, allowing it to terminate employment without real justification, in violation of Article 4 of the Convention. They contend that the indeterminacy of the "specific grounds" equates in reality to a lack of grounds. The two confederations criticize the rationale behind APDEs, as provided for under article L. 2254-2 of the Labour Code, which require employees to forgo part of their remuneration or accept an increase in their working time for the same salary in order to expand employment, while the enterprise is making a profit. They consider that the type of termination of employment provided for under article L. 2254-2 is not based on a reason related to the "operational requirements of the undertaking". APDEs do not concern enterprises which are or soon will be in difficulty. Consequently, terminations of employment which follow employees' refusal to have their employment contracts amended are dubious. Citing the 1995 General Survey by the Committee of Experts on the Application of Conventions and Recommendations (CEACR), [1] the two confederations consider that the reason for termination based on the "operational requirements of the undertaking" carries the implication that the objective must be viability: to be validly justified, terminations must be essential to the sound operation of the enterprise and hence to its viability. However, in their view, that is not the objective of APDEs. Although the complainants recognize that the objective of an enterprise is to make higher profits, they consider that this must not be done to the detriment of employees. The very principle of employment contracts, and of the labour law that governs them, is that employees agree to subordinate themselves to their employer and to forgo part of their freedom as far as

[1] ILO, Protection against unjustified dismissal, General Survey on the Termination of Employment Convention (No. 158) and Recommendation (No. 166), 1982, Report III (Part 4B), International Labour Conference, 82nd Session, Geneva, 1995.

employment is concerned in exchange for payment of the remuneration specified in the contract. Employees are not supposed to bear the enterprise's financial risks. APDEs subvert that reasoning and allow enterprises to transfer operational risks to employees by requiring them to work the same hours for a lower salary or to work extra hours for the same salary.

9. In addition to considering that the specific grounds provided for under article L. 2254-2 of the Labour Code do not come within the legal categories of reasons for termination of employment specified in Article 4 of the Convention, the two confederations submit that the courts cannot determine whether these terminations are justified.

10. The complainants allege that the APDE mechanism violates Articles 8 and 9 of the Convention in that it renders ineffective judicial review of the justification for the termination of employment. The two confederations recall that Articles 8 and 9 establish the opportunity for any employee who considers that his or her employment has been unjustifiably terminated to appeal against that termination to an impartial body. That body must be able "to examine the reasons given for the termination and the other circumstances relating to the case" and to decide whether the termination was justified. In France, it is the *conseils de prud'hommes* (labour courts) who are empowered to review the justifications for terminations of employees' employment. The Labour Act does not undermine that; judicial review remains possible. However, the complainants consider that the opportunity to appeal to "an impartial body" is worthless if the members of that body are not able to review fully "the reasons given for the termination". Under article L. 2254-2 of the Labour Code, "[t]hat termination shall be based on specific grounds constituting real and serious justification … The termination letter shall include a statement of the specific grounds on which the termination is based." The complainants find the fact that this is a "specific" type of termination deeply "disturbing". The Act does not state what the specific grounds are nor whether the collective agreement itself constitutes the grounds for the termination. It will hence be difficult for employees to challenge this type of termination since they will not know the grounds for it. If the collective agreement does indeed form the basis for the specific grounds, it will also be very hard to challenge it since, according to the complainants, "there is no justification for it, since any enterprise can use [an APDE] as long as it has a (vague, unquantified) objective (attainment of which is not verified) related to the preservation or expansion of employment".

11. The failure to state reasons for the specific grounds will thus prevent employees from challenging their terminations effectively. This is exacerbated by the Act's stipulation that these grounds constitute a real and serious justification. The complainants consider that through this Act, the legislature has created a third type of termination (in addition to termination on grounds relating to the employee and termination for financial reasons), described as a "*sui generis*" termination, and it prejudges the validity of those grounds by stating at the outset that they constitute real and serious justification. However, it is for the courts to determine, in the light of evidence submitted by the employer, whether grounds exist and whether they are real and serious. Article L. 2254-2 hence reduces judicial review to a procedural check: the court must merely ascertain whether the agreement has been legally validated and contains all the mandatory provisions. The complainants claim that a court cannot review the justification for the agreement, since an enterprise can use this type of bargaining regardless of its financial situation. In their view, the allocation of the burden of proof governed by Article 9 of the Convention likewise becomes meaningless. In practice, the employer simply has to cite the APDE in its termination letter for the termination to be justified. It will not have to provide any evidence apart from the agreement.

2. Cap on compensation for termination of employment

12. In the additional information dated 1 February 2019, the two confederations consider that the orders of 22 September 2017 that were ratified by the Act of 29 March 2018 erode the principles set out in Article 10 of the Convention, according to which the compensation paid in the event of unjustified termination must be "adequate" and the courts must be able to order any other form of relief as may be deemed appropriate. Until now, a court hearing a case of a termination without a valid reason had, firstly, to propose that the employee be reinstated in the enterprise. If one party objected, the employee whose employment had been terminated was awarded compensation, to be paid by the employer. An employee who had worked for at least two years in an enterprise with at least 11 employees could not receive compensation of less than six months' gross salary, without a cap. For an employee who had worked in an enterprise for less than two years or in an enterprise with fewer than 11 employees, compensation was to be calculated on the basis of the damage suffered, without a lower or upper limit (previous version of article L. 1235-5). The principle of full reparation of damage was thus an essential element of labour law. The courts had unfettered discretion to assess the facts with a view to determining the amount of compensation to be awarded for the damage suffered by the employee whose employment had been terminated.

