GRADUATE SCHOOL
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DEPARTMENT OF PRIVATE LAW

EMPLOYMENT SECURITY SYSTEM IN TURKISH LABOUR LAW

Master's Thesis

Egemen İLGÜN

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This PhD thesis titled “Employment Security System in Turkish Labour Law” written by Egemen İLGÜN at the Department of Private was accepted by our jury.

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STATEMENTS

Style and Reference Manual Statement

Having reviewed this thesis written under my supervision, I confirm that it has been written in accordance with Chicago Manuel of Style and used its footnote reference format consistently throughout the entire text.

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Declaration of Originality

I hereby declare that all information in this dissertation has been obtained and presented in accordance with academic rules and ethical conduct. I also declare that, as required by these rules and conducts, I have fully cited and referenced all material and results that are not original to this work.

Signature

Egemen İLGÜN

GENİŞ ÖZET

Türk İş Hukukunda İş Güvencesi Sistemi

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Hukukumuzda işverenlerin karşısındaki zayıf durumları sebebi ile işçilerin işveren karşısında korunması gerektiği belirtilmiştir. Bunun bir sonucu olarak birtakım düzenlemeler Türk Hukuk mevzuatı ile hüküm altına alınmış olup bu korumayı sağlayan mevzuat hükümlerinin en önemlilerinden birisi de iş güvencesidir. Nitekim iş güvencesi hükümleri ile işçilerin iş akitlerinin sebepsiz bir şekilde işveren tarafından feshedilmesinin önüne geçilmeye çalışılmıştır.

Uluslararası Çalışma Örgütü (ILO) tarafından hazırlanan 2 Haziran 1982 tarihli *"Hizmet İlişkisine İşveren Tarafından Son Verilmesi Hakkında 158 Sayılı Sözleşme"* Türkiye tarafından 9 Haziran 1994 tarihli 3994 sayılı Kanun ile kabul edilmiş ve bu Kanun 4 Ocak 1995 tarihinde yürürlüğe girmiştir. Bu uluslararası sözleşmenin kabulünden sonra, sözleşmede yer alan düzenlemelere ilişkin milli kanunlarımızda değişiklik yapılması gereği hasıl olmuştur. İşte bu sebeple çıkarılan 9 Ağustos 2002 tarihli 4773 sayılı *"İş Kanunu, Sendikalar Kanunu ile Basın Mesleğinde Çalışanlarla Çalıştıranlar Arasındaki Münasebetlerin Tanzimi Hakkında Kanunda Değişiklik Yapılması Hakkında Kanun"* ile o dönemde Türkiye'de yürürlükte olan 1475 sayılı İş Kanunu'nun 13/A, 13/B, 13/C, 13/D ve 13/E maddelerinde değişiklik yapılmış ve böylece iş güvencesi sistemi ilk defa ülkemizde de uygulama alanı bulmuştur. İşbu 4773 sayılı Kanun'un kabulünden çok kısa bir süre sonra yürürlüğe giren ve halihazırda yürürlükte olan 4857 sayılı İş Kanunu da benzer nitelikte düzenlemeler ile iş güvencesi sistemini kabul etmiştir.

ILO'nun 158 sayılı Sözleşmesi'nin 2. maddesinde bu sözleşmenin tüm ekonomik faaliyet alanlarına ve hizmet sözleşmesi ile istihdam olunanlara uygulanacağı belirtilmiştir. Buna karşılık aynı hükmün ikinci fıkrası ile bir kısım işçilerin gerekli güvenceler kazandırıldıktan sonra işbu sözleşmenin hükümlerinin uygulanmasından muaf tutulabileceği belirtilmiştir. Bu kategoride olan işçiler; (i) belirli süreli sözleşmeyle ya da belirli bir işin tamamlanması ile ilgili hizmet sözleşmesiyle çalıştırılan işçiler, (ii) süresi önceden ve makul

olarak belirlenmiş deneme süreli hizmet sözleşmesi ile çalışan işçilerden deneme süresi içerisinde bulunanlar, (iii) süreksiz hizmet sözleşmesi ile çalışan işçilerdir.

4857 sayılı İş Kanunu'nda da, Türkiye'de çalışan her işçinin değil ancak belirli şartları kendilerinde bulunduran işçilerin iş güvencesi hükümlerinin sağladığı korumalardan yararlanabileceği belirtilmiştir. Buna göre, bir işçinin iş güvencesi hükümlerinden yararlanabilmesi için; (i) işçinin çalıştığı işyerinde 30 veya daha fazla işçinin işveren tarafından istihdam edilmiş olması, (ii) işçi ile işveren arasında kurulan iş ilişkisinin 4857 sayılı İş Kanunu veyahut 5953 sayılı Basın Mesleğinde Çalışanlarla Çalıştıranlar Arasındaki Münasebetlerin Tanzimi Hakkında Kanun hükümleri kapsamında olması, (iii) işçinin en az 6 aylık kıdeme sahip olması, (iv) işçinin işletmenin bütününü sevk ve idare eden işveren vekili ve yardımcıları ile işyerinin bütününü sevk ve idare eden ve işçiyi işe alma ve işten çıkarma yetkisi bulunan işveren vekili olmaması, (v) işçinin belirsiz süreli iş sözleşmesi ile istihdam edilmesi, (vi) işveren tarafından iş sözleşmesinin feshedilmesi gerekmektedir. Bu şartların hepsinin bir arada gerçekleşmesi halinde işçi iş güvencesi hükümleri kapsamında sağlanan korumalardan yararlanabilecektir.

Her şeyden önce ilk şart olarak işverenin işyerinde 30 veya daha fazla işçinin istihdam edilmiş olması gerekmektedir. Bu sayı iş sözleşmesinin feshine ilişkin bildirimin işçiye tebliğ edildiği tarihe göre tespit edilecektir. 4857 sayılı İş Kanunu'nun açık hükmü uyarınca işverenin birden fazla işyerine sahip olması ve bu işyerlerinin aynı işkolunda faaliyet göstermesi halinde ise, bu işyerlerinde çalışan işçilerin toplam sayısına göre 30 işçi şartının sağlanıp sağlanmadığı tespit edilecektir. Bahsekonu hükümde, işverenin birden fazla işyeri olması halinde bu işyerlerinin aynı bölge veya aynı il sınırları içerisinde bulunması koşulu aranmamış olup bu işyerlerinin aynı işkolunda faaliyet göstermesi yeterli kabul edilmiştir. Yargıtay'a göre işverenin Türkiye'de bulunan işyeri ile birlikte yurt dışında aynı işkolunda çalışan başka işyeri veya işyerlerinin olması halinde, bu işyerlerinde çalışan işçilerin de 30 işçinin tespitinde dikkate alınması gerekmektedir. Bununla birlikte, 4857 sayılı İş Kanunu sadece bu Kanun kapsamında kalan işçilerin veyahut sadece iş güvencesi hükümlerinden yararlanan işçilerin bu sayıya dahil edileceğini belirtmediği için, 4857 sayılı İş Kanunu kapsamında veyahut iş güvencesi hükümleri kapsamında olsun veya olmasın, işyerinde çalışan işçilerin tamamı 30 işçinin tespitinde dikkate alınacaktır. Buna karşılık; çıraklar, stajyerler, meslek öğrenimi gören öğrenciler Türk hukuku uyarınca işçi olarak değerlendirilemeyecekleri için bu sayının tespitinde dikkate alınmayacaktır.

İşçinin iş güvencesi hükümlerinden yararlanması için getirilmiş olan bir diğer şart ise işçi ile işveren arasında kurulan iş ilişkisinin 4857 sayılı İş Kanunu veyahut 5953 sayılı Basın Mesleğinde Çalışanlarla Çalıştıranlar Arasındaki Münasebetlerin Tanzimi Hakkında Kanun hükümleri kapsamında olmasıdır. Bu hüküm uyarınca, 6098 sayılı Türk Borçlar Kanunu ve 854 sayılı Deniz İş Kanunu kapsamında istihdam edilen işçiler iş güvencesi hükümlerinden yararlanamayacaktır. Buna karşılık, 6112 sayılı Radyo ve Televizyonların Kuruluş ve Yayın Hizmetleri Hakkında Kanun'un 23. maddesi uyarınca, medya hizmet sağlayıcılarının haber birimlerinde çalıştırılacak basın kartlı personellerinin 5953 sayılı Basın Mesleğinde Çalışanlarla Çalıştıranlar Arasındaki Münasebetlerin Tanzimi Hakkında Kanun hükümlerinden yararlanacağı belirtilmiş olduğundan, bu kapsamda kalan işçilerin, diğer şartların da mevcut olması halinde, iş güvencesi hükümlerinden yararlanması mümkündür.

4857 sayılı İş Kanunu'nun açık hükmü uyarınca işçinin iş güvencesi hükümlerinden yararlanabilmesi için en az 6 aylık kıdeme sahip olması gerekmektedir. Bu 6 aylık süre işverenin aynı veya değişik işyerlerinde işçi tarafından geçirilen sürelerin birleştirilmesi suretiyle hesaplanacaktır. Bu kıdem süresi hesaplanırken 4857 sayılı İş Kanunu'nun 66. maddesinde günlük çalışma süresinden sayılacağı belirtilen sürelerinde de dikkate alınması gerekir. Kıdem süresinin başlangıcı olarak iş sözleşmesinin yapıldığı tarih değil işçinin fiili olarak çalıştığı tarih esas alınacak olup, kıdem süresinin sonu olarak ise iş sözleşmesinin feshedildiğine dair bildirimin işçiye tebliğ edildiği tarih esas alınacaktır. Bu kapsamda işçiye süreli fesih hükümleri uyarınca sağlanan ihbar süresinin, işçinin iş güvencesi hükümlerinden yararlanıp yararlanmayacağının tespiti için gerekli olan en az 6 aylık kıdem süresinin hesaplanmasında dikkate alınması mümkün değildir. Bununla birlikte, her ne kadar Yargıtay 6 aylık kıdem süresinin dolmasına kısa bir süre kala yapılan fesihlerin kötü niyetli olduğunun tespit edilmesine rağmen işçinin iş güvencesi hükümlerinden yararlanamayacağını ve işçinin sadece 4857 sayılı İş Kanunu'nun 17. maddesinde düzenleme altına alınan kötü niyet tazminatına hak kazanacağını belirtmiş ise de, bizim de katıldığımız doktrin görüşüne göre, bu durumda işverenin kötü niyetli eylemlerinin önüne geçilebilmesi için işçinin iş güvencesi hükümlerinden yararlanması gerekmektedir.

İş güvencesi hükümlerinin uygulanması için gerekli olan bir diğer şart ise işçinin işletmenin bütününü sevk ve idare eden işveren vekili ve yardımcıları ile işyerinin bütününü sevk ve idare eden ve işçiyi işe alma ve işten çıkarma yetkisi bulunan işveren vekili olmamasıdır. Her ne kadar 1475 sayılı İş Kanunu'nda 4773 sayılı Kanun ile yapılan değişiklikte sadece işçinin işletmenin bütününü sevk ve idare eden işveren vekili olmaması

şartı öngörülmüş ise de, halihazırda yürürlükte olan 4857 sayılı İş Kanunu bu şarta ilişkin kapsamı genişletmiştir. Hemen belirtmek gerekir ki, işçinin bu şart kapsamında belirtilen işveren vekillerinden olup olmadığının tespiti sırasında işçinin işyerinde hangi sıfatla çalıştığı önem arz etmemektedir. Önemli olan husus işyeri yönetimi kapsamında işveren vekilliğine dair bu yetkilerin işçiye gerçekten sağlanıp sağlanmadığındır. Bu şart uyarınca kapsam dışında bırakılan işveren vekilleri; (i) işletmenin bütününü sevk ve idare eden işveren vekilleri ve yardımcıları ile (ii) işyerinin bütününü sevk ve idare eden ve işçiyi işe alma ve işten çıkarma yetkisi bulunan işveren vekilleri olmak üzere ikiye ayrılmıştır. İşçinin işletmenin bütününü yöneten işveren vekili olması halinde artık başka bir şarta gerek olmaksızın bu işçi iş güvencesi hükümlerinin dışında kalacaktır. Buna karşılık, işçinin işyerinin bütününü sevk ve idare etmesi halinde ise bu yetkisine ek olarak ayrıca işçi alma ve işçi çıkarma yetkisine sahip olması gerekmektedir. Bu yetkileri kümülatif olarak kendisinde bulundurmayan işyerinin bütününü sevk ve idare eden işveren vekilleri ise iş güvencesi hükümlerinden yararlanabilecektir.

