Legal Effects of Termination of Employment Based on the Needs of the Business under Labour Law in Turkey

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I. Introduction

The restructuring and downsizing needs of enterprises create the need to terminate workers individually or collectively. In fact, recently, it is seen that the businesses in Turkey are significantly affected from the said development.

Accordingly, while on the one hand, the current labour law system should allow for dismissals due to the needs of the business; on the other hand, the necessity of protecting the workers who will be unemployed against dismissals arises. In this respect, the Turkish employment security system allows the termination of the employment contract based on business requirements for a valid reason.

The valid reasons arising from the requirements of the business, unlike the others, arise without any direct influence of the worker. Therefore, it is noteworthy that the provisions relating to the valid reasons arising from the business requirements are regulated differently. The fact that it is not necessary to take the defence of the worker before the termination for the termination under valid cause due to the requirements of the business (art. 19 para. 2 Labour Act) is the most vivid example of this.

On the other hand, valid reasons based on business requirements are regulated in a twin division under the law statement of reasons for Article 18 Labour Act as 'reasons deriving outside the workplace" and "reasons deriving from within the workplace'. Accordingly, we will first deal with the valid reasons arising from the requirements of the business, with the adherence to the said distinction, and then examine the content of 'the principle of termination as a last resort' and the 'social selection criteria'. Thus, in the termination based on business requirements, it is clarified whether the employer applies the business decision consistently (consistency audit) and acts arbitrarily in termination (arbitrary audit) and whether the termination is unavoidable as a result of the operational decision (proportionality control or termination principle).

II. Reasons for dismissal based on business requirements

1. Causes deriving outside the workplace

a. Scope and content of situations affecting the workplace

The law statement of reasons for Article 18 Labour Act; show the reasons such as 'decreased version and sales opportunities, decreased demand and orders, energy shortages, economic crisis in the country, general stagnation in the market, loss of foreign markets, shortage of raw materials' between the reasons outside of the workplace and may result in termination of the employment contract for a valid reason.

Where the reasons indicated in the aforementioned justification are to be observed; it is seen that the common point of these is not caused by the workplace itself, but there are external factors. However, all these situations have a direct impact on the operation of the business, even though they do not originate from the workplace. In this sense, it is not possible for the employer (the business) to have any effect on the formation of the mentioned valid reasons.

On the other hand, it should be said that these situations are mostly economic. As a matter of fact, a significant part of these situations is related to the recession period examples related to the economic crisis. Likewise, as in the case of the economic crisis, the emergence of the situations here in the world or country economy dimension is another feature. Thus, not only domestic markets are considered, but economic difficulties in foreign markets are also accepted as valid reasons arising from business requirements.

b. Some example cases that will affect the workplace from outside

An important part of the business requirements that affect the business from the outside is shown in the law statement of reasons for Article 18 Labour Act. Based on these, examining the case studies will contribute significantly to explaining the valid reasons arising from the operational requirements.

On the other hand, it depends on the fact that all these situations originating from outside the workplace constitute a valid cause and that these situations have eliminated the possibility of continuing to operate in the workplace. In other words, in order for a situation to arise from the outside of the workplace to become a valid reason based on the requirements of the business, this situation should make it impossible to continue the work in the workplace. As a matter of fact, the law statement of reasons for Article 18 Labour Act mentions 'making work impossible in the workplace'.

aa. Low opportunity of sales

Economic negativity in domestic or foreign markets may have reduced the sale opportunities of the goods or services produced in the workplace. The

economic downturn in the markets will ultimately lead to a decline in workplace production. In this case, low production will increasingly have a negative impact on employment and will require the termination of employment contracts.

bb. Reduction in demands and orders

The most important indicator of the economic crisis environment is the decrease in domestic or foreign demand for goods or services, and the gradual decrease in the quality and quantity of the orders that will form the basis of production. Such situations have a negative impact on the production in the workplace and consequently on the employment of the workplace.

cc. Energy difficulty

Continuous production in the workplace depends to a large extent on the supply of external energy. As a matter of fact, the difficulties in supplying energy have a negative effect on production and employment. In this context, the energy constraints that occur in the workplaces lead to a decrease in production and consequently a surplus of labour.

dd. National economic crisis

What is at stake here is that the economic crisis prevails nationwide. However, it cannot be overlooked that in a global world, economic crises do not occur on a national scale and national economic crises are supported by the world economic crisis. However, the important point here is that the workplace is affected by the economic crisis in the country.

The law statement of reasons for Article 18 Labour Act, on the other hand, mentions the 'economic crisis in the country'. Thus, it is not intended that only some sectors or certain sectors or groups of professionals will be affected by the economic crisis.

ee. Market stagnation

Inactivity in the domestic or foreign markets, i.e. the decrease in the volume of transactions and the resulting recession, adversely affect the production of the workplace. Because, even if the production is not realized after the sale of the goods, the continuation of production and, when production is not needed, it will be necessary to resort to a reduction in employment.

ff. Foreign market loss

The example of foreign market loss is directly related to the workplaces oriented mainly to foreign sales. The decrease in their export revenues may constitute a valid reason based on operational reason[1].

However, the goods or services produced may be sold both domestically and abroad. The important point in terms of these workplaces is the losses to be experienced in the foreign market. If the workplace cannot turn to the domestic market as a result of foreign market loss, there is a necessity to shrink the employment of the workplace.

gg. Difficulty in raw materials

Supply of raw materials is vital when the production of goods in the workplace depends on processing raw materials. Indeed, the raw material difficulties and hardships negatively affect the production and gradually, employment.

However, it is imperative that these difficulties arise from outside. Therefore, the shortage of raw material supply by the workplace due to its own economic difficulties does not fall into the aforementioned status. On the other hand, situations such as the government's prohibition on foreign procurement or the rationing of the raw material within the country may constitute a valid reason.

2. Causes from within the workplace

a. Freedom to make decisions concerning business requirements

The employer is free to make business decisions regarding the functioning of the workplace. As a matter of fact, it is not possible for the court (judge) to intervene in the decisions in this way and to check whether they are acceptable[2]. In this sense, the court is only authorized to monitor whether such operational decisions are properly (objectively) implemented[3]. Accordingly, the employer is

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[1] *See* Court of Cassation [Crt. of Cass.] 9th Chamber, 24.2.2016, 2015-26193/3803, Legal İSGHD (Istanbul) 2016, no. 13, p. 2196.