13. The two confederations observe that Order No. 2017-1387 of 22 September 2017 concerning the predictability and security of employment relationships amended the provisions on financial compensation for terminations without a valid reason by setting mandatory compensation brackets (minimum and maximum levels) depending on an employee's length of service and the size of the enterprise. Article L. 1235-3 of the Labour Code as amended provides that if an employee's employment is terminated on grounds that are not real and serious, the court may propose that the employee be reinstated in the enterprise, with the retention of his or her acquired benefits. If one party objects to the employee's reinstatement, the court is to award the employee compensation, to be paid by the employer, of an amount between the lower and upper levels set out in the table below:

Employee's length of service in the enterprise (full years)	**Minimum compensation** (months of gross salary)	**Maximum compensation** (months of gross salary)
0	Not applicable	1
1	1	2
2	3	3.5
3	3	4
4	3	5
5	3	6
6	3	7
7	3	8
8	3	8
9	3	9
10	3	10
11	3	10.5

Employee's length of service in the enterprise (full years)	**Minimum compensation** (months of gross salary)	**Maximum compensation** (months of gross salary)
12	3	11
13	3	11.5
14	3	12
15	3	13
16	3	13.5
17	3	14
18	3	14.5
19	3	15
20	3	15.5
21	3	16
22	3	16.5
23	3	17
24	3	17.5
25	3	18
26	3	18.5
27	3	19
28	3	19,5
29	3	20
30 and above	3	20

In the case of a termination in an enterprise that habitually employs fewer than 11 employees, the minimum amounts set out below are applicable by way of exception from those fixed in the preceding paragraph:

Employee's length of service in the enterprise (full years)	**Minimum compensation** (months of gross salary)
0	Not applicable
1	0.5
2	0.5
3	1
4	1
5	1.5
6	1.5

Employee's length of service in the enterprise (full years)	**Minimum compensation** (months of gross salary)
7	2
8	2
9	2.5
10	2.5

14. While noting that the lower limit generally applicable to employees in enterprises of more than ten employees who have at least two years of service is halved (three months as opposed to six months), the complainants observe that the upper limits are the main new feature of the compensation arrangements for terminations without real and serious justification. These caps vary only according to an employee's length of service. That criterion alone is taken into account when redressing the damage caused to the employee, while other criteria such as age, health and family responsibilities are completely disregarded in this relief. The flat rate specified by the table is a maximum of 20 months as of 29 years of service, and cannot increase further.

15. The two confederations note that an exception is made to the binding nature of the table when the court finds that the termination is null and void on one of the grounds listed in the second paragraph of article L. 1235-3-1 of the Labour Code.

These grounds are:

- violation of a fundamental freedom;
- psychological or sexual harassment;
- discriminatory termination of employment;
- termination of employment following the bringing of legal action concerning gender equality in the workplace or the filing of a report of an offence;
- termination of employment in connection with duties carried out by a protected employee; and
- non-observance of the protection granted to certain employees (maternity, and occupational accidents and diseases).

In these cases, if the employee does not request that his or her employment contract be continued or if his or her reinstatement is impossible, the courts award compensation, to be paid by the employer, which may not be less than the salary for the last six months, with no cap.

16. The two confederations claim that the new provisions introduced by the orders, and in particular article L. 1235-3 of the Labour Code, do not ensure that adequate compensation or other appropriate relief is granted to a worker whose employment has been terminated without a valid reason, as required under the Convention.

17. Thus, the Labour Code does not provide for compensation that is sufficiently high to redress the damage caused to a victim:

(i) The capping of compensation does not ensure adequate redress for damage caused by termination of employment without a valid reason. The complainants refer to the

European Committee of Social Rights which, by decision of 8 September 2016 in Complaint 106/2014, *Finnish Society of Social Rights v. Finland*, found that the Finnish Act on terminations of employment contracts, which set the maximum amount of compensation which could be awarded at 24 months of salary, was contrary to Article 24 of the European Social Charter, which includes a requirement similar to that of Article 10 of Convention No. 158, namely, "the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief". Citing a study by the Ministry of Justice – which was published in May 2015 and commissioned by the Ministry of Labour "in the context of the consideration of whether to introduce a table of compensation in the labour courts" – the complainants point out that the caps set by the compensation brackets appear lower than the maximum sums awarded by the labour courts in 2015. They observe, inter alia, that the maximum compensation that can be claimed by an employee with 40 years of service is the same as by an employee with 29 years of service, despite the fact that it is precisely these older employees who experience long-term unemployment.

(ii) According to the complainants, the compensation brackets raise a second difficulty: they treat all types of damage caused by termination in the same way, thereby decreasing the amount of damage caused by unjustified loss of employment. The fourth paragraph of article L. 1235-3 of the Labour Code [2] provides that "[w]hen determining the amount of compensation, the court may take account, where appropriate, of the compensation for termination of employment paid on severance, with the exception of the type of compensation indicated in article L. 1234-9". [3] According to the fifth paragraph, "[t]hat compensation may be awarded at the same time, where appropriate, as the types of compensation specified in articles L. 1235-12, L. 1235-13 and L. 1235-15, [4] up to the maximum amounts specified in this article". The complainants point out that as soon as the court reaches the cap on compensation for termination without a valid reason, any other types of damage are not redressed since they may not together exceed the upper limit.

(iii) The bracket for compensation for damage has been set solely in consideration of the employee's length of service in the enterprise. The two confederations consider that an examination of the employee's personal circumstances cannot be conducted on the basis of length of service alone. Although this criterion is meant to be objective, it prevents a real, individual assessment of the damage and hence consideration of the employee's circumstances in terms of other factors such as age, family circumstances, training and

[2] In the version amended by Act No. 2018-217 of 29 March 2018.

[3] Article L. 1234-9 refers to the compensation that is payable for any termination of employment, whether justified or not, except in cases of serious misconduct or gross negligence by the employee.

[4] Article L. 1235-12: "In the case of non-observance by the employer of procedures for consulting staff representatives or notifying the administrative authority, the court shall award compensation to employees included in a collective termination of employment on financial grounds, which shall be paid by the employer and calculated according to the damage caused."

Article L. 1235-13: "In the case of non-observance of the priority re-employment provided for in article L. 1233-45, the court shall award the employee compensation which may not be less than [Order 2017-1387 of 22 September 2017] 'one' month's salary."

Article L.1235-15: "Any procedure for the termination of employment on financial grounds shall be unlawful in an enterprise where a social and economic committee has not been established although the enterprise is under such an obligation and no official report of failure to do so has been drawn up. The employee shall be entitled to compensation to be paid by the employer, which may not be less than one month's gross salary, without prejudice to compensation for termination of employment and compensation in lieu of notice."

qualifications, disability, labour market within reasonable commute and return to employment. In the complainants' view, the length of the employment relationship is only one factor taken into account by the courts when assessing the damage caused to the employee. After a certain number of years, employees are perfectly entitled to expect some "stability" in their work, but this criterion is far from sufficient. Consequently, only an assessment of personal, individual circumstances is capable of ensuring that employees whose employment has been terminated receive adequate compensation for damage, as provided for under Article 10 of the Convention.