İşçinin belirsiz süreli iş sözleşmesi ile istihdam edilmesi ise bir diğer şart olarak mevzuatımızda yer almıştır. Kural olarak iş sözleşmeleri belirsiz süreli olsa da; belirli süreli işler, belli bir işin tamamlanması veya belirli bir olgunun ortaya çıkması gibi objektif koşullara bağlı olarak işveren ile işçi arasında yazılı olması şartı ile belirli süreli iş sözleşmesi yapılması mümkündür. Bu şartları kendisinde bulundurmayan iş sözleşmeleri, her ne kadar iş sözleşmesinin taraflarınca belirli süreli iş sözleşmesi olarak adlandırılsa da, 4857 sayılı İş Kanunu hükümleri karşısında belirsiz süreli iş sözleşmesi olarak kabul edilecektir. Ayrıca, belirli süreli iş sözleşmesi esaslı neden olmadıkça birden fazla üst üste yapılamayacak olup, esaslı neden olmadan zincirleme şekilde belirli süreli iş sözleşmesi akdedilmesi halinde ise, bu sözleşme baştan itibaren belirsiz süreli iş sözleşmesi olarak kabul edilecektir. Bu niteliği itibari ile, işçi ile işveren arasında tanzim edilen iş sözleşmesinin başlığının *"belirli süreli iş sözleşmesi"* olduğunu gören ilgili iş mahkemesi hakimi doğrudan işe iade davasını reddetmemeli ve iş sözleşmesinin niteliğinin belirli süreli mi yoksa belirsiz süreli mi olduğunu tespit ettikten sonra karar vermelidir. Bununla birlikte Yargıtay'ın yerleşik içtihatlarıyla, 5580 sayılı Özel Öğretim Kurumları Kanunu uyarınca istihdam edilen işçiler için artık 4857 sayılı İş Kanunu'nda belirli süreli iş sözleşmelerinin zincirleme olarak akdedilmesi için aranan esaslı sebebin aranmasına gerek olmadığı belirtilerek, bu sözleşmelerin birden fazla yapılması halinde dahi belirli süreli iş sözleşmesi özelliğini koruyacakları belirtilmiştir.

İş güvencesi hükümlerinin uygulanması için gerekli olan son şart ise iş sözleşmesinin işveren tarafından feshedilmesidir. İş güvencesi sistemi işçi için sağlanmış birtakım korumalara ilişkin olduğu için işçinin kendi iradesi ile iş sözleşmesini feshetmesi halinde işverene karşı bir korunmaya ihtiyaç duyduğundan bahsedilemeyecektir. Fesih kural olarak işverenin işletmesel kararıdır ve tek taraflı bozucu yenilik doğuran bir hak olarak değerlendirilmektedir. Karşı tarafın rızası olmaksızın, hukuki alanında bu denli önemli etki yaratan yenilik doğuran haklar ise birtakım sınırlamalara tabi tutulmuştur. İşte bu kapsamda, her ne kadar işverenin kural olarak işletmesel kararları yargı denetimine tabi tutulmasa da, bu kararın keyfi bir karar olup olmadığının yargılama erki tarafından denetlenmesi hukuk devleti olmanın bir gereğidir. Buna karşılık, iş sözleşmesi sadece fesih ile sona ermek zorunda değildir. Nitekim tarafların anlaşması ile de iş sözleşmesi sona erdirilebilecek olup, doktrinde bu sözleşmeler bozma (ikale) sözleşmesi olarak adlandırılmaktadır. Bozma sözleşmesi uyarınca tarafların karşılıklı serbest irade beyanları ile iş sözleşmesi ortadan kaldırılmakta olup, bu durumda işverenin feshinden de bahsedilemeyeceği için, işçinin iş güvencesinin sağladığı korumalardan yararlanması söz konusu olmayacaktır. Buna karşılık, işçinin iradesinin sakatlanması halinde ise artık bozma sözleşmesinden bahsedilemeyecek olup, bu durumda iş sözleşmesinin işveren tarafından feshedildiği kabul edilerek, diğer şartların da olması halinde, işçi iş güvencesi hükümlerinden yararlanabilecektir.

İş güvencesinin şartlarından bahsedildikten sonra, bu şartları kendisinde aynı anda bulunduran işçiye sağlanan korumalardan da bahsetmek gerekmektedir. Öncelikle iş güvencesi kapsamında olan işçinin iş sözleşmesini feshetmek isteyen işveren, işçinin davranışından, işçinin yetersizliğinden veya işletmenin, işyerinin veya işin gereklerinden kaynaklanan geçerli bir neden göstermek zorundadır. Bu şart ile işverenin keyfi olarak iş sözleşmesini sona erdirmesinin önüne geçilmiştir. İşveren tarafından iş sözleşmesi feshedilirken geçerli bir neden gösterilmemesi halinde ise işveren tarafından yapılan feshin geçersizliğine karar verileceği düzenleme altına alınmıştır.

Bununla birlikte işverenin işçinin davranışı veya yetersizliği ile ilgili geçerli nedenle iş sözleşmesini feshetmeden önce işçiyi ihtar ile uyarması gerekmektedir. İhtar ile işçiye davranışlarını düzeltmesi veya yetersizliğini giderebilmesi için işveren tarafından bir fırsat verilmesi gerekmektedir. Buna karşılık bizim de katıldığımız görüşe göre, işçinin ancak değiştirebileceği veya düzeltebileceği davranış veya yetersizliklerine ilişkin ihtar zorunluluğu öngörülmelidir. İşçinin ihtarda bulunulsa da zaten değiştiremeyeceği davranışı veya yetersizliği söz konusu olduğunda ihtar düzenlenmesinin beklenmesi gereksiz olacaktır.

Bir diğer korumamız ise işverenin işçinin davranışı veya yetersizliği ile ilgili geçerli nedenle iş sözleşmesini feshetmeden önce işçiden savunmasını alması zorunluluğudur. Bu savunma ancak fesih beyanından önce alınabilecek olup, fesih beyanı ile alınan veya fesih beyanından sonra alınan savunmalar ise geçersiz kabul edilecektir.

İş güvencesi hükümleri kapsamında kalan işçilerin iş sözleşmeleri feshedilirken fesih beyanı yazılı olmak zorunda olup, ayrıca bu fesih beyanında fesih nedeni kesin ve açık bir şekilde belirtilmek zorundadır. İşveren fesih beyanında belirtmiş olduğu fesih sebebi ile bağlı olacak ve bu fesih beyanını daha sonrasında değiştiremeyecektir. Ayrıca fesih beyanında bir fesih sebebi göstermeyen işverenin yargılama aşamasında cevap dilekçesinde fesih nedenini göstermesi de mümkün olmayacaktır. Bu durum işçinin hangi sebeplerle iş sözleşmesinin feshedildiğini bilme hakkını sağlayacak ve işçinin fesih beyanında gösterilen sebebin geçersiz olduğunu düşünmesi halinde bu fesih beyanına karşı yasal yollara başvurabilmesi mümkün olacaktır.

Tüm bunlarla birlikte, her ne kadar işveren gerekli olan bütün usulleri yerine getirse de, iş güvencesi kapsamında olan işçilerin iş sözleşmesini birtakım ilkeleri göz önüne almadan feshederse, yine fesih beyanı geçersiz kabul edilecektir. Bu ilkeler feshin son çare olması ilkesi (ultimo ratio), orantılılık ilkesi, menfaatlerin karşılaştırılması ilkesi, olumsuz öngörü ilkesi ve eşitlik ilkesidir. Bununla birlikte, her ne kadar Yargıtay sosyal seçim ilkesini daha önceki kararlarında kabul etmekte idiyse de, Yargıtay'ın şu anki uygulamasında herhangi bir pozitif düzenlemesi olmayan bu ilke kabul görmemektedir.

İşveren tarafından yapılan feshin geçerli bir nedene dayanmadığını ve/veya usulüne uygun olarak ifa edilmediğini düşünen işçi fesih bildiriminin tebliğinden itibaren 1 ay içerisinde işe iade istemli olarak arabulucuya başvurmak zorundadır. Taraflar arabulucu huzurunda gerçekleştirdikleri görüşmeden sonra anlaşamazlarsa, arabuluculuk son tutanağının düzenlendiği tarihten itibaren 2 hafta içinde işçi yetkili iş mahkemesinde dava açabilecek veya tahkim usulüne başvurabilecektir. İşçinin yokluğunda arabuluculuk son tutanağının düzenlenmesi halinde ise bu süre, arabuluculuk son tutanağının işçiye tebliği edildiği tarihten itibaren işlemeye başlayacaktır. Tahkim usulüne başvurabilmesi için ise, iş sözleşmesi tanzim edilirken veya iş sözleşmesi devam ederken yapılan anlaşmalar, bizim de katıldığımız görüşe göre, işçinin serbest iradesi ile yapılmış anlaşmalar olarak değerlendirilemeyeceği için geçersiz kabul edilmelidir.

İşe iade davaları basit yargılama usulüne tabi olarak incelenmekte olup, istinaf incelemesi sonrasında kesinleşmektedir. İşe iade davalarında asıl talep feshin geçersizliğinin tespiti ve işçinin işe iadesidir. Bu sebeple de işçi her ne kadar işe iade davasının sonucu olan iş güvencesi tazminatı ve boşta geçen süreye ilişkin alacak ve diğer haklarını talep etmese dahi, ilgili iş mahkemesi bu tazminat ve alacağa re'sen karar vermelidir. Buna karşılık, feshin geçersizliğine ve işçinin işe iadesine karar verilmeden, işçinin sadece iş güvencesi tazminatı ve boşta geçen süreye ilişkin alacak ve diğer haklarını talep etmesi mümkün olmayacaktır. Bununla birlikte, işe iade davasının, doğumu feshe bağlı alacaklar ile birlikte de açılması mümkün olmayacaktır. Buna karşılık, feshe bağlı alacak davaları ile işe iade davalarının birlikte açılması halinde ise, ilgili iş mahkemesi feshe bağlı alacaklar yönünden davanın tefrikine karar verecek ve tefrik edilen bu dosya için işe iade davası bekletici mesele olarak değerlendirilecektir. Öte yandan, bu iki davanın terditli olarak açılmasına ise kanunen bir engel bulunmamaktadır.

Yargılama sonucunda feshin geçersizliğine ve işçinin işe iadesine karar verilirse, işçinin 10 iş günü içerisinde işe başlamak için işverene başvurması gerekmektedir. Bu süre kesinleşen mahkeme kararının işçiye tebliğinden itibaren başlayacaktır. Bu süre içerisinde işçinin işverene başvurmaması halinde ise işveren sadece geçerli feshin sonuçlarından sorumlu olacaktır. İşçinin başvurusuna kadar askıda olan fesih, işçinin süresi içerisinde işverene başvurması ile geçersiz hale gelecektir. İşçinin başvurusu üzerine işveren 1 ay içerisinde işçiyi eski işine başlatmak zorundadır. Bu süre işçiyi işe başlatmak için davetin düzenlenmesine yönelik değil, işçinin bu süre içerisinde işe başlatılması için öngörülmüştür. Aksi takdirde ise, işverenin maddi olarak sorumlulukları meydana gelecektir.

Feshin geçersizliğine ve işe iade davasına bağlı olarak iki tür alacak kalemi 4857 sayılı İş Kanunu'nda düzenleme altına alınmıştır. Bunlar işçinin çalıştırılmadığı süreye ilişkin en çok 4 aylık ücreti ve diğer hakları ile iş güvencesi tazminatıdır. Bu alacak kalemlerini ise iş mahkemesi işçinin dava tarihindeki ücreti üzerinden tespit edecektir. İşçinin boşta geçirdiği süreye ilişkin alacağı, işçinin işverene başvurması ile doğacaktır. İşveren ister işçiyi tekrar işe başlatsın isterse de başlatmasın bu alacak kalemini ödemekle yükümlü olacaktır. Bu alacak kalemi işçinin geniş ücreti üzerinden hesaplanacaktır. Ayrıca, işçinin işe başlatılması halinde bu alacak kaleminden işçiye daha önce ödenmiş olan kıdem tazminatı ve ihbar tazminatı mahsup edilecektir. Buna karşılık, iş güvencesi tazminatının ödenmesi için ise işverenin işçiyi tekrar işe kabul etmemiş olması gerekmektedir. Eğer işçiyi işveren süresi içerisinde tekrar işe kabul ederse artık bu tazminattan işverenin sorumluluğu olmayacaktır. Bu tazminat ilgili iş

mahkemesince işçinin en az 4 aylık en fazla ise 8 aylık ücreti tutarında tespit edilebilecektir. İş güvencesi tazminatı işçinin çıplak ücreti üzerinden hesaplanacaktır.