[2] ***Fevzi Demir***, *"Geçerli Sebeple Fesih Kavramı ve Uygulama"*, Legal İSGHD (Istanbul) 2006, no. 3, p. 490; ***Ömer Ekmekçi***, *"Yargıtay'ın İşe İade Davalarına İlişkin Kararlarının Değerlendirilmesi"*, Legal İSGHD (Istanbul) 2004, no. 1, p. 167; ***Bektaş Kar***, *"İşletme, İşyeri ve İşin Gereklerinden Kaynaklanan Nedenlere Dayalı Fesihlerde Yargısal Denetim"*, 17 Çalışma ve Toplum Dergisi (Istanbul) 2008, no. 17, p. 113; ***Nezihe Binnur Tulukçu***, *İş Güvencesi İşe İade*, Ankara 2017, p. 207

[3] ***Mustafa Alp***, *"Die unternehmerische Entscheidungsfreiheit trotz eines Kündigungs-schutzes?"*, *in* Prof.Dr. Nuri Çelik'e Armağan, Istanbul 2001, pp. 1015-1016; ***E. Murat Engin***, *İş Sözleşmesinin İşletme Gerekleri İle Feshi*, Istanbul 2003, p. 74; ***Polat Soyer***, *"Feshe Karşı Korumanın Genel Çerçevesi ve Yargıtay Kararları Işığında Uygulama Sorunları"*, *in* İş Güvencesi Kurumu ve İşe İade Davaları, Istanbul 2005, pp. 47-48; ***Fevzi***

free to make operational decisions, such as automation of the workplace, closure of a number of divisions or initiation of subcontractor practice[4] or termination of subcontracting contract[5] or reduction of workplace; it is not possible, as a rule, to hold these subjects to judicial review by the judiciary.

However, merely the employer's loss does not constitute a valid reason for termination based on business requirements[6]. Accordingly, the employer, after taking such decisions, before applying the termination actions he/she thinks about, should apply the principle of last resort (ultima ratio)[7], which can be seen below[8].

Accordingly, it should be noted whether there is a surplus of employment[9]. As a matter of fact, if the employer has the opportunity to employ the employee in another part of the same workplace and in another workplace, a valid termination based on the requirements of the business will not be possible[10]. On the other hand, in cases where the employer has no other workplace where the employer can employ the worker and there is no recruitment of new workers, termination may be possible for a valid reason[11].

Reducing labour surplus and changing the structure of the labour force emerge as the main objectives of the employer's decisions on business requirements. As a result, the Court of Cassation accepted it as a just cause for the termination of the employment contract based on the needs of the business to no longer need the employees who maintain and process the tobacco left in stock due to the restructuring of the company and implementation of high technology or giving obligatory leave to the employees due to economic

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Şahlanan, *"Şirket Birleşmelerinde İşletme Gerekleri İle İş Akdinin Feshi"*, Sicil İş Hukuku Dergisi (Istanbul) 2006, no. 4, pp. 16-17

4 *See* Crt. of Cass. 22d Chamber, 9.2.2017, 500/1875, Legal İSGHD (Istanbul 2017), no. 14, p. 1554; Crt. of Cass. 22d Chamber, 4.3.2015, 4586/8934, Legal İSGHD (Istanbul 2015), no. 12, pp. 435-436; Crt. of Cass. 9th Chamber, 26.10.2009, 2005/29326, Çimento İşveren Dergisi (Ankara) 2012, no. 4, p. 38

5 *See* Crt. of Cass. 22d Chamber, 19.4.2017, 32477/9066, Legal İSGHD (Istanbul) 2017, no. 14, p. 2080

6 Crt. of Cass. 9th Chamber, 22.2.2010, 2971/4114, Legal İSGHD (Istanbul 2010), no. 7, p. 761

7 ***Ercan Akyiğit***, *Türk İş Hukukunda İş Güvencesi (İşe İade)*, Ankara 2007, p. 270; Kar, op.cit., pp. 124-125.

8 *See* below IV.

9 *See* Crt. of Cass. 9th Chamber, 8.5.2017, 7301/8075, 14 Legal İSGHD (Istanbul) 2017, no. 14, pp. 1933-1934

10 Crt. of Cass. 9th Chamber, 23.3.2009, 2008-17009/7711, in ***Bektaş Kar***, *İş Güvencesi ve Uygulaması*, Ankara 2011, pp. 662-663

11 Crt. of Cass. 22d Chamber, 17.4.2018, 2630/8727, Legal İSGHD (Istanbul 2018), no. 15, p. 1144. Also *see* Crt. of Cass. 22d Chamber, 1.3.2018, 2017-46184/5467, Legal İSGHD (Istanbul 2018), no. 15, p. 691

difficulties of a small municipality or forced termination of the employment of the employees of a bank which was liquidated after being transferred to Savings Deposit Insurance Fund.[12]

However, the employer must be sincere in this regard, i.e., the need for termination should indeed exist. In fact, in cases where the employer intends to get rid of one or more workers that he does not really want, it should be mentioned that the operational decision taken by the employer is now arbitrary[13]. In this context, the Court of Cassation did not consider the decision to recruit new workers when hitting the employment surplus, within the scope of termination based on business requirements[14]. Likewise, the application of a subcontractor contract based on law collusion does not constitute a valid reason, according to the Court of Cassation[15].

b. Some examples from the workplace

In the law statement of reasons for Article 18 Labour Act, 'the reasons such as the implementation of new working methods, the scaling down the workplace, the application of new technology, the cancellation of some parts of the workplaces, the removal of some types of work' were accepted as the situations that may result from within the workplace and lead to termination. Indeed, it is directly related to the operation of the workplace where the termination occurs, and the reasons arising from that workplace itself are among the business requirements that can lead to a reduction in the labour force of workplaces.

On the other hand, the examples given in the law statement of reasons for Article 18 Labour Act do not include the termination cases that may arise as a result of mergers, which are of great importance for the application. This is probably due to the fact that, the legislator considers mergers under the transfer of the workplace or a part of it (art. 6 para. 5 Labour Act). However, mergers may occur in the form of transfer of two separate employer legal entities belonging to the same holding or group of companies to a common/single technological infrastructure without transfer[16].

[12] *See* ***Akyiğit***, op.cit., pp. 270-271

[13] *See* ***Soyer***, op.cit., pp. 49-50

[14] ***Şahlanan***, op.cit., p. 17. Also *see* Crt. of Cass. 22d Chamber, 20.12.2017, 44870/30216, Legal İSGHD (Istanbul) 2018, no. 15, p. 292; Crt. of Cass. 9th Chamber, 22.11.2010, 2009-33926/33874, Legal İSGHD (Istanbul) 2011, no. 8, p. 671

[15] Crt. of Cass. 9th Chamber, 26.10.2009, 2005/29326, Çimento İşveren Dergisi (Ankara) 2010, no. 4, pp. 38-39

[16] *See* ***Şahlanan***, op.cit., p. 18

aa. Changing workplace methods

Over time, work methods in the workplace may be exceeded. In this case, new work methods are applied in the workplace. Adoption of new methods of work often requires fewer workers in the workplace.

Indeed, with an operational decision, the employer can go to a real subcontractor practice in the workplace. In this case, the employer, who is the main employer, can no longer employ workers in the works assigned to the sub-employer. In this case, the workers who had previously worked in subcontracted jobs should be applied as a last resort principle and then shifted to other jobs in the workplace[17]. However, when this is not possible, it should be recognized that a valid cause based on business requirements has emerged[18].