18. The complainants claim that the Labour Code does not provide for compensation that is sufficiently high to deter the employer from unjustifiably terminating employment. They observe that the French public service has even made a "compensation calculator for unlawful dismissals" available on its official website. That predictability automatically divests the compensation of its deterrent effect and undermines Article 24 of the European Social Charter and Convention No. 158. The capping of compensation and the predictability of the cost of terminating employment together mean that workers are poorly protected against terminations without real and serious justification. They consider the caps extremely low, often ultimately approaching the amounts of statutory compensation awarded for justified terminations.

19. Furthermore, the complainants claim that the Act does not provide for any alternative legal remedy to supplement the amount of compensation. The two confederations point out that French law does not provide for alternative legal means of redressing the damage entirely. In their opinion, article L. 1235-3-1 of the Labour Code simply lists a number of exceptions to the compensation brackets when the termination is null and void, for example owing to a violation of a fundamental freedom. These are isolated instances that concern the most wrongful of terminations and do not provide all employees with access to adequate compensation for the damage suffered.

20. Lastly, the complainants allege that article L. 1235-3 of the Labour Code undermines the right to an effective remedy against termination of employment provided for under Article 8 of the Convention. The low rates of compensation will discourage victims of wrongful terminations from taking legal action.

21. The complainants append to their additional information decisions of the labour courts (*Cons.prud'h.* Amiens, 19 December 2018; *Cons.prud'h.* Grenoble, 18 January 2019; and *Cons.prud'h.* Troyes, 13 December 2018) finding that the tables specified do not comply with Article 24 of the European Social Charter and/or Article 10 of Convention No. 158.

B. The Government's observations

1. Agreements to preserve or expand employment

22. In its reply dated 24 November 2017, the Government states that the mechanism in question was amended by section 3 of Order No. 2017-1385 of 22 September 2017 on strengthening collective bargaining, which is pending ratification, and that its "comments will hence pertain to the mechanism established under section 22 of the Labour Act, which has now been repealed and replaced by a similar mechanism".

23. The Government observes that the APDEs provided for in the Labour Act, which are a new kind of enterprise-level agreement signed with majority trade unions, allow the terms on which employment contracts are performed – in particular remuneration, working time and working hours – to be amended, provided that employees' monthly salary is not decreased. It explains

that if employees refuse to have their employment contracts amended as a result of the application of an APDE, the employer may decide to terminate their employment on specific grounds that constitute a real and serious justification. The Government adds that the letter of termination of employment must include a statement of the specific grounds for the termination. However, the employer must make the personal support programme referred to in article L. 2254-3 of the Labour Code [5] available to employees whose employment it plans to terminate. If employees agree to participate in the programme, on the day after separation they will be granted the status of vocational training intern and receive intensive support from the public employment service. In addition, if an employee was employed by the enterprise for at least 12 months, he or she will receive a personal support allowance that is higher than the jobseeker's allowance that would otherwise be payable. The Government thus states that the objective of the reform initiated by the Labour Act was to develop bargaining in enterprises so as to preserve and expand employment (and hence avoid terminations) by making majority collective agreements take precedence over employment contracts.

24. The Government considers that the impugned provisions cannot be deemed incompatible with Article 4 of the Convention, which recognizes that a termination of employment may be justified on grounds connected to an enterprise's operations, which cannot be reduced to the "financial" grounds defined in article L. 1233-3 of the Labour Code. In the Government's opinion, it was the legislature's deliberate intention not to limit the application of the mechanism solely to cases where an enterprise was facing "financial difficulties". According to the Government, the aim of this mechanism is to allow an enterprise to change the way in which it organizes its operations in order to win new markets so as to bring about a growth in employment or at least preserve existing jobs. The Government states that this mechanism drew on examples from the aeronautic and automotive industries which have allowed enterprises in these sectors to achieve renewed growth. The general philosophy underpinning the reform is for employees' representatives and the employer to reach agreement on the basis of a joint assessment provided as part of the mechanism with a view to expanding or preserving employment. That being the case, the collective agreement takes precedence over individual employment contracts.

25. The Government emphasizes that the grounds for termination resulting from the employee's refusal to have an APDE applied are not covered by the financial grounds provided for in article L. 1233-3 of the Labour Code, but are "specific grounds that constitute a real and serious justification".

26. The Government indicates that, as for any termination of employment, employees may file an appeal with the labour courts on the terms and within the timescales that ordinarily apply. The Government also observes that the courts likewise review the grounds put forward by the employer. Under article L. 2254-2 of the Labour Code (as provided for under the Act of 8 August 2016), the letter of termination of employment "must include a statement of the specific grounds on which the termination of employment is based".

27. The Government makes clear that this requirement exists in the similar mechanism for termination of employment on *sui generis* grounds when an employee refuses to accept an amendment following an agreement to reduce working time: the letter of termination of employment sent to the employee "must include an indication of that agreement" (Cass. soc.,

[5] Provision repealed by Order No. 2017-1385 of 22 September 2017.

15 March 2006, No. 04-40.504), otherwise the letter does not provide a proper statement of grounds and the termination does not have a real and serious justification.

28. Lastly, the real and serious nature of a termination of employment following the conclusion of an APDE cannot be endorsed by a court unless the collective agreement complies with the applicable legal provisions in terms of validity, procedures for adoption, content and observance of the rules of validity for a majority agreement. The APDE must therefore comply with public social policy.

2. Cap on compensation for termination of employment

29. In its communication dated 30 July 2019, the Government states that the establishment of a table, which already exists in several European States (including Belgium, Denmark, Finland, Germany, Spain and Switzerland), aims to increase predictability and increase the security of employment relationships or the consequences of the termination thereof for employers and their employees. The intention is not to deny employees fair compensation, but to regulate the amount that can arise from such terminations, sometimes after many years of legal proceedings. The aim is to achieve greater legal security and predictability for the parties to a contract on severance by harmonizing judicial practice.

30. The Government recalls that Order No. 2017-1387 was ratified by Parliament by the Act of 29 March 2018, and that this Act was submitted to the Constitutional Council, which found that article L. 1235-3 of the Labour Code, which establishes the compensation table, complied with the Constitution.