İşte yukarıda genel yapısı anlatılan iş güvencesinin önemi nedeniyle bu çalışmada; Türk İş Hukuku'nda düzenleme altına alınan iş güvencesi hükümleri incelenecek, hangi çalışanların iş güvencesi kapsamında olduğu değerlendirilecek, iş güvencesi kapsamında olmanın ne tür korumalar sağladığı açıklanacak ve en sonda da iş güvencesi hükümlerine aykırı davranılması halinde ne tür yaptırımların uygulanacağı detaylı bir şekilde doktrin görüşleri ve güncel yargı kararları da incelenerek ele alınacaktır.

Anahtar Kelimeler: İş Güvencesi, İşveren, İşçi, Keyfi Fesih, Geçerli Neden, İş Güvencesi Tazminatı

ABSTRACT

Employment Security System in Turkish Law

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In the Turkish legal system, it is declared that employees shall be protected before employers because of their weak positions. As a consequence of this, a set of legal provisions has been regulated with Turkish legal legislations and one of the critical legal provisions providing this protection is the employment security. Not every employee, but only some employees are taken into the scope of employment security with current legal provisions. Only employees who have conditions specified by Labour Code numbered 4857 shall be deemed as being in the scope of employment security. The reason to exclude some employees from the scope of employment security is the purpose of labour law to find a fair balance between an employee and an employer. Indeed, employment security does not mean leaving employers completely unprotected while protecting employees. With provisions of employment security, it is aimed to prevent termination of employment contracts of employees from employers' arbitrary terminations. Therefore, some specific procedures while terminating employment contracts of employees being in the scope of employment security are determined by Labour Code numbered 4857 such as issuing a warning before termination and issuing termination notice in written form. Due to the importance of employment security both for employees and employers; in this thesis; provisions of employment security regulated in Turkish Labour Law shall be studied, it shall be evaluated which employees shall be considered to be in the scope of employment security, it shall be declared that being in the scope of employment security provides what kind of protections and in conclusion, it shall be discussed which measures shall apply in case of a violation of provisions of employment security.

Keywords: Employment Security, Employer, Employee, Arbitrary Termination, Valid Reason, Reemployment Case, Reemployment Compensation.

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ABBREVIATIONS

CPC	: Civil Procedural Code numbered 6100
CMPLD	: Code on Mediation Procedure for Civil Disputes numbered 6325
Convention	: Termination of Employment Convention numbered 158
CSSGHI	: Code on Social Security and General Health Insurance
CTUCLC	: Code on Trade Unions and Collective Labour Contract numbered 6356
etc.	: Et cetera
ff.	: following pages
GDP	: Gross Domestic Product
I	: Issue
ILO	: International Labour Organization
LC	: Labour Code numbered 4857
LCC	: Labour Courts Code numbered 7036
Ministry	: Ministry of Labour and Social Security
NJIS	: National Judiciary Informatic System
p.	: Page
SDIF	: Saving Deposit Insurance Fund
SSI	: Social Security Institution
TCC	: Turkish Civil Code numbered 4721
TCO	: Turkish Code of Obligations numbered 6098
TTC	: Turkish Trade Code numbered 6102
TUSI	: Turkish Statistic Institution
V	: Volume

PREAMBLE

Following the Industrial Revolution at the end of the 18th century, the need to make legal regulations in order to protect employees was revealed. Today, one of the most important risks for employees is losing their jobs in business. The reason why the risk of losing their job is very crucial for employees is that the only manner to provide for their families' and their well-beings is by taking the wage that is deserved equivalent to their work and effort. For this reason, one of the important purposes of Labour Law is to ensure them to believe in their future, to hold them out of anxiety about losing their wage constituting the only source of their lives and their family's livelihood by protecting their job. When the right to have wage takes back following the termination of the employment contract, employees may encounter the risk of not being able to maintain their existence. For this reason, it is clear that enabling the continuousness of employment contracts concluded between employees and employers is one of the most important issues of the Labour Law.

To realize the purpose of protecting employees, some regulations have been taken in the Turkish legal system. Protecting employees against arbitrary termination is the head of these regulations and the employment security system is one of the manners that become concrete in this mean. However, restricting strictly employer's right to terminate an employment contract shall be deemed as being against the employer's rights protected by the Turkish Constitution and other relevant regulations. In other words, employment security does not mean an employment contract shall continue under all circumstances. The purpose of regulating employment security shall not be interpreted as compelling employers to employ unproductive employees or employ more employees than the need of the industry. Otherwise, the protection of employees against termination becomes technically so strict that accustomation of employers to economic and technological developments may be impossible and severe. Therefore, the manner being most suitable and effective for the economic and judicial regime of business life is not taking the employer's right to terminate back but it is to restrict this right for some reasons.

Employers have freedom of enterprise. The reason to provide this freedom to employers is to enable employers to maintain their enterprises and/or workplaces with their own rules and to accustom circumstances to be changed during the process of the work. With this freedom and their freedom of contract provided by the Turkish Code of Obligations numbered 6098, as a rule, employers may manage their enterprises and workplaces in a

manner that they determine. As the protection may not be provided absolutely for employees, this freedom may not be provided absolutely for employers in order to find a fair balance between parties of the employment contract. The precaution to be taken for continuousness of contract relation is not totally in conformity with one of the most essential principles of the Private Law named freedom of contract. Indeed, generally Labour Law means intervening in employers' freedom of contract and freedom of enterprise in order to protect employees against employers by restricting their right to terminate employment contracts and in order to maintaine continuousness of employment relation with this manner.

In the Turkish Labour Law System, it is not deemed appropriate to cover all employees within the scope of employment security. With this regard, in order to be included in the scope of employment security, an employee has to meet some conditions. These conditions are (i) the existence of 30 or more employees working within the same working sector in the workplace, (ii) being employed in accordance with provisions of Labour Code numbered 4857 or the Code on Regulations Between Workers Working in Press Profession and Employers numbered 5953, (ii) having a seniority for a duration as 6 months or more, (iv) not to be appointed as employer's representatives specified in Turkish Labour Code numbered 4857 (v) being employed with an employment contract with indefinite duration and (vi) the existence of the termination issued by an employer. An employee has to meet all of these conditions at the same time in order to be evaluated as being in the scope of employment security.

Employment security provides some specific protections for employees. As the first protection provided by employment security, an employer has to demonstrate a valid reason for terminating employment contracts of employees who are in the scope of employment security. Valid reasons are not as serious as justified reasons for an employer but they are reasonable for termination of employment contracts. These valid reasons may depend on the incapability or behavior of an employee or a reason arising from needs of enterprise, workplace or work. Also, when an employer terminates the employment contract, s/he has to issue a termination notice in written form and specify the termination reason explicitly and certainly in this termination notice to be served to the employee.

In accordance with the explicit provision of Labour Code numbered 4857, without taking employee's defence about an allegation regarding him/her, employee's employment contract with indefinite duration shall not be terminated for reasons arising from the

employee's incapability and behavior. Additionally, a warning has to be issued before terminating employee's employment contract for reasons arising from the employee's behaviors and incapability. In the event of termination with valid reason arising from employee's behaviors and incapability, a warning is an opportunity provided in order that an employee may act in conformity with the employment contract. As a general description, the warning is to inform an employee regarding the fact that the employer does not accept the employee's behavior and incapability which are against the employment contract, if it is repeated, there will be legal consequences for his/her behaviors and incapability regarding content and existence of employment contract.

It is not sufficient for an employer to issue a termination depending on a valid reason by fulfilling these conditions specified in Labour Code numbered 4857. Employers must also follow some principles in order to issue a termination depending on a valid reason. These principles are the principle of last resort (ultima ratio), the principle of proportionality, the principle of comparison of benefits, the principle of prediction (negative estimation) and the principle of equal treatment. However, even though the principle of social (objective) selection does not apply currently, since it was accepted by the Turkish Court of Appeals for a while with its previous practice, this principle shall also be examined in this thesis.

In accordance with Article 20 of the Labour Code numbered 4857, an employee whose employment contract is terminated may apply for a mandatory mediation procedure with a reemployment request within 1 month from the time that termination notice is served to him/her with allegations that termination reason was not demonstrated, demonstrated termination reason is not a valid reason or termination procedure is not in conformity with provisions of Labour Code numbered 4857. Supposing that termination notice is not issued in writing form despite the clear provision of Labour Code numbered 4857, the period of prescription as 1 month shall commence passing from the time that oral or actual termination happens. This period of time specified for applying mediation procedure is deemed as a period of prescription and therefore, this period of time shall be taken into consideration by the judge *ex officio*.

Provided that parties may not reach any consensus regarding termination before the mediator following the mandatory mediation procedure having been tried by parties, it should be possible to initiate a case before labour courts within 2 weeks from the time that the last mediation minute is issued. If parties agree that disputes arising from employment contract

shall be resolved by arbitration procedure, employee should apply to arbitrator/arbitrators within 2 weeks from the time that the last mediation minute is prepared.

Some circumstances may occur during the pending reemployment case and the consequences of these circumstances may affect the pending reemployment case. These circumstances to be examined in this thesis are; reemployment of the employee, closing of the workplace, the death of the employee, employee's rejection of employer's offer, retirement of the employee, transfer of the workplace, employee's starting to a work for another employer and termination of the employment contract with justified reason made by the employer within notice period or within the process of reemployment case.

In accordance with the explicit provision in Labour Code numbered 4857, an employee is obliged to apply to the employer within 10 working days, from the time that the judgment held by the relevant labour court or arbitrator/arbitrators regarding reemployment is served, so as to be reemployed. If the employee does not apply to the employer within this period of time, termination made by the employer shall be deemed as a valid termination and the employer shall be responsible only for consequences of a valid termination. Following employee's application, the employer has to reemploy the employee within 1 month following employee's application to the employer.

Provided that the employee is not reemployed by the employer with employee's previous working conditions, the employer has to pay the reemployment compensation and the payment regarding the duration that the employee is not engaged in work and employee's other rights. On the one hand, the reemployment compensation shall be between 4 and 8 months' wage of the employee; on the other hand, the payment regarding the duration that the employee is not engaged in work and employee's other rights shall be calculated with employee's 4 months wage at most.

With all these explanations, it is obvious that employment security restricting employers' freedoms in order to protect employees against employers is so important for both employees and employers. Even though the scope of the subject matter of this thesis is vast and this subject matter was studied before in doctrine, as a consequence of dynamic feature of Labour Law and chances made on applications of provisions of employment security system both with legal norms and practice of labour courts, Regional Court of Appeals and the Court of Appeals, it is considered that studying on employment security system by examining different approaches in doctrine and practice of legal authorities shall be beneficial for both

employees and employers. Indeed, in order to act accurately in conformity with provisions of employment security system and to undertand rights and obligations arising from employment security system, it is mandatory to pursue updated evaluations and practices regarding employment security system and it may be possible only by examining current developments. Therefore, with this thesis, it is aimed to provide information regarding current developments and evaluations for employment security system to readers. Also, with English language of this thesis, an opportunity to reach more people for explaining the concept of employment security system occurred and thereby, this thesis shall be benefial for both Turkish and foreign employees and employers to understand their rights and obligations arising from employment security system. With these aims, the historical development of employment security in Turkish Law shall initially be examined, following this, conditions specified for employees to be in the scope of the employment security system shall be evaluated in detail, and which circumstances shall be interpreted as a valid reason or invalid reason for termination of employment contracts and other conditions for issuing a valid termination notice shall be explained and reemployment cases being as a natural consequence of regulations of employment security, features of these cases, ruling principles regarding these cases and the last but not least, types of claims being as a result of these cases shall be explained in conformity with Regional Court of Appeals' and the Turkish Court of Appeals' judgments and evaluations of the doctrine.

We hope that this thesis shall be informatic and helpful for your career and it shall be effective for creating a better working environment.

FIRST CHAPTER

EMPLOYMENT SECURITY AS A TERM AND CONDITIONS TO BE IN THE SCOPE OF EMPLOYMENT SECURITY

I. EMPLOYMENT SECURITY AS A TERM

A. General

Labour Law is a branch of law regulating employment relations among people (employees) working for others in return for a wage by depending on them, people (employers) employing them for their work and the government intervening in work life greatly[1]. In accordance with this definition, distinguishing characteristics of employment relations are wage, working for someone else and dependency[2]. The fact that an employee workes with an employment contract, which is a constant relation, depends on the employer's obligation to protect the employee especially, and therefore, to form a balance between parties of the employment relation[3]. The fact that an employee has to perform his/her working performance in the scope of dependency restricts an employee's fundamental rights and freedoms and on the other hand, this also allows for intervention. Besides, regulating the scope of inviolable and essential rights that employees working in the workplace have as human beings and that protect them should be a basic function of legal norms[4]. In other words, Labour Law whose reason to be is to prevent employees working as being in labour status from employer's labour exploitation, to protect various rights arising from employment relation (such as wage, working period and resting period) has provided essential remedies for

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1 Sarper Süzek and Süleyman Başterzi. *İş Hukuku*. 24th Edition (Istanbul: Beta Yayınları, October 2024), p. 2; Hamdi Mollamahmutoğlu and others. *İş Hukuku.* 7th Edition (Ankara: Lykeıon yayınları, 2022), p. 6.