As a matter of fact, the Court of Cassation acknowledged that in a dispute where all jobs in the sanitation department were left to the subcontractor through tendering, there was a valid reason for termination because it did not make sense to employ the sanitary worker in other departments[19].

bb. Downsizing of the workplace

One of the basic characteristics of today's global economy is that companies want to or have to shrink in order to increase their competitiveness. In the law statement of reasons for Article 18 of Labour Act, this situation was stated as 'narrowing the workplace'. In this context, reducing the number of workers in the workplace is one of the conceivable measures.

However, any request for downsizing should not be regarded as a valid cause of business requirements. As a matter of fact, it is not considered within the scope of the business requirements that the employer attempt to shrink arbitrarily out of a sudden. In this sense, in order to talk about termination for a valid reason, it is necessary to look for the existence of a situation that requires the downsizing of the workplace and compels the employer to act in this way in order to maintain its competitiveness.

[17] *See* Crt. of Cass. 9th Chamber, 14.2.2011, 7034/2595, Legal İSGHD (Istanbul) 2011, no. 8, pp. 1217-1218; 1.10.2007, 14264/28749, Legal İSGHD (Istanbul) 2007, no. 4, pp. 1523-1524; 11.12.2006, 30338/32729, Legal İSGHD (Istanbul) 2007, no. 4, p. 1091

[18] Crt. of Cass. 9th Chamber, 22.10.2007, 17306/31062, Legal İSGHD (Istanbul) 2008, no. 5, p. 222. Also *see* ***Şahlanan***, op.cit., p. 19

[19] *See* Crt. of Cass. 9th Chamber, 14.10.2004, 22472/23187, Legal İSGHD (Istanbul) 2005, no. 2, pp. 773-774

Likewise, the termination plan related to downsizing should be implemented consistently[20]. As a matter of fact, the Court of Cassation acknowledged that termination of employment contracts did not depend on the current reasons for business requirements in an environment in which workers terminated four months after termination were invited to work and the economic contraction turned to a positive trend[21].

On the other hand, the closure of the workplace after the termination of the employment contract upon the decrease in production in the workplace and the absence of new workers in the meantime will show that the termination was carried out for a valid reason based on the operational requirements[22].

cc. Implementation of new technology

It is clear that in the event that new technology is implemented, such as the purchase of a new device in the workplace or the abandonment of the old technology type or the automation of the workplace, certain workers will not be needed in the workplace. The important point here is that fewer workers are needed due to the new technology. However, the non-compliance of the worker with the new technology should be regarded as a valid reason stemming from the inadequacy of the worker, not mainly from business requirements.

dd. Closing work sections

The employer may, for various reasons, wish to make changes to the organization of the workplace and, in the meantime, close certain sections or departments that were previously available. In this context, the workers who worked in the closed department or departments will be first evaluated for service in other departments. In cases where it is not possible to shift and assign to another section, inevitably, it is necessary to terminate the employment contracts of these workers for a valid reason.

ee. Reduction of business types

The employer may be requested to remove some types of work previously seen in the workplace if they are no longer needed for different reasons. In this case, first, it should be considered that the workers or workers previously employed in these jobs are shifted to other work done in the workplace. If, however, it is not possible to assign the worker to another type of work,

[20] *See* Crt. of Cass. 9th Chamber, 1.10.2015, 19201/26987, Legal İSGHD (Istanbul) 2016, no. 13, p. 1103

[21] *See* Crt. of Cass. 9th Chamber, 11.12.2017, 2016-31876/20832, Legal İSGHD (Istanbul) 2018, no. 15, p. 213

[22] *See* Crt. of Cass. 22d Chamber, 18.2.2015, 3532/5423, 12 Legal İSGHD (Istanbul) 2015, no. 12, p. 441

termination of the employment contract for a valid reason arising from the operational requirements will be brought to the agenda.

III. Business decisions of the employer

Neither in the text nor the law statement of reasons for Article 18 Labour Act includes the business decision of the employer. However, Court of Cassation is looking for the existence of a business decision to justify the employer's termination in this way in its decisions regarding termination based on business requirements. Accordingly, 'operational decision' is considered as all kinds of decisions that the employer is free to determine the purpose and content and within the framework of the right to management, on all matters concerning his business[23]. In this context, the Court of Cassation does not find it obligatory to comply with the written format regarding the format of the business decision[24].

The main reason for the employer to make business decisions is the necessity to take measures for the benefit of the business against the changes in the physical and monetary values and the quality of the employees[25]. In this context, the employer has the right to take the operational decision on the basis of management right. Accordingly, the employer is free to take the operational decision[26]. However, the termination procedure as a result of the implementation of this decision is subject to judicial review[27].

As a matter of fact, the Court of Cassation, while using the employer's right to make operational decisions, seeks to act in accordance with the principle of honesty (art. 2 Civil Code) (that is, it has not been arbitrary)[28] and agrees to the fulfilment of the principle that the termination is the last resort (ultima ratio). In this sense, the Court of Cassation adopts the principle that the operational decision is implemented objectively and consistently[29], is not arbitrary and is

[23] *See* ***Yeliz Bozkurt Gümrükçüoğlu***, *"İşletmenin, İşyerinin ve İşin Gerekleri İle Fesih"*, Legal İSGHD (Istanbul) 2017, no. 14, pp. 678-680; ***Kar***, op.cit., p. 108; ***Hakan Keser***, *4857 Sayılı İş Kanunu ve Yargıtay Uygulamasında İş Sözleşmesinin Bildirimli Feshinde Geçerli Sebep*, Ankara 2016), pp. 397-398; ***Tulukçu***, op.cit., p. 214

[24] *See* Crt. of Cass. 22d Chamber, 9.3.2014, 6702/7420, Legal İSGHD (Istanbul) 2015, no. 12, pp. 377-378

[25] ***Keser***, op.cit., p. 398.

[26] *See* Crt. of Cass. 9th Chamber, 3.5.2010, 2009-19729/11964, Legal İSGHD (Istanbul) 2010, no. 7, p. 1094

[27] ***Gümrükçüoğlu***, op.cit., pp. 680-683

[28] *See* Crt. of Cass. 7th Chamber, 15.6.2015, 9946/12122, Legal İSGHD (Istanbul) 2016, no. 13, p. 1090; Crt. of Cass. 9th Chamber, 22.10.2010, 2009-31834/30149, Legal İSGHD (Istanbul) 2011, no. 8, pp. 175-176

[29] *See* Crt. of Cass. 22d Chamber, 23.1.2017, 829/63, Legal İSGHD (Istanbul) 2017, no. 14, p. 1574; Crt. of Cass. 7th Chamber, 9.2.2016, 2015-34867/2230, Legal İSGHD (Istanbul) 2016, no. 13, p. 1564

used as a last resort to termination[30] Accordingly, when the employer gets new workers under the same title before and after the termination, the employee's termination of the employment contract will require the termination to be deemed invalid[31].

IV. Implementation of the principle of termination as a last resort

1. Adoption of last resort principle

'Termination is the last resort (ultima ratio)' principle is not written in the legal regulations related to job security and is not embodied[32]. However, the Court of Cassation duly accepts and applies the application of this principle, which is not covered by any text of law[33].