31. The Government goes on to observe that Convention No. 158 allows ratifying States broad discretion in terms of the measures to be adopted, and that the compliance of the French Act with the Convention must be assessed in the round, that is to say, taking account of the body of legislation which penalizes unjustified or unlawful termination of employment and not just the table in article L.1235-3 of the Labour Code. The assessment must hence consider all the exceptions provided to the application of the table in the case of violations of fundamental freedoms, harassment or discrimination and disregard for the protection to which certain groups of employees are entitled, which render the termination irreparably null and void and entitle the employee to reinstatement and uncapped compensation. Likewise, the Government states that, in respect of terminations that are covered by the table, regard must be had to the entitlement to compensation for damage that is separate from the loss of employment and the entitlement to compensation for separate wrongful acts committed upon termination of the contract. Lastly, account must be taken of orders for the employer to reimburse the unemployment allowance paid to an employee in certain circumstances. Together these rules constitute a comprehensive system of penalties and redress which, in the Government's view, fully satisfies the provisions of the Convention and in particular Articles 8, 9 and 10 thereof.

32. The Government further provides the information that the Court of Cassation, requested by two labour courts for its opinion concerning the capping of compensation for termination of employment, delivered its opinion on 17 July 2019 (Opinion No. 15012) in plenary sitting. It found that article L.1235-3 of the Labour Code, in the version resulting from Order No. 2017-1387 of 22 September 2017 – which provided, in particular, that an employee who had been employed for a full year in an enterprise that employed at least 11 employees was to receive compensation for termination without real and serious justification that was between a minimum amount of one month's gross salary and a maximum amount of two month's gross salary – was compatible with Article 10 of the Convention. The Government notes that the Court of Cassation considered that "the word 'adequate' should be understood as allowing States

parties a measure of discretion". In assessing the compatibility of the table mechanism with Article 10 of the Convention, the Court took account of the entire body of French legislation on unlawful terminations of employment, in particular the option for the court to propose the employee's reinstatement in the enterprise and the exceptions to the table. The Court of Cassation concluded that the above-mentioned provisions of article L. 1235-3 of the Labour Code were compatible with Article 10 of the Convention.

33. Concerning the amounts of compensation considered too low by the two trade union confederations, the Government comments that the latter allege that the French situation is similar to that of Finland, which was found by the European Committee of Social Rights (ECSR) to breach Article 24(b) of the European Social Charter (which lays down the same principle as Article 10 of Convention No. 158). The Government does not agree with that assessment because the two situations are different and therefore hard to compare. It considers that: (i) "Article 24(b) of the Charter and Article 10 of Convention No. 158 do not rule out the principle of capping but must, according to the case law of the ECSR, be construed as requiring *the award of compensation of a sufficiently high amount to dissuade the employer and redress the damage caused to the victim*"; and (ii) "the ECSR specified that the upper limit compensation for termination of employment without a valid reason could be contrary to the Charter only in cases where *the compensation awarded was not commensurate with the loss suffered and not sufficiently dissuasive*". However, according to the Government, the deterrent role of compensation and redress for damage incurred by employees must be analysed in view of the totality of applicable compensation mechanisms, taking a comprehensive and *in abstracto* approach, and not in the light of the table alone and a specific case assessed *in concreto*.

34. The Government emphasizes that the Constitutional Council considered in its Decision No. 2018/761 DC of 21 March 2018 that the cap "did not establish disproportionate restrictions" on the rights of the victims of wrongful acts when compared to the general interest objective of increasing the predictability of the consequences of terminating an employment contract. That decision clearly recognized that: (i) the predictability of the consequences of terminating an employment contract is a general interest ground allowing the right to redress to be qualified; and (ii) the terms on which this right has been qualified are not such as to erode this right disproportionately since, firstly, the amounts correspond to the "recorded averages" of compensation awards made by the courts before the reform and, secondly, the table is not applicable in the most serious circumstances, which are penalized by the termination being rendered null and void.

35. In the Government's view, it should be pointed out that compensation for termination without real and serious justification seeks only to redress the damage resulting from the lack of justification for the dismissal; the table therefore does not cover redress for damage that is separate from the lack of a real and serious justification for the termination, nor damage arising from separate wrongful acts by the employer (for example, damage resulting from vexatious circumstances surrounding the termination of the employment contract, damage in connection with an employee's loss of opportunity to increase the value of capital invested in the enterprise saving plan, damage resulting from the loss of opportunity to participate in training, or damage resulting from a deterioration in the employee's health that is attributable to the employer).

36. The Government asserts that the courts have by no means been divested of their power to assess the various types of damage claimed by employees on the strength of the evidence submitted to them so that, cumulatively, the compensation awarded adequately redresses the entirety of the damage suffered by the employee.

37. The Government also argues that the financial aspect of losing a job (loss of salary) is in part recompensed by unemployment insurance, which is partly financed by employer contributions and aims precisely to safeguard employees against the risk of involuntary job loss.

38. In respect of the allegation that the amounts specified by the table are too low to act as a deterrent, the Government argues that: (i) the dissuasive effect does not arise from the unknown and unpredictable nature of the amount of compensation but from the amount itself in view of the enterprise's circumstances and the economic climate; (ii) the legislature specified that the table would not apply in cases of the most serious wrongful acts by the employer, which render the termination of employment null and void; and (iii) in certain cases (if an employee has at least two years' service in an enterprise habitually employing at least 11 employees), where a court finds that the termination does not have a real and serious justification, it may order the employer to reimburse the public employment service for all or part of the unemployment benefit paid to the employee, for up to a maximum of six months, without the employee having to file a request to this end (article L. 1235-4 of the Labour Code). The Government takes the view that this reimbursement represents a not insignificant extra expense for employers, especially in respect of employees with a short length of service, which must be added to the compensation awarded to employees for termination without a real and serious justification.

39. Lastly, the Government refutes the complainants' allegation that French law does not provide for any alternative remedies to redress entirely the damage caused. Where employees are able to demonstrate the existence of separate damage, they may be awarded separate relief under ordinary civil liability law. In the Government's view, this complementary compensation is neither hypothetical nor residual.

▶ III. The Committee's conclusions

40. The Committee notes that the complainants' allegations concern two main elements: (i) agreements to preserve or expand employment (APDEs), now known as "collective performance agreements" under current legislation; and (ii) the matter of capping compensation in cases of unjustified termination.