2 Süzek and Başterzi, p. 237; Nuri, Çelik and others. *İş Hukuku Dersleri*, 36th Edition, (Istanbul, 2023), p. 170; Mollamahmutoğlu and others, p. 327; Ömer Ekmekçi and Esra Yiğit. *Bireysel İş Hukuku*. Istanbul: Onikilevha Yayınları, 4th Edition, (December 2022), p. 23; Süleyman Başterzi. "Avukatla Bağıtlanan Sözleşmenin Hukuki Niteliği, İş Sözleşmesinin Vekalet ve Diğer İş Görme Sözleşmelerinden Ayrılması". *Sicil İş Hukuku Dergisi*, I: 17, (March 2010): p. 178.

3 Nezihe Binnur Tulukçu. "İş Mahkemeleri Kanunun ve Arabuluculuk Hükümlerine Göre İş Güvencesi İşe İade, İş Davaları Dizisi: Beşinci Kitap". (Ankara: Seçkin, November 2017), p. 17; Ayşe Köme Akpulat. "The Principle of "Ultimo Ratio" in Termination of Employment Contract in Turkish Labour Law". *Annales de la Faculté de Droit d'Istanbul*, I: 67, (2018): p. 44.

4 Ali Güzel and Emre Ertan. "İşyerinde Psikolojik Tacize (Mobbinge) Hukuksal Bakış: Hukuksal Bakış: Avrupa Hukuku ve Karşılaştırmalı Hukuku*". Legal İş Hukuku ve Sosyal Güvenlik Hukuku Dergisi*, I: 14, (2007): p. 548.

the protection of employees against termination from the time of its occurrence to nowadays[5]. Indeed, employment contracts are contracts that are signed between parties that are not equal and which establish dependency relation as a result of their natures, so maintaining the continuousness of employment contracts is also very crucial for employees as much as the conclusion of employment contracts does[6].

An employment contract establishing the legal base of labour relation constitutes the legal base of the employer's competence to manage at the same time and also, it becomes possible with this employment contract to protect the employee against arbitrary usage of this competence[7].

With provisions of employment security regulated in Turkish legal system, it is provided, by preventing employees from termination of their contracts easily without any reason, to make employees continue to work by ensuring that they are employed[8].

With the regard of the need to protect the employee, the need to change negative working conditions arising from capitalism on behalf of employees is accepted as the main reason for revealing Labour Law as a branch of law in the historical period[9]. In the past, while the work made by employees was evaluated as only contractual relation objectively, nowadays, the close relation between the work performed by employees and their lives, their family's lives, their personalities is taken into consideration. In the era that economic liberalism and freedom of contract as its appearance in the law were prevailing, absolute freedom was provided for parties, so for employers, to terminate employment contracts. Economic liberalism provides equality between employers and employees legally. Yet, in practice employees, whose well-being and needs are required to be protected, were in a weaker position against employers, who are in a stronger position in terms of determining working conditions with employment contract. In order to abolish this situation, European Countries using the system of capital economy commenced using the principle of social state

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5 Yusuf Yiğit. "İş Hukukunda Geçersiz Fesih Kavramı ve Geçersiz Fesih Üzerine İşe İade Başvurusu Yapan İşçinin İşverence İşe Başlatılmaması". *Prof. Dr. Sarper Süzek'e Armağan*, Istanbul: Beta, V: II, (2011): p. 1143.

6 Ali Güzel. "İş Sözleşmesinin Geçerli Nedenle Feshinde Ultima Ratio (Son Çare) İlkesi ve Uygulama Esasları". *A. Can Tuncay'a Armağan*, Istanbul, (2005): p. 64.

7 Ali Güzel. "İş Sözleşmesinin Değiştirilmesi ve Son Çare İlkesi". *Prof. Dr. Turhan Esener II. İş Hukuku Uluslararası Kongresi*, Ankara: Seçkin, October, (2017): p. 539.

8 Saim Ocak. "İş Sağlığı ve Güvenliği Profesyonellerinin (İş) Güvencesi". *Prof. Dr. Turhan Esener II. İş Hukuku Uluslararası Kongresi,* Ankara: Seçkin, (October 2017): p. 224.

9 Tulukçu, p. 18.

instead of liberalism[10]. On the other hand, today, it is accepted that maintenance of an employee's job is crucial, in other words, it is crucial to provide the employment security system accepting termination of employment contract as an exception and dependency with employment contract as a rule[11].

Employment security means that an employee may protect his/her job in the workplace without being affected by internal and external factors and employer's will[12]. The main purpose of employment security is to prevent the continuousness of employment relation concluded between the employer and the employee, who provides his/her well-being with his/her effort, from termination issued with employer's arbitrary acts and to provide legal measures against employer's arbitrary acts when an employer terminates employment contract with arbitrary reasons. In other words, the essence of employment security is to prevent employment contract from employer's arbitrary termination[13]. In this regard, the main purpose of provisions of employment security is to protect the job of an employee who is the weaker party of the employment contract[14]. The term of termination of employment contract with employer's arbitrary acts means the occurrence of termination to be made by the employer against the employee without any justified or valid reason, and even without any reason. In this circumstance, an employment contract is finalized just as a result of arbitrary acts of employers[15]. In other words, employment security is a Labour Law establishment that restricts employer's right to terminate an employment contract in order to protect the employee's job[16]. As a consequence of this, provisions of the employment security system shall not be taken into account for termination performed by employees[17]. With this regard, a positive measure restricting only employer's right to terminate an employment contract, making termination more complicated, prohibiting termination for a specific time or with a specific reason and making invalid termination become null and void retrospectively shall be deemed as a measure of employment security[18].

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10 Tulukçu, p. 38-39.

11 Çelik and others, p. 507.

12 Güzel, Son Çare, p. 58.

13 Gülsevil Alpagut. "Yargıtay Kararları Işığında İş Güvencesi ve Çalışma Koşullarında Esaslı Değişiklik". *Bankacılar Dergisi*, I: 65, (2008), p. 89; Köme Akpulat, Ultimo Ratio, p. 44.

14 Bektaş Kar. *İş Güvencesi ve Uygulaması*. 4th Edition (Ankara: Yetkin Yayınları, 2020), p. 27.

15 Tankut Centel. *İş Güvencesi* (Istanbul: Legal, March 2013), p. 10.

16 Kar, p. 26; Bektaş Kar. "İş Güvencesi Kavramı". *Legal İş Hukuku Ve Sosyal Güvenlik Hukuku Dergisi*, I: 6, (2005), p. 561.

17 Gaye Baycık. "İş Akdini Fesih Sebebinin Değiştirilmesi". *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, (2006), p. 131.

18 Kar, p. 200.

Employment security is also a system regarding social utility. Indeed, there is a social utility in protecting employment relation. First of all, since the protection of the employment contract affects both the parties of the employment contract and employee's family, it affects social peace directly[19]. In addition to this, this utility demonstrates itself in ensuring social welfare, thereby, social peace. It is not only crucial to provide jobs for unemployed individuals for ensuring social welfare and social peace but it is also important for the protection of employment. Additionally, the social utility does not demonstrate itself only in the protection of the job. There is a crucial utility of society for the maintenance of the performance of workplaces. In this regard, the social utility is reciprocal. It does not mean only the protection of the job but protection of workplaces also comes into the forefront. Therefore, it is accepted generally that there is no need for law of firm employment security system for today[20].

Employment security at the same time helps to establish working peace in the workplace and to increase yield and production. An employee working by ensuring that s/he may not be fired without any valid reason works more peacefully and productively due to this assurance[21].

The right and duty to work is regulated under the third chapter, which is titled as *"Social and Economic Rights and Duties"*, of the Turkish Constitution and it is described as a social right. The main purpose of social rights is to protect individuals in economically and socially weaker positions, to enhance their moral and material existence. These rights are for decreasing social and economic inequality. Individuals being a part of society desire intrusion of the state for some issues as a right. In order to protect and to enhance people being in a weaker position economically in society, to establish an equality for relations between effort and capital; as a whole, economic, social and liberal measures have to be taken by states. Indeed social rights are manners for realising the social state[22].

Employment security is a system, in fact, for assuring employee's right to work regulated under Article 49 titled *"Right and Duty to Work"* of the Turkish Constitution. In accordance with this article, everyone has right and duty to work and the State shall take necessary measures to raise the standards of workers, to protect workers and unemployed

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19 Tulukçu, p. 35.

20 Alpagut, Esaslı Değişiklik, p. 89.

21 Subaşı, İbrahim. "İşe İade Davaları ile İlgili Bazı Uygulama Sorunları". *Prof. Dr. Turhan Esener II. İş Hukuku Uluslararası Kongresi*, Ankara: Seçkin, October, (2017), p. 597; Köme Akpulat, Ultimo Ratio, p. 46.

22 Tulukçu, p. 20.

people in order to improve the general circumstance of labour, to promote labour, to create suitable economic conditions for prevention of unemployment and to secure labour peace. In the scope of this provision, it is inevitable for the Turkish legal system to obtain employment security regulations in order to promote employees, to secure labour peace between employees and employers.

As indicated above, the competence of an employer regarding management and organization of industries and his/her competence regarding discipline and arrangement as an extension of it are no longer unlimited. Employer's freedom of contract and enterprise has some restrictions determined with its own purpose and subject at first[23]. As an example, unlimited competences having been given to employers regarding dismissal in the past have been restricted significantly by contemporary Labour Law and provisions of employment security[24].

In addition to this, it is doubtless that while there is a need to restrict employers' freedom to dismiss employees in the scope of the principle of being a social state, the circumstances should also be evaluated in the sense of the employer for determining restrictions. Indeed, industries may not be operated without profit for a long period of time. If the profitability of industries cannot be maintained by other manners and it becomes necessary to dismiss some employees, this action must be allowed[25]. The obligation to observe a certain balance between employer's freedom of enterprise and competence of management and the protection of employees against dismissal occurred as a need of current economic and technological conditions. This obligation having been mentioned above affected the term and model of employment security adopted by positive laws and absolute right for employment security is not given to employees[26]. In other words, employment security does not mean that an employment contract shall continue under all circumstances. The purpose to regulate employment security shall not be interpreted as compelling employers to employ unproductive employees or employ more employees than the need of the industry[27]. Otherwise, the protection of employees against termination is technically so strict that employer's accustomation to economic and technological developments may be impossible and severe. On the other hand, providing a broad scope of freedom for dismissal

[23] Fevzi Şahlanan. "Şirket Birleşmelerinde İşletme Gerekleri İle İş Akdinin Feshi". *Sicil İş Hukuku Dergisi*, I: 4, (December 2006): p. 14.
[24] Güzel, Son Çare, p. 67.
[25] Çelik and others, p. 508.
[26] Güzel, Son Çare, p. 59; Kar, Güvence, p. 563.
[27] Subaşı, p. 598.

may weaken protection against termination[28]. As a consequence of this, the need to find a fair balance between employee's freedom of enterprise and management competence and the protection of employees against dismissal became crucial in the scope of both international legal norms and legal systems of countries accepting employment security[29].

On the one hand, employment security in a strict sense is described as the protection of employees against termination; on the other hand, it may be described in a broad sense as all precautions compensating damages arising from dismissal such as notice period in addition to precautions making dismissal more difficult and preventing arbitrary termination[30]. In other words, as opposite to employment security in a strict sense described as a purpose to maintain employment relation by preventing arbitrary termination of employment contracts without any reasonable reason; employment security in a broad sense means all restrictions brought by law or contracts for employer's right to terminate and all precautions to minimize results of termination[31]. When it's mentioned about employment security, mostly it's understood as protection against termination in the strict sense. However, we figure it out that protection against termination in a broad sense appears frequently in Turkish Labour Law. Suspending employment contract, continuousness of employment contract following the transfer of workplace, application of notice period for termination of the employment contract concluded for an indefinite duration, application of specific procedure and, in this scope, application of notice period for collective dismissal, the severance payment, dependency of employment contracts for a definite period to objective reasons in order for making it justified to regulate for a definite period of time, in accordance with conditions, restriction of its duration and quantity, dependency of essential amendment on labour conditions to written form and explicit consent of the employee, the principle of termination as a last remedy, dependency of transfer of work to sub-employer to some conditions, regulation of short-time working are deemed as typical examples of protection against termination in broad sense[32].

In this regard, the existence of employment security enables both the continuousness of employment relation and the effective application of Labour Law. Indeed, as will be

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28 Sebastian Krebber. "Ekonomik ve Teknolojik Gelişimde Feshe Karşı Koruma", Tr. Nilüfer Köker, *Prof. Dr. Turhan Esener II. İş Hukuku Uluslararası Kongresi*, Ankara: Seçkin, (October, 2017): p. 507.