The principle of termination as a last resort is an extremely important principle that will be applied to control whether or not termination of business requirements is valid. Accordingly, in order for the termination to be carried out for a valid reason, the existence of a valid reason arising from the requirements of the business is not sufficient, and the termination should be inevitable, although the employer does his best to keep the worker in the workplace, that is to say, keeping the worker in the workplace is meaningless. In this context, the employer has to prove that the last resort principle has been complied with[34]. Thus, the termination of the employment contract is now considered as a last resort and it is necessary to determine whether it can achieve the desired result with lighter measures[35].

However, it is necessary to consider that the employer should avoid behaviours that bring unnecessary expenditure to the workplace and harm the enterprise. In this respect, the freedom of the employer to make decisions based on the benefit of the enterprise limits the principle of termination as a last resort[36].

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[30] Crt. of Cass. 22d Chamber, 11.9.2018, 9332/18182, Legal İSGHD (Istanbul) 2018, no. 15, p. 1666

[31] Crt. of Cass. 9th Chamber, 3.4.2014, 760/11249, Legal İSGHD (Istanbul) 2015, no. 12, p. 310

[32] ***Cumhur Sinan Özdemir***, *"İşe İade Davası ve Sonuçları"*, Çimento İşveren Dergisi (Ankara) 2011, no. 1, p. 26

[33] *See* Crt. of Cass. 9th Chamber, 5.12.2016, 18864/21473, Legal İSGHD (Istanbul) 2017, no. 14, p. 1470

[34] ***Gümrükçüoğlu***, op.cit., p. 685

[35] ***Alp***, op.cit., pp. 1024-1025; ***A. Eda Manav***, *İş Hukukunda Geçersiz Fesih ve Geçersiz Feshin Hüküm ve Sonuçları*, Ankara 2009, p. 112

[36] ***Emine Tuncay Senyen-Kaplan***, *Bireysel İş Hukuku*, Ankara 2019, pp. 288-289

The application of the principle of termination as a last resort is not considered a legal obligation in the doctrine due to the lack of basis in positive law[37]. However, in a legal system that adopts more abstract methods, not every subject must be written in the law. Otherwise, if every issue was sought in law, the case law would not be necessary, and the judge would not create law. Whereas, although the principle of termination is a last resort, in the law statement of reasons for Article 18 of Labour Act it stated that termination should be considered as a last resort.

On the other hand, the principle of termination as a last resort is an integral part of the legal job security mechanism and, increasingly, employment security law. As a matter of fact, the basis of legal job security is not to terminate the existing employment contract, that is to say, to protect the job (labour relationship) as much as possible, not to lose the worker. In this respect, it is beneficial to encourage and support this since the Court of Cassation accepts the implementation of the principle of termination as a last resort as a matter not written in law.

2. Scope of last resort principle

a. Last resort principle in practice

Under the last resort principle, employer employing the worker elsewhere should be considered limited to the workplace or enterprise where the worker is employed. Accordingly, the employer should be not expected to employ the worker in another workplace of a group of companies or a company within the holding[38].

Furthermore, the employer's employment of the worker in another place depends on the existence of a vacancy. In this sense, the employer cannot be expected to create a new vacant position instead of terminating the employment contract. Thus, when the worker is sent to another workplace of the employer, no surplus of employment should be created[39]. As such, when there is vacancy, the worker must possess the qualifications sought for that place[40]

In this context, Court of Cassation, in a decision on the last resort principle, instead of resorting to termination, it sought to implement measures such as the abolition of excess work prior to termination, the shortening of working time with the approval of the worker and the spread of work overtime[41].

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[37] *See* ***Ekmekçi***, op.cit., p. 168.

[38] Crt. of Cass. 9th Chamber, 22.12.2008, 39933/34838, Legal İSGHD (Istanbul) 2009, no. 6, p. 324.

[39] Crt. of Cass. 9th Chamber, 10.12.2010, 2009-41815/37214, Legal İSGHD (Istanbul) 2011, no. 8, p. 604

[40] ***Soyer***, op.cit., pp. 52-53

[41] *See* Crt. of Cass. 9th Chamber, 8.7.2003, 12442/13123, Tekstil İşveren Dergisi (Istanbul) 2003, no. 10, p. 32

In this context, the Court of Cassation, in a decision on the last resort principle, sought to implement measures such as the abolition of overtime work before the termination, the shortening of working time with the approval of the worker and the spread of work overtime[42].

In this sense, the Court of Cassation, with its decisions applying the last resort principle, emphasizes the necessity of resorting to measures that can keep the worker in the workplace. However, the appropriateness of the proposed measures is controversial in terms of concrete events. Because, in these decisions, measures that will not be an alternative to the termination are emphasized and whether the purpose of termination is achievable with the mentioned measures is not taken into consideration[43].

b. Proposal of same or similar work to the worker

The qualifications of the work to be proposed by the employer to the worker are of particular and special importance in the implementation of the last resort principle. Because, if a real job security is to be provided to the worker, he should not be expected to accept any kind of job proposed to him. In this regard, the employer should first investigate whether there is a job of the same value or similar position as the work the employee and should recommend that to the worker[44]. For this, it is compulsory to take into consideration the personal situation of the worker, professional skills and job descriptions and the organization chart of the workplace. If the employee cannot find the same or similar job, the employer should not be required to conduct research for a lower position[45].

c. Search for vacancies

As a rule, the employer should take into account the vacancies at the moment of termination in determining the vacancies to be offered to the worker[46]. However, it is also necessary to take into account the objectively identifiable jobs to be vacated within the notification priority and the positions that are understood to be vacant after the notification priority.

[42] *See* Crt. of Cass. 9th Chamber, 29.12.2003, 23204/22988, Legal İSGHD (Istanbul) 2004, no. 1, p. 634

[43] For details *see* ***Soyer***, op.cit., pp. 54-55

[44] Also *see* Crt. of Cass. 9th Chamber, 4.2.2014, 2013-9571/3206, Legal İSGHD (Istanbul) 2014, no. 11, p. 209

[45] ***İlke Gürsel***, *"Feshe Bir Alternatif Olarak İşverenin Fesihten Önce İşçiyi Başka İşte Çalıştırması"*, Sicil İş Hukuku Dergisi (Istanbul) 2018, no. 40, p. 105. *Opposite* Crt. of Cass. 9th Chamber, 3.4.2014, 761/11250, Legal İSGHD (Istanbul) 2015, no. 12, pp. 308-309

[46] *See* Crt. of Cass. 9th Chamber, 4.2.2014, 15658/3208, Legal İSGHD (Istanbul) 2014, no. 11, p. 207

All workplaces belonging to the same real or legal person should be taken into consideration while conducting the research in question. Similarly, if the workplace where the employee is working is a group of companies or a holding company, it should be checked whether there is a vacant place in the same community or companies under the holding roof[47].

V. Employer's social choice

It is seen that the valid reasons for business requirements often affect multiple workers instead of a single worker, and that their size reaches to collective dismissal. In such cases, the question arises as to whether the employer is free to select the workers to terminate the employment contract on the basis of operating requirements.