A. Agreements to preserve or expand employment, known as "collective performance agreements" under current legislation

41. The Committee notes that the complainants' allegations, as well as the Government's reply, concern the mechanism under article L. 2254-2 as introduced by the Labour Act of 8 August 2016. While the parties have not provided the Office with information concerning subsequent legislative developments, the Committee notes that, since the submission of the representation, article L. 2254-2 has been amended by section 3 of Order No. 2017-1385 of 22 September 2017 on strengthening collective bargaining, which was itself amended by section 2 of Act No. 2018-217 of 29 March 2018, which ratified various orders adopted on the basis of the Enabling Act No. 2017-1340 of 15 September 2017. [6]

42. In the version currently in force, as amended by the Act of 29 March 2018, the agreement is now known as a "collective performance agreement". Despite the above-mentioned

[6] See article L. 2254-2 (with its various amendments).

amendments, the Committee understands that the mechanism remains essentially unchanged: if an employee refuses the amendment of his or her employment contract following the application of the enterprise agreement provided for in the law, the employer may still decide to terminate his or her employment on specific grounds constituting real and serious justification.

43. However, substantial changes to the mechanism introduced by the Labour Act are worthy of note:

- In its original version, as provided for in the Labour Act, article L. 2254-2 (I) concerns enterprise agreements (APDEs) concluded in order to preserve or expand employment. In later versions, paragraph I of the provision in question is not limited only to the preservation or expansion of employment, but also includes a reference to the operational requirements of the enterprise.
- Order No. 2017-1385 expands the scope of the enterprise agreement to professional or geographical mobility within the enterprise. Article L. 2254-2 (III) now allows for the provisions of the enterprise agreement to automatically replace any conflicting and incompatible clauses of an employment contract, including with regard to remuneration, working time and professional and geographical mobility within the enterprise.
- There is no longer any mention of the initial obligation to state the specific grounds for the termination of employment in the termination letter (but the obligation itself remains, under article L.2254-2 (V), which refers to article 1232-6). In addition, the obligation to reach a joint opinion between the employer and the trade union organizations of the employees has not been included in the amended versions of the article in question. Finally, the provision concerning support for an employee who refuses the implementation of the agreement has also been amended.

44. The Committee notes that, in their representation of 31 January 2017, the complainants allege that France's non-observance of Convention No. 158, and in particular the fact that the Labour Act provides for terminations of employment further to the conclusion of an APDE, violates Articles 4, 8 and 9 of the Convention.

45. The Committee notes that, according to the complainants, the Labour Act violates the Convention by authorizing enterprises to terminate the employment of employees on grounds other than their capacity or conduct and irrespective of any financial difficulty, but "within the context of the growth and development of the enterprise". They believe that this Act allows for the possibility of an employer terminating the employment of an employee without the real grounds to do so, without having to give a reason before a court, and without the employee being able to defend himself or herself. The two confederations argue that:

(i) according to article L. 2254-2 of the Labour Code resulting from the Labour Act, APDEs may be signed under which, even where there are no financial difficulties, employees may be required to forgo part of their remuneration or accept an increase in their working time for the same salary in order to expand employment;

(ii) any employee who is unwilling to accept this agreement may be dismissed on "specific grounds constituting real and serious justification".

46. The Committee notes that the complainants allege firstly that, to the extent that collective performance agreements may be concluded even when the enterprise has no operational requirements that necessitate it, the specific type of termination of employment set out in article L. 2254-2 of the Labour Code is not based on justifiable grounds under the meaning of

Article 4 of the Convention. The Committee notes that the two confederations also allege that the indication provided by the new article L. 2254-2 of the Labour Code, according to which a termination of employment following an employee's refusal to accept the application of an agreement is based on "specific grounds constituting real and serious justification", prevents a genuine judicial review of the grounds for termination of employment, in violation of Articles 8 and 9 of the Convention, and that even if the courts refused to construe article L. 2254-2 of the Labour Code as containing a presumption of validity of the termination of employment, their review would be limited to a mere procedural check of the validity of the agreement.

Operational requirements of the enterprise

47. The Committee recalls that, according to Article 4 of the Convention: "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."

48. The Committee notes that the Government states that the purpose of the reform resulting from the Labour Act was to develop bargaining within enterprises in order to preserve and expand employment (and therefore avoid terminations) by having the majority collective agreement take primacy over the employment contract. For the Government, the provisions in question could not be seen as being incompatible with those of Article 4 of the Convention, which allows the termination of employment to be justified on the basis of the operational requirements of the enterprise, which cannot be reduced only to "financial" grounds. Thus, it argues, there is no need to implement the mechanism solely in cases where the enterprise is facing financial difficulties. The Committee notes that, according to the Government, the objective of the mechanism is to enable an enterprise to gain access to new markets by changing the organization of its work to expand employment, or at least to maintain the current number of jobs.

49. The Committee further notes the Government's statement that, as is the case for any termination of employment, the employee may file an appeal with the labour court within the legally established conditions and time limits. The Committee notes that the Government observes that the courts: (i) consider whether the employer has respected the procedure for termination on individual economic grounds, with any significant irregularity requiring the termination to be reclassified as a termination without real and serious justification; and (ii) also consider the justification stated by the employer. In fact, according to the Government, under article L. 2254-2 of the Labour Code (as provided for by the Act of 8 August 2016), the letter of termination of employment must "contain a statement of the specific grounds for the termination".

50. The Committee notes that the current wording of article L. 2254-2 provides for a mechanism applicable to all collective agreements that amends working conditions to respond to the "operational requirements of the enterprise" or to preserve or expand employment.

51. In this regard, the Committee notes that the CEACR has often recalled that the need for justifiable grounds was the cornerstone of the provisions of the Convention in order to restrict the employer's discretionary power to terminate the employment relationship for any reason or without reason.