29 Fevzi Şahlanan. "İş Güvencesinin Genel Esasları ve Gazetecinin Feshe Karşı Korunması", *İş Dünyası ve Hukuk, Prof. Dr. Tankut Centel'e Armağan*, İstanbul Üniversitesi Hukuk Fakültesi, Istanbul, (2011): p. 560.

30 Mustafa. Alp. "İşçinin Feshe Karşı Korunması (İş Güvencesi Yasası)". *Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi*, V: 5, I: 1, (June 2003): p. 1; Kar, Güvence, p. 560.

31 Centel, p. 13; Kar, p. 26; Tulukçu, p. 26-27.

32 Süleyman Başterzi. "Geçici İş İlişkisi, İstihdam Edilebilirlik ve İş Güvencesi". *Prof. Dr. Turhan Esener II. İş Hukuku Uluslararası Kongresi*, Ankara: Seçkin, (October 2017): p. 519-520.

discussed below, employment security does not prohibit the termination of an employment contract; rather, it mandates that termination without a valid reason or justifiable reason shall be subject to certain consequences[33]. On the contrary, the scope and features to be regulated by employment security may change from state to state, with this regard, in accordance with the intensity and scope of provided security, the reality of how much an employee's right to work is protected in the scope of the system shall be released[34]. Indeed, every state's social condition is different from others and it is possible that on the one hand, one state has to take more positive measures to protect employees; on the other hand, another state has to take positive measures for protecting industries more. As an example, as it shall be explained below in detail, contrary to many states, the Swiss Labour Law system has not regulated employment security regulated clearly by the Turkish legal system[35].

B. The History of Legislation of Employment Security

Protecting employees' jobs had commenced to take part initially in civil laws and following this, it took part in special Labour Law systems in many countries, especially European Countries, in accordance with the soul of economic theories. At present, employment security has taken part in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and different conventions of the International Labour Organization as a fundamental human right[36].

As it is acknowledged, ILO is an International Organization that the Turkish Republic has been one of its members since 1932. The legislative function of this organization occurs by accepting recommendations and conventions. Even though recommendations are not binding for member states, conventions should be approved by member states in accordance with their own domestic legal regulations, approval certificates should be registered in Geneva and these conventions shall be binding for member states following 1 year. ILO concluded a recommendation regarding employment security for the first time in 1963. Especially, as a consequence of circumstances having happened after 1970, Convention numbered 158 is accepted in 1982. The main purpose of the Convention is to find a universal solution for problems which arise from technological developments and economic difficulties in different countries and which are regarding employment security. Convention provides

33 Subaşı, p. 607.
34 Centel, p. 12.
35 For more information please look: p. 14.
36 Kar, p. 25.

employment security for employees by eliminating employer's arbitrary terminations[37]. Also, in the same year, the Termination of Employment Recommendation numbered 166, which has more information in detail, was published[38].

In accordance with Article 2 of the Convention, all branches of economic activities and employed individuals shall be deemed as being subject to this Convention. However, (i) workers working with an employment contract with definite duration, (ii) workers working with an employment contract with a probation duration and (iii) workers engaged on a casual basis for a short period of time may be excluded from the scope of this Convention wholly or partially, on the condition that adequate precautions are provided for these workers too. In accordance with Article 4 of the Convention, an employee's employment contract may not be terminated unless there is a valid reason arising from the employee's behaviors or capacity or reason arising from needs of enterprise, workplace or work. According to Article 7 and 8 of the Convention, an employee's employment contract may not be terminated without receiving his/her defence against allegations with reasons regarding employee's behaviors or performance unless the employer may not be expected reasonably to provide this opportunity. Additionally, adequate legal manners in order for an employee to consider that his/her employment contract has been terminated without valid or justified reason to apply should be provided by member states such as the court, labour tribunal, arbitration committee or arbitrator. These manners to be applied by an employee may be varied in conformity with national laws and practices.

However, in contrary to many states accepting employment security, Swiss Law has accepted freedom of termination contracts concluded between employers and employees. As a consequence of this, parties of employment contract may terminate employment contract without demonstrating any reason at any time in Swiss Law. In addition to this, Article 4 of the Convention regulates that an employment contract may not be terminated unless there is a valid reason for such termination connected with employee's capacity or behaviors or based on the operational requirements of the enterprise, workplace or work has not been adopted by Switzerland[39].

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37 Semih Aktuğ. "İş Güvencesinin Uluslararası Dayanakları". *Erzincan Binali Yıldırım Üniversitesi Hukuk Fakültesi Dergisi*, V: 13, I: 1-2, (2009): p. 222.

38 Metin Kutal, "İş Güvencesi Kavramı ve Uluslararası Kaynağı", *Mercek*, I: 30, (April 2003): p. 6.

39 Wolfgang Portmann. "İsviçre İş Sözleşmesi Hukuku'nda İş Güvencesi". Tr. Yeliz Bozkurt Gümrükçüoğlu, *Prof. Dr. Turhan Esener II. İş Hukuku Uluslararası Kongresi*, Ankara: Seçkin, (October 2017): p. 640.

Despite having remained on the agenda for more than 30 years, employment security has taken its place in legislation of Turkish Law in August 2002. For the purpose of compensating negative effects of dismissal issued without any reason on employees and providing employment security, with the amendment having been made on Labour Code in 1975 before, a provision regulating the fact that employer may not have employed another employee for the position of employee, who had been dismissed by the employer, for 6 months and if s/he had wanted to employ for that position, s/he must have given notice to the employee via notary and must have employed him/her following his/her application regarding collective dismissal had been extended to apply on individual dismissal and the amount of the severance payment had been increased by decreasing the duration specified in order for the employee to obtain the severance payment[40]. That amendment had not been totally sufficient for problems regarding employment security. Following drafts of codes prepared in 1978 and 1982 had remained inconclusive, it had tried to accelerate the codification of employment security with a new draft of code in 1992. That draft prepared by inspiring from German Protection Against Dismissal Act had regulated that termination of an employment contract must have depended on a valid reason arising employee's personality or behaviors or operational requirements. According to that draft, the burden of proof regarding the validity of reason had belonged to the employer and the employee must have been reemployed by re-concluding the employment contract if termination of the employment contract had been deemed as invalid; on the other hand, if it had not been possible to reemploy the employee, compensation had been obliged[41].

Meanwhile, Termination of Employment Convention numbered 158 and dated 1982 discussed in the meeting in Geneva following the invitation made by the Board of Directors of the Working Office of the General Conference of International Labour Organization and prepared by ILO has adopted by Türkiye on 9 June 1994 with the Code numbered 3999 and it had been needed to amend provisions regarding Turkish Labour Law in accordance with the Convention numbered 158. Indeed, it is not possible to apply ILO's conventions directly on domestic law for the countries accepting a dualist system. Also, it is not possible either to apply ILO's conventions directly to the countries accepting a monist system. Since, ILO's

[40] Çelik and others, p. 508.

[41] Mollamahmutoğlu and others, p. 995; Çelik and others, p. 508.

conventions may not apply directly due to their regulatory content and the wording of articles, separate regulations must be enacted within domestic law[42].

For these reasons, a draft which had been different from other drafts had been prepared in 2000 in Türkiye but, because it had not been deemed as sufficient, scientists prepared a new draft. That last draft having been become a draft of code was adopted by naming as the Code on Amending on Labour Code, Trade Unions Code, the Code Regarding Preparation of Relations between Employees Employed in Press Profession and Employers numbered 4773 on 9 August 2002. This Code entered into force on 15 March 2003. With the amendments made by the Code numbered 4773 on Article 13/A, Article 13/B, Article 13/C, Article 13/D and Article 13/E of Labour Code numbered 1475, the employment security system was regulated for the first time in the Turkish legal system. These regulations applied for a very short period of time were amended by Labour Code numbered 4857 which is the 4th labour code of Türkiye but it is regulated substantially in conformity with the same principles.

Before the Code numbered 4773 entered into effect, freedom of termination had applied in Türkiye and employers were able to terminate employment contracts, without any obligation to demonstrate a valid reason, just by complying with the notice period in anytime they wanted. Even though the termination in question was deemed as an abuse of right, since the employment contract was deemed as being terminated, it was evaluated as valid termination and an employee may have requested only for compensations regulated by the Code numbered 1475[43]. Because of this regulation, it had not been possible to reemploy other employees who had complained about the invalidity of termination and whose complaints had been deemed as justified by competent authorities. Therefore, employees' total damages may not have been compensated with that regulation.

II. THE SCOPE OF EMPLOYMENT SECURITY

In accordance with Article 18 of LC, it is regulated that not every employee but only employees having conditions indicated in this article shall be deemed as being in the scope of employment security and shall benefit from these protections regulated in this regard.

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42 Savaş Taşkent. "İş Güvencesi Hükümlerinin Gemi Adamlarına Uygulanması". *A. Can Tuncay'a Armağan*, Istanbul ,(2005): p. 389.

43 Sarper Süzek. "İşçinin Yetersizliği veya Davranışları Nedeniyle Geçerli Fesih". *A. Can Tuncay'a Armağan*, Istanbul, (2005): p. 565; Subaşı, p. 595; Kadriye Bakırcı. "İş Güvencesi Kapsamındaki İşçilerin Doğrudan Tazminat Talep Hakları ve Kötüniyet veya Sendikal Tazminat İle Ayrımcılık Tazminatı İlişkisi". *Sicil İş Hukuku Dergisi*, I: 2, (June 2006): p. 114.

Although the authority to determine employees to be excluded from employment security is left to the legislator's discretion, this scope should be detected by complying with the scope given to them by and in conformity with the abovementioned provisions of the Convention[44]. These conditions determined for being in the scope of employment security may be regarding employee as well as they may be regarding enterprise, workplace or work[45]. For employees not having these conditions, regulations having been concluded under both TCO and LC shall apply. On the contrary, as it is going to be explained below in detail, provided that employees have these conditions obliged for them in order to be in the scope of employment security, it is not possible anymore for employees to request the compensation for bad faith regulated under Article 17 of LC or any compensation arising from specific provisions of the TCO by waiving from the right given by provisions of employment security[46].

It is crucial to emphasize that an employee must have all of these conditions explained below in detail at the same time in order to be evaluated as being in the scope of employment security. In other words, whether it is regarding employee or employer, an employee must have these conditions at the same time to be in the scope of employment security. Due to this importance, conditions that must be obtained by employees in order to be in the scope of employment security shall be evaluated in this section of our study.

A. Condition regarding the Workplace: Employing 30 or More Employees in the Workplace

1. General Evaluation of the Threshold

In accordance with Article 18, titled as *"Grounding the Termination on Valid Reason"*, of the LC, it is necessary that 30 or more employees are employed in the workplace in order to consider that an employee is in the scope of employment security. Yet, this condition was regulated as employing 10 or more employees with the amendment made on the Code numbered 1475 by the Code numbered 4773 on 9 August 2002. As it is understood from this situation clearly, the scope of application of employment security is restricted significantly with LC.

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44 Centel, p. 27.

45 Ercüment Özkaraca. "İş Güvencesinin Kapsamı". *Prof. Dr. Turhan Esener II. İş Hukuku Uluslararası Kongresi*, Ankara: Seçkin, (October 2017): p. 33.

46 Fevzi Şahlanan. "4857 sayılı Kanun'un İş Güvencesine İlişkin Hükümleri". *Bankacılık Dergisi*, I: 52, (2005): p. 57; A. Eda Manav. "İş Hukukunda Feshe İtiraz Davasının Şartları Ve Yargılama Usulü", *Türkiye Adalet Akademisi Dergisi*, V:1, Year:1, I: 3 (20 October 2010): p. 260.

In the reasoning of Article 18 having been mentioned above, it is explained that it was not deemed proper to apply provisions of employment security on small enterprises and for employees who had just started to work, by indicating when there was an essential problem regarding special employment conditions of employees or with regard to the quality and size of enterprise, it was regulated in Convention that one category of employees may be excluded from whole or a part of provisions of Convention. In fact, this issue was criticized when the old Labour Code numbered 1475 was amended with the Code numbered 4773 and even though a proposal was submitted during the discussion of that draft of code on the Commission of Health, Family, Labour and Social Affairs of Turkish Grand National Assembly for including all of employees to the scope of employment security by indicating that exclusion of workplaces that less than 10 employees work in meant the discrimination among employees, that proposal was rejected on the grounds that the Convention was allowing to regulate such restrictions.