In this context, if an employer that incurs losses is forced to lay off some workers to prevent such damage, he or she must have discretion in determining which workers these will be. Likewise, the provision of collective employment contract, which includes the social selection criteria, may give the employer certain discretion (merit, seniority, register, achievement, etc.)[48]. In exercising this right, the employer is expected to act in a fair and moderate manner, in accordance with the requirements of the work, and to select the workers who will suffer the least from the dismissal[49].

Indeed, due to the differences in the subjective nature of the workers between the workers who will be dismissed by the termination of employment contracts, there is generally no mention of the employer's obligation of equal treatment[50]. As a matter of fact, the employer does not necessarily have to terminate the contracts of all participating workers for the sake of compliance with the principle of equality in an event involving many workers[51].

However, in some countries, the laws on protection against termination explicitly stipulate that the employer must select workers to be dismissed by certain criteria in order to protect the socially weak in termination based on

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[47] ***Gürsel***, op.cit., pp. 106-109

[48] *See* Crt. of Cass. 22d Chamber, 27.6.2016, 12378/19443, 14 Legal İSGHD (Istanbul) 2017, no. 14, p. 442

[49] ***Devrim Ulucan***, *"Ekonomik ve Teknolojik Nedenlerle Fesihlerde Geçerlilik Denetimi"*, Legal İSGHD (Istanbul) 2015, no. 12, p. 78

[50] *See* ***M. Fatih Uşan***, *"İş Sözleşmesinin Feshinde İşverenin Eşit Davranma Borcu Var mıdır? (Yargıtay 9. Hukuk Dairesinin Bir Kararı Üzerine Değerlendirme)"*, Legal İSGHD (Istanbul) 2005, no. 2, p. 1628

[51] ***Kübra Doğan Yenisey***, *"İşverenin Sözleşmenin Feshinde Eşit Davranma Borcuna İlişkin İki Yargıtay Kararının Düşündürdükleri"*, Sicil İş Hukuku Dergisi (Istanbul) 2006, no. 2, p. 63

business requirements[52]. According to this, social selection is the means to concretize the abstract surplus that will arise due to the requirements of the enterprise by identifying the workers whose employment contract will be terminated[53].

In Turkish law, however, there is no law provision that explicitly envisages social selection criteria. As a matter of fact, the social selection criteria and the obligation of the employer not to contradict them are not included in the provisions of job security. In fact, social selection criteria are not even included in the law statement of reasons for Article 18 Labour Act. On the other hand, the Court of Cassation, in some of its previous decisions, has included some principles, partly reminiscent of the regulation in the German Protection against Dissolution Act, under the so-called 'social selection criteria'[54]. Thus, the social selection criteria adopted by legal regulations in some of the foreign countries and the obligation to comply with them has been adopted by the Court of Cassation in the past in Turkish law practice[55].

Regarding the criteria on which social selection should be based, the Court of Cassation has made it possible for the employer to compare the workers with the same job in the selection of the dismissed worker, and to be unable to come to work due to illness, sickness, the right to retirement, seniority, retirement, married and to have a child or young[56].

In this context, it is undeniable that the social selection criteria and the necessity of observing them must be observed. However, it is legally worrying that the Court of Cassation should prioritize and strictly comply with each other, without any conditions and limiting narrative, in the absence of any legal regulation[57].

Likewise, the Court's Cassation's acceptance that the burden of proof falls to the employer rather than the worker if it is alleged that arbitrary treatment of worker choice is not complied with, deepened the concerns about the social choice. This is because the Court of Cassation does not take into account that the

[52] *See* ***Gülsevil Alpagut***, *"İş Sözleşmesinin Feshinde Sosyal Seçim Yükümlülüğü Mevcut mudur?"*, Sicil İş Hukuku Dergisi (Istanbul) 2006, no. 4, p. 100

[53] ***Erhan Birben***, *"İşletme Gerekleri Nedeniyle İşten Çıkarılacak İşçilerin Belirlenmesinde İşverenin Seçim Serbestisi ve Sınırları"*, Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi (Izmir) 2006, no. 2, p. 8

[54] For details *see* ***Nuri Çelik***, *"İşletmenin, İşyerinin Veya İşin Gerekleri Sebebiyle İş Sözleşmesinin İşverence Feshinde Eşit Davranma Borcu"*, Sicil İş Hukuku Dergisi (Istanbul) 2006, no. 4, p. 6

[55] ***Gümrükçüoğlu***, op.cit., pp. 693-696; Manav, op.cit., pp. 125-12

[56] *See* Crt. of Cass. 9th Chamber, 13.3.2006, 2894/6224, Çalışma ve Toplum Dergisi (Istanbul) 2006, no. 3, p. 258

[57] *See* ***Çelik***, op.cit., pp. 7-8.

employer has an obligation to prove that the termination is based on a valid reason and that the employee who claims that the termination is based on another reason is obliged to prove this claim (art. 20 para. 2 Labour Act)[58].

Although Court of Cassation has heard the concerns mentioned, Court of Cassation seems to have returned from only some of its earlier decisions on social selection criteria[59]. In contrast, Court of Cassation maintained its earlier view that social selection criteria should be applied if the criteria for termination of the employment contract were agreed by the contract or agreement, or if the employer met certain criteria[60].

When there is no provision regarding the social selection criteria, the objective selection criterion is used in the Court of Cassation decisions. Accordingly, in the absence of a contractual arrangement between the parties:

- The employer's freedom of choice is limited to the principle of equality,

- The criteria to be used by the employer must be applied consistently and

- The criteria to be taken as basis by the employer should be objective and criteria such as poor performance, filling a certain age and seniority are accepted as objective criteria.

VI. Collective worker termination

1. Relation of collective termination with business requirements

The dismissal of workers collectively, that is, at the same time, or at short intervals and in large numbers over a period of time, is closely related to business requirements. As a matter of fact, the idea of improvement based on economic, or technological or structural reasons emerges as business requirements.

However, if layoffs with such an idea reach a certain number, the provisions for collective dismissal must now be applied. In fact, art. 29 Labour Act regulates the collective termination of workers in a specific procedure and which procedure should be considered as collective termination and the procedure in which the employer is obliged to comply in cases where such situations arise.

Accordingly, if the worker is dismissed individually on the basis of the requirements of the business, the provisions of the assurance in Articles 18-21 Labour Act shall apply. If workers are dismissed on the basis of operational

[58] For details *see* ibidem, pp. 9-10.

[59] *See* ***Kar***, op.cit., pp. 125-126; ***Keser***, *op.cit.,* p. 428; ***Senyen-Kaplan***, op.cit., pp. 290-291

[60] *See* Crt. of Cass. 9th Chamber, 5.10.2015, 19830/27185, Legal İSGHD (Istanbul) 2016, no. 13, p. 1658

requirements but collectively, the special procedure in Article 29 Labour Act is required. In this sense, Article 29 Labour Act is complementary to the protection provided by statutory job security provisions.