52. The Committee notes, however, that in the 1995 General Survey,[7] the Committee of Experts indicated that, while the concept of "operational requirements" of an enterprise is not defined in the Convention or in the Recommendation, the report presented by the Office for the first discussion at the Conference stated that the reasons for termination of employment "generally include reasons of an economic, technological, structural or similar nature. Dismissals resulting from these reasons may be individual or collective and may involve reduction of the workforce or closure of the undertaking" (paragraph 96). The Committee of Experts referred to its General Survey of 1974 on the Termination of Employment Recommendation 1963 (No. 119), in which it had pointed out that "reasons relating to the operational requirements of the undertaking were generally defined by reference to redundancy or reduction of the number of posts for economic or technical reasons, or due to *force majeure* or accident" (ibid.). It went on to refer to the legislation of two States, in the first of which (Chile) "the following reasons are given as examples: rationalization or modernization of undertakings, establishments or services, a fall in production, changed market or economic conditions requiring the dismissal of one or more workers and failure of the worker to adapt to the work or technique", and the in the second of which (France) "it has been ruled that a termination of employment is not for an economic reason if it is the result of a reorganization that has not been carried out in the interests of the undertaking" (paragraph 97). The Committee of Experts also stated that "[r]easons related to the operational requirements of the undertaking, establishment or service could also be defined in negative terms as those necessitated by economic, technological, structural or similar requirements which are not connected with the capacity or conduct of the worker" (paragraph 98).

53. In its general observation of 2008, the Committee of Experts identified the link between termination of employment and economic stagnation, highlighting the issue of the sustainability of an enterprise: "The Committee considers that the principles underlying the Convention constitute a carefully constructed balance between the interests of the employer and the interests of the worker as evidenced by its provisions relating to termination on grounds of operational requirements of the enterprise. This is of particular relevance given the current financial crisis. Because the Convention supports productive and sustainable enterprises, it recognizes that economic downturns can constitute a valid reason for termination of employment."

54. **The present Committee observes that the Convention and Recommendation do not define the concept of operational requirements of the enterprise and that the supervisory bodies have illustrated the concept on the basis of specific elements in the sources referred to in paragraphs 52 and 53 above. In the light of the foregoing, the Committee considers that determining whether the concept of operational requirements has been respected within the meaning of Article 4 of the Convention is a matter for the national courts.**

Consideration by the courts of the grounds for termination

55. The Committee notes that, under article L. 2254-2 of the Labour Code, the provisions of the collective performance agreement automatically replace any conflicting and incompatible clauses of an employment contract, including with regard to remuneration, working time and professional and geographical mobility within the enterprise. The employee may refuse to have the employment contract amended as a result of the application of the agreement. If the

[7] ILO, *Protection against unjustified dismissal*.

employer decides to terminate the employment of employees who object to the application of the agreement, the termination is therefore considered to be based on grounds that constitute "real and serious justification" as expressly mentioned in the provisions of the Labour Code.

56. The Committee recalls that:

- according to Article 8 of the Convention:

> 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.

- according to 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 [8] 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.

57. The Committee observes that it is clear from the aforementioned provisions of the Convention that, in the case of a termination of employment on the grounds of the operational requirements of the enterprise, the body responsible for determining the validity of the termination must, at the very least: (i) be able to conduct an effective and not just formal examination of the reasons for the termination of employment in order to be satisfied in particular that the termination of the employment contract was indeed for the stated reasons related to the operational requirements of the enterprise and not for other reasons that might be contrary to the Convention; and (ii) ensure that the burden of proving that the termination of employment was justified or unjustified does not solely rest with the individual employee.

58. The Committee considers that, beyond the explicit reference in article L. 2254-2 to the real and serious nature of the termination of employment on the grounds of an employee's refusal to have his or her employment contract amended as a result of the conclusion of a collective performance agreement, the judge must be able to continue to conduct a genuine judicial review. The Committee indeed considers that the provisions of article L. 2254-2 merely recall the requirement that any termination of employment must be based on real and serious justification. It is for the judge to determine as part of the judicial proceedings on termination based on article L. 2254-2 whether a valid reason

[8] Article 1: "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."

exists within the meaning of Article 4 of the Convention, that is, whether the reason for the termination is based on "the operational requirements of the undertaking, establishment or service", it having been established that, during the judicial examination, the burden of proof must not rest on the employee alone. The Committee requests the Government to keep the CEACR informed in this regard in the context of the regular supervision of the application of the Convention.

B. Cap on compensation for termination of employment

59. The Committee notes that the additional allegations made by the complainants on 1 February 2019 relate to the overall framework of relief from unfair dismissal, which is separate from the question of collective performance agreements.

60. The Committee notes that article L. 1235-3 of the Labour Code establishes a table for the courts to determine compensation for termination of employment without real and serious justification, which must be an amount between the minimum and maximum amounts; the maximum amounts vary, according to the length of service of the employee, between one month and 20 months of gross salary. The Committee notes that the compensation bracket is applicable in all cases, whatever the workforce of the enterprise; only the minimum amounts for the first ten years of service change depending on whether the enterprise employs fewer than 11 employees or at least 11 employees. Previously, the courts were free to determine the amounts, as the texts did not provide for any caps. [9]

61. The issue before the Committee is whether the system of tables of compensation payable for the termination of employment, introduced in September 2017, allows for the "payment of adequate compensation or such other relief as may be deemed appropriate", as required by Article 10 of the Convention.

62. The Committee notes that, according to the complainants, the table is contrary to Article 10 of the Convention in that it constitutes an impediment to the full exercise of power of the courts to adjudicate, as it appears to be curbed. They allege that capping compensation awarded by the labour courts does not allow the judges to consider the individual circumstances of employees whose employment has been unfairly terminated as a whole or to provide fair redress for the damage that they have suffered. Moreover, the Committee notes that the complainants allege that the new provisions in question do not provide for a sufficiently high level of compensation either to compensate for the damage suffered or to dissuade the employer from carrying out unfair terminations, and finally that there is no other legal recourse available to supplement the amount of the compensation.