Even though this regulation may be deemed contrary to the principle of equality regulated by the Turkish Constitution, some specific amounts of employees are sought with regard to the application of some of rules and provisions of LC in Labour Law in addition to employment security. Thus, LC seeks the existence of a specific number of employees employed in a workplace even with regard to the application of its provisions[47]. There has been no judgment of the Constitutional Court deciding that this provision is contrary to the principle of equality. When the circumstances of small enterprises are taken into consideration, restriction of the application of employment security with employing more than a specific number of employees by LC shall not be evaluated as being contrary to the principle of equality regulated under the Constitution. Hence, the purpose of employment security is not to leave employers unprotected completely while protecting employees. In this regard, determining a provision giving rise to exclude some workplaces in which less than a specific number of employees work from the application of employment security shall not be evaluated as being contrary to the principle of equality in order to protect small enterprises.

The main reason to exclude workplaces within a scope which is smaller than a specific one is that reemployment of employees in spite of employers' counter-decisions causes a disruption of the peace in workplaces and those small enterprises may not resist to the

[47] Mollamahmutoğlu and others, p.1001.

termination procedure with high cost[48]. However, this provision of LC shall not be deemed as being in conformity with the Convention. It is indicated in Article 2 of the Convention that this Convention shall apply to all branches of economic activities and to all employed individuals. Although it is indicated in the reasoning of LC that this regulation was concluded by taking into consideration that a specific group of employees may be excluded from the scope of the employment security under conditions regulated by the same article's 5th sub-paragraph in so far as necessary, when the Turkish Labour Law is examined, it shall be observed that not a specific group of employees but a considerable number of employees is excluded from the scope of employment security. In fact, following the acceptance of the condition regarding 30 employees, when the number of employees specified by LC is taken into consideration, it is understood that both small enterprises and lots of medium enterprises are excluded from the scope of employment security[49]. Indeed, as it is stated by the statistics of SSI dated 2020, there are 1.960.911 workplaces in Türkiye and 96% of these workplaces are employed with less than 30 employees. The total amount of employees employed in these workplaces that less than 30 employees work in is 7.341.125. In accordance with the statistics, as it is taken into consideration that 15.203.423 people work with insurance, 48% of employees are not in the scope of employment security just because they do not meet the condition regarding employing 30 or more employees[50]. This circumstance is contrary to the principle of proportionality regulated under Article 13 of the Turkish Constitution[51].

In addition to this, when other countries regulating the employment security in their own countries are analyzed, it is observed that the number of employees regarding this condition of employment security is 11 and more in France[52], 11 and more in Germany[53], 5 and more in Austria and 15 and more for the workplaces working in trade and industry in Italy and it may be also distinguished that there is no restriction with the number of employees in

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48 Süleyman Başterzi. "4857 sayılı İş Kanununa Göre İş Güvencesi Kurallarının Uygulama Alanı ve İstihdama Etkisi". *A. Can Tuncay'a Armağan,* Istanbul, (2005): p. 626.

49 Süzek and Başterzi, p. 585; Talat Canbolat. "Toplu İş Sözleşmesi Aracılığıyla İş Güvencesi". *Prof. Dr. Turhan Esener II. İş Hukuku Uluslararası Kongresi*, Ankara: Seçkin, (October 2017): p. 143; Deniz Ugan Çatalkaya. *İş Hukukunda Ölçülülük İlkesi*, (Istanbul: Beta, December 2019), p. 469.

50 Mollamahmutoğlu and others, p. 1002.

51 Çelik and others, p. 513; Cevdet İlhan, Günay. "Türk İş Hukuku Uygulamasında İş Güvencesi". *A. Can Tuncay'a Armağan*, Istanbul, (2005): p. 633.

52 Ugan Çatalkaya, p. 466.

53 Ulrich Krichel. "Alman İş Hukukunda İşyeri Gereklerinden Kaynaklanan Nedenlerle Fesih ve Sosyal Tercih". *Sicil İş Hukuku Dergisi*, I: 5, (March 2007): p. 177; Magotsh, Michael and Kremp, Pascal R. "Termination of Employment". in Key Aspects of German Employment and Labour Law, editors: Jens Kirchner, Pascal R. Kremp and Michael Magotsh, p. 135- 155. Spinger, (2010). p. 138; Ugan Çatalkaya, p. 467.

order to be in the scope of employment security in Sweden[54]. As it is understood that there are regulations to exclude workplaces with limited employees in other countries accepting employment security but this number is not as high as it is in the Turkish legal system. Even though we also consider that the limited group of employees should be excluded from provisions of employment security in order to protect small enterprises, the number determined in the Turkish legal system should be decreased since this number causes so many employees to be excluded from the scope of employment security.

In order to detect this number, due to the fact that the circumstances of workplace at the time of termination shall be taken into consideration, the number of employees working in workplace at the time of termination should be detected[55]. Indeed, the Turkish Court of Appeals also accepts this evaluation and it was decided in its relevant judgments that there should have been 30 or more employees employed in workplace at the time that termination notice was served to the employee so that the employee may have benefited from the scope of employment security in accordance with Article 18 of LC[56].

As another opinion in the doctrine, despite termination of employment contract with duration, the number of employees detected at the time of service of termination should be taken into consideration but on the other hand, circumstances causing abuse of right such as employing new employees right after termination of the employment contract has to be excluded[57]. The Turkish Court of Appeals accepted that in order to detect this condition regarding the number of employees employed in workplace, employees working in workplaces with payrolls shall be taken into consideration and the capacity of the workplace to employ employees shall not be evaluated whilst detecting this condition[58]. Yet, it must not be forgotten that this circumstance may be used with bad faith. In fact, right after terminating one or more employees' employment contracts and decreasing the number of employees

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54 Süzek and Başterzi, p. 584; Ercüment Özkaraca. "İş Güvencesi Sistemine Eleştirel Bakış". *İş ve Sosyal Güvenlik Hukukuna İlişkin Sorunlar ve Çözüm Önerileri*, 2011 Yılı Toplantıları, İstanbul Barosu Yayınları: p. 96; Kar, p. 109; Emine Esra Uysal İbat. *Feshin Geçersizliği ve İşçilik Alacakları, Onikilevha Yayınları.* (Istanbul, November 2018), p. 43.

55 Ekmekçi and Yiğit, p. 619; Haluk Hadi Sümer. *İş Hukuku*. 25th Edition (Ankara: Seçkin Yayınları, 2020), p. 103; A. Can Tuncay. "İşe İadede 30 İşçi Ölçütünün Yorumu". *Sicil İş Hukuku Dergisi*, I: 6, (June 2007): p. 78; Kar, p. 104; Başterzi, İş Güvencesi Kuralları, p. 627-628; Öner Eyrenci and others. *İş Hukuku*. 10th Edition, (Istanbul: Beta, 2020), p. 196; Alpagut, Esaslı Değişiklik, p. 90; Emine Tuncay Senyen Kaplan. *Bireysel İş Hukuku*. 12th Edition (Yetkin, 2022), p. 399; Özkaraca, p. 41.

56 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 16/11/2009 numbered 2009/5148 E. and 2009/31975 K. (legalbank.com).

57 Ekmekçi and Yiğit, p. 619.

58 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 07/05/2005 numbered 2005/17838 E. and 2005/23813 K. (kazanci.com).

working in the workplace to less than 30 employees; if the employer terminates other employees' employment contracts, as long as there is no reasonable reason to make these terminations separately, employees should benefit from provisions of employment security[59]. As an example, at the same time 6 employees from 35 employees working in the workplace are dismissed, the employer may not claim that these employees are not in the scope of employment security because there are 29 employees working in the workplace[60]. With another explanation, it should be noted that the application of gradual termination issued by the employer by dismissing employees until the number of employees decreases to less than 30 in order to exclude employees, whose employment contracts have already been decided to be terminated, from the scope of the employment security shall be deemed as being against good faith and it is clear that this practice and such circumstances shall not be protected by LC[61].

2. The Condition regarding the Workplace and Working Sector

It is possible that one employer may have one or more workplaces. However, it is understood from the clear provision of LC, provided that an employer has more than one workplace being in the scope of same working sector, the number of employees working in his/her workplaces shall be calculated with the total number of employees working in all workplaces belonging to the same employer. It is not sought in the provision that these workplaces should be in the border of the same province or region and only being regulated under the same working sector is evaluated sufficient.

In order to detect the total number of employees, there must initially be an employer. Following this, the employer must have more than one workplace and all of these workplaces belonging to the same employer must practice in the same working sector[62].

As a result of this condition having been mentioned before, as long as less than 30 employees work in a workplace, employees working in this workplace shall be deemed as being out of the scope of employment security. A workplace is a unit organized together with

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59 Çelik and others, p. 515.

60 Günay, İş Güvencesi, p. 183.

61 Başterzi, İş Güvencesi Kuralları, p. 628; Kübra Doğan Yenisey. "İş İlişksinin Sona Ermesi ve Kıdem Tazminatı". *Yargıtay'ın İş Hukuku ve Sosyal Güvenlik Hukuku Kararlarının Değerlendirilmesi 2016*, Ankara: Onikilevha Seminer, (01-02 December 2017), p. 420.

62 Savaş Taşkent. "Otuz İşçi Ölçütü ve Yurt Dışındaki Bağlantılı İşyerleri Sorunu". *Prof. Dr. Sarper Süzek'e Armağan*, Istanbul: Beta, V: I, (2011): p. 715

material and immaterial elements and employees by employers to produce service[63]. Whilst determining the condition regarding 30 employees for applying employment security, it should be considered that the working organization is a whole unit established with both annexes and tools. In accordance with this, for example, places constituting totality within the scope of a working organization should be evaluated as a whole even though they are registered separately[64].

It is indicated in LC that employees working in different workplaces are taken into account to detect the number of employees in the condition that they are subject to the same working sector. In this regard, employees employed for different workplaces belonging to the same employer but being subject to different working sectors may not be taken into account for determining the number of employees regulated for employees. Provided that there is more than one workplace belonging to the same employer, whether workplaces are subject to the same working sector or not shall be detected with inspection executed in accordance with Article 5 of the Code on Trade Unions and Collective Labour Contract numbered 6356. In accordance with Article 5 of CTUCLC, the working sector of a workplace shall be detected by the Ministry of Labour and Social Security. In accordance with the Regulation on Working Sector, there are 20 working sectors as Hunting; Fishery Industry; Agriculture and Forestry; Food Industry; Mining and Quarry; Petrol, Chemistry, Rubber, Plastic and Medicine; Weaving, Ready-made Clothes, Leather; Tree and Paper; Communication; Press, Publication and Journalism; Banking, Finance, Insurance; Trade; Branch, Education and Fine Arts; Cement, Soil, Glass; Metal; Construction; Energy; Transportation; Ship Building and Marine Transportation; Warehouse and Warehousing Business; Health and Social Services; Accommodations and Entertainment Affairs; Defence and Security; General Affairs. In accordance with an evaluation in doctrine that we also support, given the need for reemployment cases to be resolved promptly; if the specific sector of the workplace is unclear, it may be more practical for the relevant court to decide the dispute by conducting an evidentiary investigation, without treating this as a preliminary issue[65]. Indeed, the fact that the relevant court detects the number of employees employed in the same working sector in

[63] Çelik and others, p. 140; Çağrı Çelik. *İş Sözleşmesinin İşçiden Kaynaklanan Sebeplerle Süreli Feshi ve Sonuçları*, (Ankara: Seçkin Yayınları, 2007), p. 39; Sarper Süzek. "İşyerinin Devri ve Hukuki Sonuçları". *Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi*, V: 15, Special Issue, (2013) (Publication Year: 2014): p. 313; for more information for material elements, immaterial elements, workforce, technical aim and organization: Kübra Doğan Yenisey. *İş Hukukunda İşyeri ve İşletme*, (Istanbul: Legal, 2007), p. 17-25.

[64] Mollamahmutoğlu and others, p. 1011.

[65] Centel, p. 42.

accordance with the records of the Social Security Institution may be deemed as the most reasonable manner[66].

3. Including Employees Working Abroad

As multinational companies perform in different countries and there are lots of workplaces of them in these countries, even though headquarters of these companies are placed in their own countries, they employ employees from many different nations and in many different countries. Supposing that this type of company perform in Türkiye too, the issue of whether employees working in different countries under the same multinational enterprise were taken into account or not whilst detecting the number of employees specified by Article 18 of LC was discussed before. This issue shall not be deemed as a problem at the time that the number of this type of company's employees working in Türkiye is 30 or more but on the contrary, it shall be deemed as a problem when the number of this type of company's employees employed in Türkiye is less than 30.