2. The concept of collective employee termination

a. Definition of collective termination

ILO-Convention no. 158 does not appear to directly define collective dismissal. It can be said, however, that the number of workers whose employment are sought to be dismissed for economic, technological or structural or similar reasons may reach "a certain number or a certain percentage of the number of personnel" (art. 13 para. 2 ILO-Convention no. 158) indirectly, as collective dismissal.

Within this context, art. 29 para. 2 Labour Act states the following:
If the number of workers in the workplace:
a) Between 20 and 100 workers, at least 10 workers,
b) Between 101 and 300 workers, at least ten percent of the workers,
c) If it is 301 or more, at least 30 workers,
Termination of employment in accordance with Article 17 and within one month on the same date or on different dates shall be deemed to be collective labour termination.

Although the numerical ratio and percentage in the said regulation is not stated in the law statement of reasons for Article 29 Labour Act, it is seen that it is partly taken from the second article of EU- Directive no. 98/59. As a matter of fact, the said directive perceived the dismissal of at least twenty workers within ninety days regardless of the number of workplace employees as collective dismissal, while the alternative was not included in art. 29 para. 2 Labour Act. It should be noted, however, that the definition of collective dismissal in Article 29 Labour Act is substantially in line with both ILO-Convention no. 158 and the EU- Directive no. 98/59.

Accordingly, in the Turkish labour law, it is necessary to collectively collect workers who are not less than a certain number or a certain percentage of the number of workplaces on the same date or different dates within a certain period of time due to economic, technological or structural reasons or similar business requirements of the employer.

b. Elements of collective termination

aa. The termination being based on business requirements

The reasons for dismissal that may lead to collective dismissal are cited by the Labour Act as ‘economic, technological, structural, and similar requirements for a business, workplace or job’ and to a limited extent.

Accordingly, even if the termination due to the inadequacy or behaviour of the worker (art. 18 para. 1 Labour Act) has reached the numbers specified in art. 29 para. 2 Labour Act, they are not counted as collective dismissal[61].

The employer is forced to reduce the number of employees in the workplace, especially in the event of economic crisis. However, the economic reason for termination must be of a real nature and substantial weight. Accordingly, crisis situations, such as, for example, financing or production deficit and loss of the customer environment, which would undermine the economic condition of the workplace in general, fall within these economic requirements.

Likewise, the situation that constitutes the economic cause should constitute a weighting reason that will not enable the continuation of the existing business relationship without damaging the workplace. As a matter of fact, simple decreases in sales or a temporary and weak decline in turnover or profits are not covered by economic reasons that may lead to collective dismissal[62].

On the other hand, it is undeniable that technological change will increase the competitiveness of the enterprise. It is another fact that the new advanced technology reduces the need for the labour force. In this context, the workplace, to the extent that it keeps pace with technological change, it can increase its competitiveness and achieve sustainability. However, as a result of technological renewal of the workplace, some workers lose their employment opportunities.

Finally, terminations for structural reasons often arise as a result of changes in market conditions. As a matter of fact, the employer may need to reorganize in the workplace under the conditions of the market. In this case, as the workplace will shrink or shrink, some sections will be closed, or some sections replaced by others or some goods or services to be abandoned. If it is not possible to employ some workers as a result of restructuring, it will be necessary to collectively terminate the employment contracts.

bb. Performing multiple layoffs

One of the most important features of collective dismissal is that layoffs are carried out for multiple workers at the same time or within a certain period of time.

The moment from which layoffs will become 'collective' is shown in art. 29 para. 2 Labour Act. Accordingly, the termination of the employment contract of at least ten workers if the number of workers in the workplace is between twenty and one hundred workers, of at least ten percent of the employees if the

[61] ***Ufuk Aydın***, *"Avrupa Birliği, ILO ve Türk Hukukunda Toplu İşçi Çıkarma"*, *in* A. Can Tuncay'a Armağan, Istanbul 2005, p. 672; ***Erten Cılga***, *"Toplu İşçi Çıkarma"*, Sicil İş Hukuku Dergisi (Istanbul) 2009, no. 13, pp. 78-79

[62] ***İştar Urhanoğlu Cengiz***, *Türk Hukukunda Toplu İşçi Çıkarma*, Ankara 2009, pp. 48-49

number of the employees is between hundred and three hundred, at least thirty employees if the number of the employees is at least three hundred and one and more are considered as 'collective'.

In this context, it is essential that the workplace for collective termination is a workplace with at least twenty workers. Accordingly, in a workplace employing less than twenty workers, regardless of the number of workers dismissed, there will be no collective dismissal[63].

On the other hand, in order for the specified number of cancellations to qualify as collective labour termination, they must be carried out either on the same date or separately but within a period of one month (art. 29 para. 2 Labour Act).

3. Assurance against collective termination

a. Employer's free space

Businesses need to shrink or reduce the number of staff, especially during the crisis, when significant economic difficulties are experienced. However, the requirement does not only arise during periods of economic crisis, but also the necessity of business or structural transformations (changes) that may arise in order to increase the competitiveness of the workplace and ensure the sustainability of the enterprise may require the collective dismissal of the workers.

The basis of this termination authority, which is granted to the employer within the framework of job security provisions in collective dismissal, is the 'freedom of initiative', which is explained in art. 48 Constitution of Turkey. In this sense, the legal assurance (art. 29 Labour Act) granted to the employer by the 'collective termination' institution has to be considered within the scope of the measures 'to ensure the security and determination of private enterprises' (art. 48 para. 2 Constitution of Turkey).

b. Protection provided to the employee

In collective termination, the worker is collectively protected against the termination of the employer, not on an individual level, but together with others.

On the other hand, the employer can dismiss workers collectively for certain reasons. As a matter of fact, the employer cannot use the provisions of collective termination in order to prevent the application of the job security provisions (arts 18-21 Labour Act). In this sense, the worker whose employment contract has been terminated without reasons for collective termination may sue for reinstatement (art. 29 para. 8 Labour Act).

[63] Ibidem, p. 73

Finally, notice of termination in collective dismissal shall be affected thirty days after the employer notifies the provincial directorate of the Ministry of Labour of his request for collective dismissal (art. 29 para. 5 Labour Act).

4. The obligation of the employer during collective termination

a. Contents of employer obligations

aa. Employer's notification obligation

Employers, who will want to collectively dismiss workers as a result operating requirement, so in writing and at least thirty days in advance, are obliged to report to the workplace union representatives with the provincial directorate of Ministry of Labour and the Employment Agency (art. 29 para. 1 Labour Act).

However, closing the business in its entirety if it ceased to operate precise and continuous way, the employer is obliged to report only to the relevant provincial directorates of Ministry of Labour and of Employment Agency of Turkey and to announce the situation in the workplace (art. 29 para. 6 Labour Act). In this case, the employer no longer has to report the matter to the trade union representatives.

The notion of being prepared is the basis for predicting the notification in question. In this way, the trade union, through the trade union representatives, has the opportunity to know that its members can be dismissed and to monitor whether the employer complies with the collective dismissal provisions.

In this context, the notification in question is intended only to inform the relevant persons about the provincial directorates of the Ministry of Labour and Employment Agency of Turkey and does not mean to allow collective dismissals[64].