63. The Committee notes that, in its communication of 30 July 2019, the Government emphasizes in particular: (i) the aim of the reform, which is to increase the security of employment relationships or the consequences of the termination thereof for employers and their employees, by harmonizing judicial practice; and (ii) the importance of incorporating the

[9] Articles L. 1235-3 and L. 1235-5 of the Labour Code, which were in force from 1 May 2008 until Order No. 2017-1387 of 22 September 2017, fixed the compensation for termination of employment without real and serious justification: (i) as the value of the damage suffered by the employees who have fewer than two years of service in an enterprise or are dismissed from an enterprise that employs fewer than 11 employees; (ii) as the equivalent value, as a minimum, of the salary of the six previous months of other employees. From the publication of Decree No. 2016-1581 of 23 November 2016 until the publication of Order No. 2017-1387 of 22 September 2017, the legal minimum of six months' salary has continued to be applied and has been complemented by the new indicative reference framework set out in the Decree, adopted under the application of Act No. 2015-990 of 6 August 2015. Since 24 September 2017, only the tables provided for in Order No. 2017-1387 are being applied.

compensation tables within a global mechanism for sanction and redress which, according to the Government, fully meets the requirements of the Convention. The Committee notes that the Government highlights in particular the fact that the table is not applicable in a number of cases in the most serious circumstances, in which the sanction is to deem the termination of employment null and void. The Committee also notes that the Government states that the amounts provided in the tables correspond to the "recorded averages" of compensation awarded by the courts prior to the reform. [10]

64. The Committee notes that the application of such a mechanism (implementing a table that is compulsory and no longer simply indicative) [11] has been challenged in the labour courts, on the grounds that it contravenes France's international commitments. In those rulings, the reasoning is often the same: the table in question contravenes Convention No. 158 and the European Social Charter, two pieces of legislation that provide that a national court must be able to order the payment of appropriate compensation in cases of unfair termination. The table of damages contained in the orders issued in 2017 does not meet this requirement, which means that a number of labour courts have rejected it on the basis of its non-compliance, and awarded amounts exceeding those set by the table. The Committee notes that the outcome of other decisions of labour courts has been the opposite, as emphasized by the Government in its communication of 30 July 2019.

65. The Committee also takes note of the position of the Reims Appeals Court, which, in a judgment dated 25 September 2019, considers that without disputing the compliance of the table *in abstracto*, the judge must be able to examine its compliance *in concreto*, which may lead the court, at the request of the employee, to remove the cap if it determines that the cap disproportionately prejudices the employee's right to appropriate compensation for the damage suffered. In a judgment of 30 October 2019, the Paris Appeals Court held that, in the matter of the minimum and maximum amounts enacted on the basis of an employee's length of service and the number of employees in the enterprise, the French courts retain a degree of discretion. More recently, in a judgment of 16 March 2021, the Paris Appeals Court overrode the maximum amount set by the table because it represented barely half of the damage suffered by the claimant and did not allow for adequate or appropriate compensation consistent with the requirements of Article 10 of Convention No. 158. Similarly, in a judgment of 30 September 2021, the Grenoble Appeals Court overrode the table by assessing *in concreto* the damage suffered by the employee.

66. The Committee notes that the two labour courts have asked the Court of Cassation to provide an opinion, without waiting for it to be seized of the substance, to assess, inter alia, the conformity of the compensation tables with Article 10 of the Convention. The Committee recalls that, according to Article 10 of the Convention, "[i]f 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".

[10] The impact of the table on judgments will be part of the forthcoming work of the Committee for the Evaluation of the Orders of 22 September 2017, the outcomes of which will be able to be assessed in the light of an existing study conducted with the support of the Law and Justice Research Mission and published in February 2019. The study (which covers 408 cases) aimed to measure what claimants were actually awarded (prior to the orders of 2017) and what they would have obtained with the table in place, taking account of criteria including the employee's length of service with the enterprise. See the *Rapport intermédiaire du Comité d'évaluation*, July 2020, 97–98.

[11] See footnote 9.

67. The Committee notes that the Court of Cassation found in its Opinions Nos 15012 and 15013 of 17 July 2019 that:

> "the term 'adequate' in Article 10 should be understood as allowing States parties a measure of discretion".

Moreover, the Court found that:

> In French law, if the termination of employment has no real and serious justification, the judge may propose the reinstatement of the employee in the enterprise. If the reinstatement is refused by either of the parties, the judge shall award compensation to the employee that is payable by the employer and the amount of which is between the minimum and maximum amounts. The table provided for in article L. 1253-3 of the Labour Code shall be disregarded in cases where the termination of employment has been deemed null and void pursuant to the provisions of article L. 1235-3-1 of the same Code.

The full bench inferred that:

(i) the provisions of article L. 1235-3 of the Labour Code, which establish a table to be applied when the court is determining the amount of compensation for the termination of employment without real or serious justification, and in particular provide for the fact that an employee who has worked for a full year in an enterprise that employs at least 11 employees will receive compensation for the termination of employment without real or serious justification of an amount between a minimum of one month's gross salary and a maximum of two months' gross salary, are in line with the provisions of Article 10 of ILO Convention No. 158, if the State has not made use of its discretionary power (Opinion No. 15012);

(ii) the provisions of article L. 1235-3 of the Labour Code, which establish a table applicable when the judge is determining the amount of compensation for the termination of employment without real or serious justification, are compatible with the provisions of Article 10 of ILO Convention No. 158 (ruling No. 15013).

68. The Committee notes that the measures taken under article L. 1235-3 of the Labour Code are considered by the Court of Cassation to be the outcome of the measure of discretion granted to States in determining adequate compensation, and that, in establishing a table applicable when the judges are determining the amount of compensation for the termination of employment without real or serious justification, the State has done nothing more than use its discretion.

69. The Committee notes that, following the aforementioned opinions and pending a judgment of the higher court, differing interpretations still exist within the national courts.

70. The Committee observes that the issue of capping compensation in cases where the termination is unfair has not been the subject of specific comments from the CEACR, which, moreover, has provided examples of the diversity of national legislations on the matter. Furthermore, in its General Survey on protection against unjustified dismissal, [12] the CEACR stated that:

> In the case of *financial compensation*, the *amount* has to be determined. Legislation often specifies the amount of compensation or the extent of damages to be awarded on the basis of one or several factors, such as the nature of the employment, length of service, age, acquired rights or the circumstances of the particular case, namely the reason for termination of employment, the possibility of finding a job, career prospects, or the personal circumstances

[12] ILO, *Protection against unjustified dismissal*.