9th Chamber of the Turkish Court of Appeals[67] discussed whether the number of employees employed in a workplace situated abroad and belonging to the same employer would be evaluated in accordance with Article 18 of LC or not on the condition that they were subject to the same working sector. In the mentioned case, while the first instance court's judgment rejecting the claims by depending on the territoriality of the law was reversed, it was indicated as follows;

> *"It is meaningful that there is not a clear regulation indicating that employees working in workplaces being subject to the same working sector abroad shall not be taken into consideration. In other words, there is no regulation regulating that workplaces being subject to the same working sector should be evaluated only with workplaces being between the borders of the same country. When it is taken into consideration that LC depends on employers with large scope, the fact that an employee working in a company working internationally and having a branch in Türkiye shall be excluded from the scope of employment security with the reason that the number of employees working in Türkiye is less than 30 shall not be in conformity with the reasoning of LC and the principle of proportionality."*

Even though the manner of the Turkish Court of Appeals to solve the problem is on behalf of the employee, this solution has a problematic nature. Above all, there is no clear

66 Mollamahmutoğlu and others, p. 1003.

67 9th Chamber of the Turkish Court of Appeals' judgment dated 09/03/2016 numbered 2015/26151 E. and 2016/5349 K. (lexpera.com).

explanation to make this interpretation either in LC or in the reasoning of LC[68]. Even though it is indicated in this judgment that employees working in foreign workplaces shall be added to the definition of the number of 30 employees by declaring that there is not a clear regulation made by the legislative authority to exclude employees working abroad in workplaces being subject to same working sector and this aspect is supported by some scholars in the doctrine[69]; this is also criticized with reasons based on the fact that it is principle not to make an explanation in laws when it is not wanted to change ordinary circumstances and since the contrary of the circumstance is aimed, there has to be a clear explanation. According to this evaluation, it is not a normal legislative technic to conclude a regulation including a provision indicating that it shall not apply for abroad and as a principle, laws shall be effective for the countries concluding them[70].

According to another view in the doctrine, the structure of the contact office situated in Türkiye should be investigated, the aim for employing employees separately from Türkiye and from foreign countries should be inspected and why this practice applies should be revealed for circumstances being as an issue of concrete cases. If it is detected that this practice applies only to prevent employees working in workplace situated in Türkiye from the protection of provisions of employment security by eliminating the number of employees as 30, it does not matter how many employees work in this workplace, all employees working in this workplace should be evaluated as being in the scope of employment security. However, provided that there is no aim as mentioned above, employees working in the contact office should not be deemed as being in the scope of employment security only as a result of the existence of employees working abroad[71].

Since an employee working in the workplace may make an application in order to detect the working sector to which the workplace is subject due to the existence of his/her legal interest, an employee may apply to the Ministry of Labour and Social Security for the definition of working sector of workplace situated in foreign countries as an individual and

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68 Tuncay, 30 İşçi, p. 77 vd; Taşkent, Yurt Dışı, p. 719-720.

69 Kar, p. 110; for another aspect in the doctrine specifying that, by evaluating provisions of employment security in the scope of rules of direct effect theory applied in International Civil Law, when the purpose of LC is considered, employees working in headquarter situated in foreign countries should be taken into account: M. Fatih Uşan and Musa Aygül. "Türkiye'de Bulunan Şubede Çalışanlar İçin İş Güvencesi Uygulamasında Aynı İşverene Ait Yurt Dışında Bulunan İşçilerin De Sayıda Dikkate Alınması Kararına Getirilen Eleştirilerin Değerlendirilmesi". *Legal İş Hukuku ve Sosyal Güvenlik Hukuku Dergisi*, I: 17, (2008): p. 46 vd

70 Tuncay, 30 İşçi, p. 77

71 Serkan Odaman. "Yurtdışında Çalışan İşçilerin İş Güvencesi Açısından İşçi Sayısı Tespitine Etkisi". *Sicil İş Hukuku Dergisi*, I: 6, (June 2007): p. 86.

provided that an employee is a defendant or claimant in any case, s/he may request for definition of the working sector of the workplace being abroad from the relevant labour court. Yet, in addition to the difficulty to detect the working sectors of workplaces being abroad, detecting contractual positions of these employees working in these workplaces may be a problem while determining the total number of employees with regard to the scope of employment security[72]. Indeed, as it shall be explained in detail below, employees of sub-employers, temporary employees, employees working for discontinuous work, interns, apprentices, officers, individuals taking vocational education shall not be taken into account whilst determining the number of the employees in accordance with the Turkish legal system[73]. Even though it may be thought that this problem may be solved for regulations of countries that have similar regulations with Türkiye, it shall not be same for countries accepting Common Law. Because of these evaluations, although the Turkish Court of Appeals' solution regarding this issue is on behalf of employees, this solution is not deemed as realistic. Territoriality of law should be executed and it should not be possible to evaluate that workplaces being in foreign countries are in the scope of LC with regard to the scope of the application of LC. With this regulation, it is not possible to add employees working in workplaces situated in foreign countries into the number of 30 employees determined in Article 18 of LC. However, it should be indicated that should employees submit proofs eliminating all of these doubts, it is needed not to take the territoriality of law into account and in this regard, employees working in workplaces being abroad should be evaluated as being in the scope of the number of employees[74].

4. Employees to be Taken into Account While Determining the Number of Employees in the Workplace

As it is understood from the wording of LC, above all, employees must be taken into account while detecting this number. In accordance with Article 2, titled as *"definitions"*, of LC, real person working by depending on an employment contract shall be deemed as an employee. There is no explanation giving rise that only employees working in the scope of LC shall be deemed as employees in conformity with Article 2 of LC and that employee working in the scope of other codes shall not be deemed as an employee in compliance with

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72 Mollamahmutoğlu and others,p. 1005.

73 Çelik and others, p. 515; Sümer, p. 103; M. Fatih Uşan and Canan Erdoğan. *İş ve Sosyal Güvenlik Hukuku*. 2nd Edition (Ankara: Seçkin Yayınları Temel Hukuku Dizisi, 2021), p. 158; Günay, İş Güvencesi, p 183; Mustafa Kılıçoğlu. "Çalışma Hakkı Kapsamında İş Güvencesi". *Prof. Dr. Sarper Süzek'e Armağan*, V: II (Istanbul: Beta, 2011), p. 1213.

74 Mollamahmutoğlu and others, p.1005

Article 2 of LC. Therefore, whilst detecting this number specified by LC not only employees being in the scope of LC but also employees working in the scope of other codes except LC shall be taken into account. In fact, in Article 2 of LC, it is required clearly that employees have to work with employment contract just for describing someone as an employee and there is no requirement for employees to work with employment contract being subject to LC. However, the Turkish Court of Appeals decided in one of its judgments that athletes may not have been added to the number of 30 employees by indicating that they were not in the scope of LC[75]. This judgment is not deemed proper by the doctrine because of reasons mentioned above[76].

While detecting this number, not only employees being in the scope of employment security and working in the workplace belonging to the employer but also employees not being in the scope of employment security shall be taken into account. Indeed, there is no regulation regulating that only employees being in the scope of employment security shall be taken into account while detecting this number[77]. Therefore, even though employer's specific representatives are not in the scope of employment security, as it shall be explained below in detail, they should be taken into account while determining this number of employees[78].

Since apprentices, interns and individuals taking vocational education may not deemed as employees in accordance with Turkish law, they are not going to be taken into account while determining the number of employees[79]. In contrast, due to the fact that interns concluding employment contracts with employers shall be deemed as employees, they are going to be taken into account whilst determining the number of employees regulated by LC. Employees working with employment contracts with probation period shall also be taken into account. In fact, the probation period does not affect employees' title as employee. The only facility that the probation period provides to parties is the ability to terminate employment

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75 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 28/04/2014 numbered 2014/6344 E. and 2014/10003 K. (Yargıtay Karar Arama).

76 Mollamahmutoğlu and others, p. 1006; Süzek and Başterzi, p. 587.

77 Kar, p. 103.

78 Mollamahmutoğlu and others, p. 1006; Çelik, Süreli Fesih, p. 41; Centel, p. 40; Kar, p. 102; Gökhan Yılmaz. *İş Hukuku Davaları*. (Ankara: Türkiye Adalet Akademisi Yayınları, 2022), p . 55; Nuri Çelik. "İş Güvencesine İlişkin Otuz İşçi Sayısını Belirleme Esasları". *Legal Yargı Kararları ve İncelemeleri Dergisi*, I: 8, (June 2008): legalbank.com; Murat Engin. "İş İlişkisinin Sona Ermesi ve Kıdem Tazminatı". *Yargıtay'ın İş Hukuku ve Sosyal Güvenlik Hukuku Kararlarının Değerlendirilmesi 2014*, Ankara: Onikilevha, Seminer, (20-21 November 2015): p. 141 İş Güvencesine İlişkin Otuz İşçi Sayısını Belirleme Esasları (legalbank.net); 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 24/03/2008 numbered 2007/27699 E. and 2008/6006 K. (legalbank.com).

79 Sümer, p. 103; Şükran Ertürk. *İş Hukuku Dersleri Bireysel İş Hukuku* (Ankara: Yetkin Yayınları, 2022), p. 306.

contract without complying with the notice period within the probation period. The existence of duty of the employer to pay wage, to act equally and to observe employees shall remain. On the other hand, from the side of an employee, the existence of the duty to work, of loyalty and to obey shall also remain[80].

Regarding the application of provisions of employment security, there is no regulation on the quality of employees that are needed to be employed in the workplace. Regardless of the fact that there is an employee working part-time or full-time; for a definite or for an indefinite duration[81] or remotely, all employees employed by the employer should be taken into account while detecting this number indicated by LC[82].

While detecting 30 employees, it is sufficient that employees' employment contracts are effective and therefore, it is not necessary whether or not employees work *de facto*[83]. As a result of this, employees who do not work in the workplace *de facto* because employment contracts of employees are suspended with reasons of strike, unpaid leave or report regulated due to illness shall also be taken into consideration while determining the number of 30 employees[84]. On the contrary, the Turkish Court of Appeals has indicated accurately in different judgments if there are employees employed because of absence of employees with reasons such as pregnancy, regular leave or occupational accident, new employees employed only for these durations as substitutes shall not be taken consideration while determining the number of 30 employees[85].

Employees working in discontinuos works and employees being sub-employers' employees who are not primary employers' employees shall not be taken into account while determining this number. As a rule, sub-employers' employees working in the same or different working sector and in workplaces belonging to primary employers shall not be taken

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80 Çelik and others, p. 239-240; Süzek and Başterzi, p. 272-273; Ekmekçi and Yiğit, p. 77-78; Gaye Burcu Yıldız. "Karar İncelemesi İşçinin Aynı İşveren Nezdinde Fasılalı Çalışması Durumunda İş Güvencesinden Yararlanması İçin Gereken Altı Aylık Kıdem Süresinin Hesaplanması". *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası*,V: LXXII, I: 2: p. 490.

81 Engin, Sona Erme, p. 141.

82 Ömer Ekmekçi, and others. *Turkish Individual Labour Law*. (Istanbul: Onikilevha yayınları, February, 2023), p. 145; Ekmekçi and Yiğit, p. 616; Tuncay, 30 İşçi, p. 78; Kar, p. 101; 22nd Civil Chamber of the Turkish Court of Appeals's judgment dated 03/12/2019 numbered 2019/7909 E. and 2019/22315 K. (lexpera.com)

83 9th Civil Chamber of Court of Appeals' judgment dated 22/05/2019 numbered 2019/4366 E. and 2019/11755 K. (legalbank.com) ; Ekmekçi and Yiğit, p. 616; Kar, p. 102; Yılmaz, Dava, p. 55; Çelik and others p. 515; Çelik, Otuz İşçi, legalbank.com; Engin, Sona Erme, p. 141.

84 Mollamahmutoğlu and others, p. 1007; Centel, p. 39.

85 Çelik and others p. 515; 9th Civil Chamber of Court of Appeals' judgment dated 01/06/2020 numbered 2020/1076 E. and 2020/4530 K. (lexpera.com); 22nd Civil Chamber of Court of Appeals' judgment dated 04/02/2020 numbered 2019/8764 E. and 2020/1548 K. (lexpera.com).

into account while determining the number of 30 employees[86]. In this regard, neither shall employees of sub-employers be added to the number of employees of primary employers nor employees of primary employers shall be added to the number of employees of sub-employers[87]. On the contrary, provided that it is detected that relation between sub-employers and primary employers depends on a collusive transaction, in accordance with Article 2 of LC, employees of sub-employers shall be deemed as employees of primary employers from the beginning[88] and shall be added to the number of these 30 employees[89]. As their employment contracts shall be deemed as concluded with primary employers, employees shall benefit from all rights and shall be responsible for all duties arising from these employment contracts and, if any, from collective labour contracts that competent primary employer's representatives signed[90].