The notification to be made shall be directed to the representatives of the workplace union. However, there may not be a workplace union representative in the workplace due to the absence of an agreed collective employment agreement or an authorized labour union to conclude a collective employment agreement. In this case, the said notification shall only be done to the relevant provincial directorates of Ministry of Labour and Employment Agency of Turkey. Accordingly, the employer is not obligated to notify the employees in such a situation.

In the letter that the employer shall notify to the relevant persons and places and that carry the request to collective termination of workers, the following shall be present 'information on the reasons for layoffs, the number and groups of workers to be affected and the time period for termination of

[64] Ibidem, p. 117

employment' (art. 29 para. 3 Labour Act). In this context, the reasons for dismissal must be based on business requirements (art. 29 para. 1 Labour Act).

On the other hand, it is not foreseen that the identity of the workers who will be collectively terminated will be provided. In this respect, it is sufficient for the employer to provide only information on the number and groups of workers to be dismissed collectively and the time period for termination of employment (art. 29 para. 3 Labour Act).

The most significant legal outcome that emerges in the matter of the notification that will be made by the employer to the workplace union representatives, Ministry of Labour provincial directorate and Employment Agency of Turkey is that the termination notices to be sent during collective termination will come into force and be effective after thirty days following the notice (art. 29, para. 5 Labour Act).

bb. The employer's obligation to interview

Once the employer has made the necessary notification, the employer is obliged to interview the trade union representatives. In any case, the said meeting must be held within the period before the enforcement date of the termination notice.

In the meetings to be held between the union representatives and the employer, the 'matters of prevention of collective termination or reduction of the number of workers to be terminated or minimization of the negative effects of termination for workers' (art. 29 para. 4 Labour Act) shall be taken into consideration. In this context, the subjects of the interview are limited. Indeed, the meeting between the parties is required to cover the points related to the opportunity to shift the employees that are considered for dismissal, to other works and the selection criteria of the employees to be dismissed.

At the end of the talks between the trade union representatives and the employer, a document will be issued to show that the meeting has been held (art. 29 para. 4 Labour Act). The legal power of the document in question will not go beyond the purpose of proving that the parties gathered related to collective termination.

In this respect, since the document in question is intended only to indicate that the meeting has been held. It is of little importance that the trade union representatives or one of them avoid signing the text to be prepared. However, the opinions of the union representatives should be included in the minutes of the meeting to be held[65].

In turn, the parties do not need to reach an agreement, that is, to make a decision or to reach a social plan. The mere talk is sufficient for the completion of the collective termination process. In this sense, the meeting between the parties is an information and consultation meeting.

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[65] ***Şefik Çalık***, *İş Sözleşmesinin Feshi ve İş Güvencesi*, Istanbul 2005, pp. 206-207

cc. The employer's obligation to announce

After the collective termination, it may be possible to close the workplace completely and terminate the activity in a definite and continuous manner. In this case, the employer is obliged to announce the situation in the workplace (art. 29 para. 6 Labour Act), since the loss of work will be the case for all workers in the workplace.

On the other hand, the legislator did not provide any clarity as to the form of the announcement to be made to the workers. Accordingly, the announcement can be made by hanging the text on the bulletin board in the workplace or in a place where workers can easily see, as well as the employer collecting the workers and explaining to them that the workplace will be closed. However, it is clear that the written announcement will provide practical benefit to the employer in terms of ease of proof.

dd. Employer's obligation to re-hire

If the employer wishes to re-hire for the same qualification within six months of the termination of the collective termination, the employer shall be obliged to selectively call the appropriate qualifiers to work (art. 29 para. 6 Labour Act). In this case, the employer is obliged to hire the worker to apply to the former workplace upon invitation. An administrative fine will be imposed on the employer or his/her representative who acts in contradiction with the obligation to re-hire.

Although the employer is obliged to recall the employer, the procedure through which the recall will be made is left blank by the legislator. In this regard, it may be said that the recall to be made should be made in writing to the address of the worker known to the employer and, after the recall, that an appropriate period should be adhered with considering the possibility that the employer may have entered into a job in the meantime[66].

Another point is that the said obligation will arise if a new worker is needed for a kind of job. In this regard, art. 29 para. 6 Labour Act mentions 'the same quality of work'. This means that the work required from the newly recruited worker should preferably be the same as that of the worker to be recruited during the collective dismissal. In cases where job descriptions are not made in the workplace or the employment contracts of the workers who are collectively dismissed does not indicate what the job description is, the persons who comply with the qualities of the job that are requested from the new employee (art. 29 para. 6 Labour Act).

[66] Also *see* ***Öner Eyrenci***, *"Toplu İşçi Çıkarma ve Ortaya Çıkan Sorunlar"*, A. Can Tuncay'a Armağan (Istanbul)2005, p. 562

b. Violation of the obligations of collective termination

In order to talk about violation of collective termination of employees, the employer should attempt to collectively terminate employment without the terms of collective termination, i.e., with the aim to prevent the implementation of job security or in case the employer does not comply with the employer's obligations foreseen for collective termination.

Any attempt to apply these without conditions for collective termination gives the worker the right to sue for employment in accordance with the provisions of the job security (art. 29 para. 8 of Labour Act). In contrast, non-compliance with employer obligations and the legal procedure for collective termination does not lead to any legal sanctions[67], but requires only administrative fines. Thus, the employer or the employer's representative, who disregard the provisions of Article 29 Labour Act, are subject to an administrative fine of 450 TL (ca. 70 Euro) for each terminated worker (art. 100 Labour Act).

However, failure to comply with the employer's obligations and the collective dismissal procedure does not invalidate the termination of employment contracts[68]. As a matter of fact, it is accepted by Court of Cassation that non-observance of collective termination procedure does not invalidate termination by itself[69].

On the other hand, the employer to prevent the application of job security provisions may have used provisions for collective termination. In this case, the worker may be able to sue and ask for his reinstatement (art. 29 para. 8 Labour Act). Particularly, in cases where the reasons for collective termination are not realized, that is, the employer performs termination outside of the business requirements; the worker may sue for reinstatement. However, in order to collectively dismiss a worker, it is compulsory to meet the conditions of benefiting from the provisions of job security (that is, to work in a workplace where 30 workers have been employed for at least six months and not to be a representative of the employer in the position of senior manager).

VII. Appeals against termination with business requirements

1. Mandatory mediation with litigation/arbitration system

It is possible for the employee to request the invalidation of the termination through a lawsuit against the termination procedure that the

[67] *Opposite* ***Senyen-Kaplan***, *op.cit.*, p. 308.

[68] ***Hamdi Mollamahmutoğlu/Muhittin Astarlı***, *İş Hukuku*, Ankara 2011, p. 951. *Opposite* ***Eyrenci***, op.cit., p. 559; ***Sarper Süzek***, *İş Hukuku*, Istanbul 2019, pp. 591-592

[69] *See* Crt. of Cass. 9th Chamber, 20.3.2006, 2990/6997, Çalışma ve Toplum Dergisi (Istanbul) 2006, no. 3, p. 238

employer claims to have carried out with the requirements of the business. For this, within the mandatory mediation system that came into force after 1 January 2018, it is mandatory for the worker to first apply to mediation and, after the matter is not resolved with mediation, to initiate the case for determining the invalidity of termination with request to be reinstated.