> of the worker, such as his family status, or of the employer, such as the size or nature of the undertaking. Some countries make provision for compensation not only for financial detriment suffered, but also for moral damage. In a number of countries, the legislation sets the amount of compensation, which is generally either a specified sum or may be influenced by various factors. In some countries, the legislation sets a minimum or a maximum amount of compensation. In others, it provides for a supplement in certain cases, in particular if the reason for the termination was the worker's trade union membership or if it was for discriminatory reasons. When the body is free to set the amount, it plays an important role in determining the criteria to be taken into consideration, including, for example, whether or not to take moral damage into account. (paragraph 229)
>
> Some countries also award damages, as distinct from compensation, in the event of unjustified termination of employment, when an employer is found to have acted in a wanton, reckless, malicious or sufficiently outrageous manner. (paragraph 230)

71. The Committee notes that the issue of capping is not questioned by the CEACR in the General Survey (or in its observations or direct requests to certain countries that have ratified the Convention). It notes that the Committee of Experts clarified, however, that:

> compensation, in the case of termination of employment impairing a basic right, should be aimed at compensating fully, both in financial and in occupational terms, the prejudice suffered by the worker, the best solution generally being reinstatement of the worker in his job with payment of unpaid wages and maintenance of acquired rights … When reinstatement is not provided as a form of redress, when it is not possible or not desired by the worker, it would be desirable for the compensation awarded for termination of employment for a reason which impairs a fundamental human right to be commensurate with the prejudice suffered, and higher than for other kinds of termination. [13] (paragraph 232)

72. In the light of the above, the Committee observes that full compensation can be distinguished from adequate or appropriate compensation and may be applied in all cases concerning a fundamental right, and that French law follows this logic, as article L. 1235-3-1 of the Labour Code rules out the application of the compensation table for all cases where the termination of employment is deemed null and void, including where there has been a violation of a fundamental right.

73. However, the Committee considers that the question at issue is whether the courts remain able to take into account the individual and personal circumstances of the employee and of the enterprise in order to ensure that a worker whose employment has been terminated receives adequate compensation for the damage he or she suffered, within the meaning of Article 10 of the Convention. Does the existence of the compensation tables prevent the courts from taking into account other elements determining the damage suffered by the employee whose employment was unfairly terminated?

74. In this regard, the Committee notes that, according to the last paragraph of article L. 1235-3, the compensation paid in cases of termination of employment without real or serious justification may be combined, where appropriate, with several other categories of compensation that may be awarded by the courts, that is:

- compensation awarded to the employee when his or her employment is terminated on financial grounds, in cases where the employer does not comply with the procedures for consultation with bodies representing staff or notifying the administrative authority (article L. 1235-12);

[13] ILO, *Protection against unjustified dismissal*.

- compensation awarded to the employee in cases where the employer did not respect the principle of priority re-employment (article L. 1235-13); and
- compensation awarded to the employee for termination of employment on financial grounds in an enterprise where no social and economic committee has been established, when the enterprise is subject to this obligation and no official report of failure to do so has been drawn up (article L. 1235-15).

75. The Committee notes, however, that according to the terms of the last paragraph of article L. 1235-3, this combined amount may not exceed the maximum amounts indicated.

76. The Committee also notes that, according to the information provided by the Government and the joint report on requests for opinions from the Court of Cassation, in certain circumstances the Labour Division of the Court of Cassation allows an employee whose employment has been terminated without real and serious justification to claim damages that are separate from the compensation awarded for termination without real and serious justification, in cases of irregular conduct by the employer in the circumstances or the consequences of the termination of employment (for example, termination by the employer in vexatious circumstances, violation of the employee's dignity, or moral harm), regardless of the justification for the termination. In these cases, the compensation for this distinct damage is not to be taken into consideration as part of the maximum compensation amounts under article L. 1235-3 of the Labour Code, unlike the compensation under articles L. 1235-12, L. 1235-13 and L. 1235-15 of the Labour Code.

77. However, the Committee observes that the matter of taking into account those elements that may lead to an uncapped amount of compensation is of little relevance to the question at issue of whether the compensation mechanism complies with Article 10 of the Convention, as those elements do not concern compensation for unfair termination of employment, but rather that of *separate* damage resulting from irregular conduct by the employer that is *separate* from the unfair nature of the termination.

78. The Committee notes that, although the introduction of tables leads to compensation no longer being subject to individual circumstances, the court still has the possibility of determining the amount of the compensation, taking into account criteria other than the length of service as provided for in the tables. Thus, the French Constitutional Council noted that the courts may take into account the personal circumstances of the employee: "When determining the amount of compensation to be paid by the employer, it is up to the judge to take into account all the elements that determine the damage suffered by the employee whose employment was terminated, within the limits of the table" (Constitutional Council, 21 March 2018, No. 2018-761 DC, paragraph 89).

79. Nevertheless, the Committee notes that although the discretion of the courts allows them to take into account individual and personal circumstances, the discretionary power of the court seized of the matter appears to be limited ipso facto, as it may only act within the limits of the bracket of the table established in the law. While noting the Government's indication that the amounts correspond to the "recorded averages" of compensation awarded by the courts prior to the reform, the Committee considers that it cannot be ruled out a priori that, in some cases, the damage suffered may be such that it would be impossible to provide redress at a level that would be considered "fair" on various grounds, such as the employee's length of service, ability to find a new job, or family circumstances. The succinctness of the bracket capped at 20 months also limits the ability of the courts to take into account individual and personal circumstances.

80. **In the light of the above, the Committee considers – aside from cases of termination concerning a fundamental right, to which the principle of full compensation applies, and irrespective of the compensation for separate damage – that the compatibility of a table, and therefore of a cap, with Article 10 of the Convention depends on whether sufficient protection is ensured for persons whose employment has been unfairly terminated and, in all cases, whether adequate compensation is paid.**

81. **Under these circumstances, the Committee invites the Government to examine, in consultation with the social partners, the modalities of the compensation mechanism provided for in article L. 1235-3 at regular intervals, to ensure in all cases that the parameters for compensation provided for in the table ensure adequate compensation for damage suffered as a result of the unfair termination of employment.**

▶ IV. The Committee's recommendations

82. **The Committee recommended that the Governing Body:**

(a) **approve the present report;**

(b) **request the Government to take account of the observations made in paragraphs 54, 58, 80 and 81 of the Committee's conclusions in the context of the application of Convention No. 158;**

(c) **invite the Government to provide information on this matter for subsequent examination and follow-up, where applicable, by the Committee of Experts on the Application of Conventions and Recommendations;**

(d) **make the report publicly available and declare closed the procedure initiated by the representation.**

7 February 2022

(signed) Khalid Dahbi
Government member

Renate Hornung-Draus
Employer member

Kelly Ross
Worker member