Accordingly, the employee whose contract is terminated is obligated to apply to the mediator with the request of reinstatement claiming that there aren't any reasons stated in the termination notice or that there is no valid reason based on the business requirements within one month following the notification of termination under the Labour Courts Act (art. 20 para. 1 Labour Act). Likewise, it can be argued in the same procedure that the decision to collectively terminate workers is not based on operational requirements and is used to prevent the application of job security provisions (art. 29 para. 8 Labour Act).

2. Mediation activity

The mediator must finalize the application for reinstatement within three weeks of the date of appointment. The mediator may extend the period for a maximum of one week (art. 3 para. 10 Labour Courts Act).

Accordingly, as a result of mediation activities, mediators will prepare a report on whether the parties have reached an agreement or on how the outcome of mediation activities. Other than the mediator, the parties, their legal representatives or lawyers shall sign this document prepared by the mediator. However, if the parties or their representatives or their agents do not sign this document, only the mediator shall sign it with stating the justification (art. 17 para. 2 Act no. 6325).

At the end of the mediation activity, if there is an agreement on the employment of the worker, the parties must determine the following:

- The employment date,

- Monetary amount of incurred wages and other rights of the worker born during the unemployed period up to 4 months,

- Monetary amount of the job security compensation in the amount between four and eight monthly wage of the employee that will be paid to the employee in case he is not employed.

Otherwise, it will be concluded that no agreement is reached, and the final report will be prepared as such (art. 21 para. 7 Labour Act).

The parties may not have reached an agreement at the end of the mediation activity. In this case, the mediator shall record that no agreement has been reached at the end of the mediation negotiations. The mediator shall deliver this final report,

stating that the parties have not reached an agreement, to the mediation office (art. 3 para. 11 Labour Courts Act).

The final record stating that no agreement is reached allows the employee to initiate a case for determination of invalidity of termination with the request for reinstatement at the labour court. Indeed, in case no agreement is reached at the end of the mediation activities, the employee, whose employment contract is terminated, may initiate a lawsuit at the labour court within two weeks starting from the issue date of the final record. As such, in case the parties agree in the stated case, they may take the dispute to private arbitration within the same period instead of labour court (art. 20 para. 1 Labour Act).

3. Litigation in the labour court

If an agreement cannot be reached at the end of the mediation activity, a lawsuit may be filed in the labour court within two weeks of the issuance of the final report (art. 20 para. 1 Labour Act). The case before the labour court shall be concluded immediately. It is possible to apply to the appeal court against the decision of the labour court. The decisions of the appeal court are final (art. 20 para. 3 Labour Act).

If the labour court decides that the termination made by the employer is invalid, it will determine the wage of the employee during the period which he is not employed until he is reinstated, and the decision is finalized up to four months and other rights of the employee (art. 21 para. 3 Labour Act), and the compensation amount that will be paid to the employee in case he is not reinstated (art. 21 para. 2 Labour Act). In application, this compensation that is called 'job security compensation' varies between minimum four months and maximum eight months of wage as per his seniority (art. 21 para. 1 Labour Act).

4. Arbitration application

If the parties agree, they may take the dispute to the private arbitrator instead of the labour court (art. 20 para. 1 Labour Act).

In the past, the Constitutional Court approved the issue of transferring the dispute to the private arbitrator for the determination of the invalidity of the termination[70].

The point at which time the agreement to take the dispute related to reinstatement will be referred to special arbitration has caused different opinions

[70] Constitutional Court, 19.10.2005, 2003-66/72, No. 26710 Official Gazette (Nov. 24, 2007) (Turk.).

in doctrine. The majority[71] in this matter state that the arbitration clause is not accepted by the free will of the employee by stating that the employee is powerless against the employer during the conduct of the employment contract. Accordingly, the arbitration clause to be stated at the beginning during the conduct of the agreement shall not be legally valid and an agreement related to arbitration clause may only be conducted within two weeks after the report of the arbitrator on non-agreement is issued[72].

As a matter of fact, Court of Cassation accepts that arbitration cannot be decided in disputes regarding the invalidity of termination with a provision to be put into the individual employment contract by the parties from the beginning[73]. In this sense, according to the Court of Cassation, the dispute concerning the termination may be brought to the private arbitrator only by an agreement by the parties after the termination of the contract[74].

VIII. Conclusion

The Turkish labour law system has adopted the provisions of statutory job (employment) security as of 2003 and allowed the termination of employment contracts for a valid reason where the requirements of the business mandates. It must be said that over the past 15 years, the labour courts and the Court of Cassation have developed an improved practice to termination and collective termination based on business requirements of the business. As a matter of fact, the Court of Cassation's decisions do not interfere with whether the employers' business decisions are in place for dismissal based on business requirements. However, it audits the implementation of these objectively.

On the other hand, this practice shed light on the enterprises during the times when the Turkish economy drifted into crisis. Similarly, in the decision of improvement of the operations for technological or structural reasons, the application principles regarding the dismissals arising from the operational requirements are taken into consideration.

On the other hand, the deficiencies arising from the legal security system itself affect adversaries based on operational requirements. In particular, the fact that reinstatement decisions are legally considered as determination makes it

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[71] ***Abbas Bilgili***, *İş Güvencesi Hukuku*, Adana 2004, p. 89; ***Süzek***, op.cit., pp. 593-594; ***Müjgan Yücel***, *"İş Güvencesi Kapsamında "Özel Hakem Şartı" (İş Kanunu Madde 20)"*, Legal İSGHD (İstanbul) 2004, no. 1, p. 1357

[72] ***Süzek***, op.cit., p. 594. Also *see* ***Senyen-Kaplan***, op.cit., p. 295; ***Tulukçu***, op.cit., pp. 289-290.

[73] *See* Crt. of Cass. 22d Chamber, 18.4.2016, 6529/11095, Legal İSGHD (Istanbul) 2017, no. 14, p. 507

[74] *See* Crt. of Cass. 9th Chamber, 2.2.2009, 2008-9747/891, Legal İSGHD (Istanbul) 2009, no. 6, p. 800. *Opposite* Crt. of Cass. 9th Chamber, 26.11.2007, 37878/35335, Legal İSGHD (Istanbul) 2008, no. 5, pp. 166-167

obligatory to initiate a secondary case for the performance thereof. As such, against the increase in reinstatement cases year by year, the workload of the labour courts has increased. As a remedy to this, first, the numbers of chambers that deal with the labour cases were increased, later; the way to appeal was accepted. Once these were not sufficient, the mandatory mediation system was accepted for reinstatement cases after 1 January 2018.

Despite the positive results of the implementation of the mandatory mediation system, it was not possible to create adequate employer awareness regarding both individual and collective dismissals. As a major factor of this negativity in terms of termination due to business requirements, it is necessary to show the difficulties faced by the Turkish economy and industry in the recent period.

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