Provided that there is a temporary employment relation in accordance with Article 7 of LC, employees of the private employment office shall not be taken into account while determining the number of employees of the borrower employer receiving these employees from the private employment office. On the contrary, since these employees are evaluated as employees of the private employment office, they shall be taken into account while determining the number of employees of the private employment office[91]. On the other hand, provided that there is a temporary employment relation concluded within the scope of holdings, as a consequence of the temporary feature of legal relation between the employee and the employer providing this employee to borrower and borrowing relation, it does not matter the employee works for which employer, this employee should be taken into account while determining the number of 30 employees working for the employer providing this employee and s/he should not be taken into account while detecting the number of employees

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86 Faruk, Andaç. "Alt İşverenlerin İş Güvencesinden Doğan Sorumlulukları". *Prof. Dr. Turhan Esener II. İş Hukuku Uluslararası Kongresi*, Ankara: Seçkin, (October 2017), p. 587; Mollamahmutoğlu and others, p. 1007; Ali Güzel. "İş Sözleşmesinin Sona Ermesi ve Kıdem Tazminatı". *Yargıtay ve Bölge Adliye Mahkemesinin İş Hukuku ve Sosyal Güvenlik Hukuku Kararlarının Değerlendirilmesi 2019-2020*, Istanbul: Onikilevha, Seminer, (13-14 November 2021), p. 238.

87 Çelik and others, p. 516; Cevdet İlhan Günay. *İş ve Sosyal Güvenlik Hukuku Dersleri.* 6th Edition, (Yetkin Yayınları, August 2020), p. 130.

88 Süzek and Başterzi, p. 180; Mollamahmutoğlu and others p. 221; Çelik and others, p. 131; Ekmekçi and Yiğit, p. 169; Ömer Uğur. *Alt İşverenlik İlişkisi ve Kamu İşyerlerindeki Uygulaması*. (Ankara: Seçkin, September 2017), p. 130.

89 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 01/06/2020 numbered 2020/1076 E. and 2020/4530 K. (legalbank.com); Centel, p. 41; Çelik and others p. 515.

90 E. Tuncay Kaplan. "Asıl İşveren- Alt İşveren İlişkisinde Muvazaalı İşlem Sorunu". *A. Can Tuncay'a Armağan*, Istanbul, (2005): p. 233.

91 Mollamahmutoğlu and others, p. 1007.

of borrower employer because this employment relation is temporary[92]. However, since temporary employment relation which is not concluded in accordance with LC shall be deemed as null and void, relation between employees and the employer providing these employees to another employer shall also be deemed as null and void. Therefore, these employees shall be deemed as being employees of the employer receiving these employees and they shall be taken into account whilst determining the number of 30 employees[93]. Furthermore, provided that employees do not return to their own workplace following the finalization of the temporary employment relation and continue to work in the workplace that they worked temporarily, it should be accepted that employees' employment contract concluded with their own employers finalized and it should be deemed that there is a new employment contract concluded between these employees and their temporary employers[94]. In other words, following the maximum legal duration for temporary relation passed with mutual intentions of all parties, because borrowing relation shall be removed, they shall be taken into account as employees of so-called borrower[95].

Circumstances that the number of employees working in the workplace is demonstrated as less than 30 in official records or employees working in the workplace are recorded as if they were working in different working sectors and in different workplaces just for evasion of LC shall not be deemed as valid. These employees shall also benefit from protection of employment security[96].

In circumstances that employees make commitments for different works in same nature and at the same time in the scope of the same employment contract to more than one real or legal employer, it shall be deemed that there is a joinder of employers for an employee. In this type of employment, the employee performs his/her obligations to two or more different employees in conformity with one employment relation. Right to manage is used jointly by these two or more employers[97]. There is also only one employment relation in joint employment[98]. As it is indicated in judgments of the Turkish Court of Appeals[99], all

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92 Alp, p. 8; Mollamahmutoğlu and others,, p. 1007.

93 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 01/06/2020 numbered 2020/1076 E. and 2020/4530 K. (legalbank.com).

94 Tulukçu, p. 141.

95 Ercan Akyiğit. "İşçinin Ölümünün İş Güvencesi Uyuşmazlığına Etkisi". *Legal İş Hukuku ve Sosyal Güvenlik Hukuku Dergisi*, 17/2008: p. 16.

96 Canbolat, Toplu İş Sözleşmesi p. 145.

97 Doğan Yenisey, Sona Erme, p. 427-428; Caniklioğlu, Sona Erme, p. 217-218.

98 Süzek and Başterzi, p. 161; Mollamahmutoğlu and others, p. 192; Kar, p. 107.

employees of employers that the employee performs his/her duties to in the scope of one employment relation shall be taken into account while determining the number of 30 employees to be detected with regard to provisions of employment security[100].

In addition to this, it is not possible that all companies depending on different legal persons in the same group of companies or holding shall be taken into account unless there is a joint employment. In other words, since companies being in the scope of the same group of companies or holding possess different titles of employership, in order to detect the number of 30 employees, all of employees working in all companies being in the scope of the group of companies or holdings may not be summed up[101]. Indeed, similarly, the Turkish Court of Appeals also decided that the working of companies being in the scope of the group of companies in the same building was not sufficient, additionally, conditions of joint employment must have been met. As indicated in the same judgment, following the initial detecting of working scopes of companies depending on the group of companies and the number of employees jointly employed by these companies, it must be examined whether the employee works in other companies, if necessary, by making evidentiary investigation. In accordance with the conclusion, it should be decided whether there is the number of 30 employees working in the workplace and whether the employee is in the scope of the employment security[102]. LC regulates if there is more than one workplace being in the scope of same working sector and belonging to the same employer, the number of employees working in these workplaces must be detected by summing them up. As it is clearly understood from this provision, as a rule, it is not possible to evaluate jointly workplaces

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99 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 18/12/2009 numbered 2009/247 E. and 2009/37746 K. (legalbank.com).

100 Mollamahmutoğlu and others, p. 1009; Süzek and Başterzi, p. 588; Kılıçoğlu, p. 1214; Caniklioğlu, Sona Erme, p. 217; Grand General Chamber of Unification of Conflicting Judgments of the Turkish Court of Appeals' judgment dated 09/06/2017 numbered 2016/3 E. and 2017/4 K. (legalbank.com).

101 Sümer, p. 103; Çelik, Süreli Fesih, p. 40; Doğan Yenisey, Sona Erme, p. 431.

102 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 12/12/2017 numbered 2017/43958 E. and 2017/28461 K. (legalbank.com); in the mentioned case, it is indicated that regarding group of companies, it is not sufficient that these companies work in the same building, it is also mandatory that conditions of joint employment occurs. As a consequence of this, after working scopes of companies being in the scope of group of companies and the number of employees employed by these companies jointly are detected concretely, whether the claimant performs his/her duties for other companies should be examined, if it is needed, by making evidentiary investigation in companies. Even though it should have been decided whether condition regarding 30 employees occured and the claimant was in the scope of employment security in accordance with the consequences of examinations; it is incorrect to decide on merit of case with inadequate examination. Therefore, first instance court's and Regional Court of Appeals' judgments were overturned with these reasons.

belonging to different legal or real persons[103]. However, in the event of detecting of real employer by removing the veil of legal personality, evaluating these employers' employees within the scope of number of 30 employees shall be in conformity with the Labour Law's principle of protecting the employee[104].

The fact that an employer is a group of companies or there is another company having organic relation with the employer does not require to sum up all of the number of employees of companies possessing different legal personalities, in other words, different employers' employees[105]. Just organic relation between employers does not demonstrate that there is an abuse of right[106]. According to the Turkish Court of Appeals, contrary to submitting different parties as defendant, in concrete dispute that the employee signed an employment contract only with one of the defendants, as a result of the fact that there has been no concrete proof demonstrating that there is an abuse of right regarding legal personality in order to damage to employee's rights arising from employment by establishing defendant company, it is not sufficient that there is a solid organic relation in order to determine the number of 30 employees[107].

Due to the absence of specific regulations in LC, the statue of seasonal employees remains controversial. Conversely, according to the prevailing perspective, seasonal employees should also be included while determining the total number of employees[108]. In fact, if it was wanted them to be excluded, it would be explained clearly[109]. On the other hand, it should be indicated that, as a consequence of the fact that they work in working

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103 As an example, in one of its judgments dated 2008, the Turkish Court of Appeals decided that even though they belonged to same group of companies, it was not possible to evaluate together the numbers of employees working in workplaces that belonged to companies that had different legal personalities for being in the scope of provisions of employment security and that just because of existence of organic relation, it was not accurate to take the number of employees working for companies being in the scope of same group of companies into consideration for the condition regarding 30 employees (9th Civil Chamber of the Turkish Court of Appeals' judgment dated 31/03/2008 numbered 2007/29950 E. and 2008/7008 K. (legalbank.com)).

104 Mollamahmutoğlu and others, p. 1009.

105 Özkaraca, p. 42.

106 Çelik and others, p. 517-519; Nurşen Caniklioğlu. "İş İlişkisinin Sona Ermesi ve Kıdem Tazminatı". *Yargıtay'ın İş Hukuku ve Sosyal Güvenlik Hukuku Kararlarının Değerlendirilmesi 2017,* Istanbul: Onikilevha Seminer, (23-24 November 2018): p. 209.

107 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 11/05/2016 numbered 2016/8355 E. and 2016/11909 K. (legalbank.com).

108 Mollamahmutoğlu and others p. 1008; Çelik and others p. 516; Günay, İş Güvencesi, p. 183; Başterzi, Süleyman, İş Güvencesi Kuralları, p. 627; Senyen Kaplan, p. 397.

109 Nuri Çelik. *İş Hukuku Dersleri*. 26th Edition, (Istanbul: Beta, July 2013), p. 237; 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 15/09/2006 numbered 2006/21611 E. and 2006/22886 K. (legalbank.com).

organization specified by their employers, employees working remotely are also going to be taken into account while determining this number.

In accordance with Article 90 of LC, the duty of mediating in order for employees seeking work to be employed in available works and the duty to find employees for different works belongs to the Turkish Employment Agency and licenced private employment agencies. In the mediating procedure, since there is just a mediating activity, an employee being subject to the mediating procedure should be taken into account while determining the number of employees of the employer employing them via the mediating procedure[110].

Another employer as a third party may participate to employment contract having been concluded before between the employer and the employee. This situation is titled as *"participation in employment contract"*. Following this participation, the employee shall have a duty to perform its obligations arising from the employment contract to the employer who has become a party to the employment contract. In this contract, relation between the employee and first employer continues and there is no transfer of employment contract, on the contrary, there is only one employment contract where two employers are regarded as the parties to the contract at the same time. There is only one employment relation and therefore, there is only one duty of paying wage to the employee in participating to the employment contract. For participating in employment contract, the number of 30 employees shall be detected in accordance with the number of employees working for all employers participating in employment contract[111].

Transfer of workplace is possible in accordance with needs of the sector and operational decisions of the employer. As it is possible to transfer of workplace wholly, it is also possible to transfer only a part of the workplace. Besides, at the time of transfer of employment contracts concluded for the whole workplace or a part of workplace transfer to transferee with all rights and debts, the number of employees working in transferee's workplace should be taken into account in order to benefit from employment security. All obligations arising from the written employment contract concluded between the employee and transferor, for example paying bonus, paying wage, increase of wage, duties regarding the payment of penal clause, shall be transferred to the transferee. Disciplinary punishments, warning regarding the fact that s/he should perform his/her duties otherwise, his/her

110 Mollamahmutoğlu and others, p. 1008.
111 Kar, p. 107.

employment contract shall be terminated, records regarding absences shall also be transferred to the transferee[112]. In accordance with this, for the transfer of a part of the workplace, provided that employees being subject to transferring procedure were in the scope of the employment security in transferor's workplace but the number of employees of transferee is less than 30, they may be excluded from the scope of employment security. The fact that employees were in the scope of the employment security when they were working for the transferor does not give them an acquired right to be in the scope of employment security regarding the employment relation transferred to the transferee[113]. In the same way, following transfer of a part of the workplace being in the scope of employment security, provided that the number of employees of transferor falls below 30, employees working in the remained part of the workplace shall be deemed as being excluded from the scope of employment security[114]. In fact, even though the main principle of the Labour Law is preserving legal situations of employees following transfer of workplace, being in the scope of employment security regarding the number of employees working in the workplace shall not be evaluated as a right arising from the employment contract[115].

The number of employees whose employment contracts are terminated should be taken into account while determining the number of employees working at the workplace indicated by LC. In fact, the employment contract shall not be finalized at the time of service of termination notice for termination with duration and therefore, employees whose employment contracts are terminated with duration preserve their title as employees of the workplace until the finalization of notice period. Additionally, other employees whose employment contracts were terminated before the time of termination notice, who initiated reemployment case because of that and who applied to the employer within 10 working days in order to be reemployed to work following judgment on invalidity of termination made by the employer in that case should be added to the number of 30 employees too[116]. Furthermore, provided that they initiated a reemployment case following the service of termination notice

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112 A. Eda Manav. "İşyeri Devrinde İş Güvencesi". *Prof. Dr. Sarper Süzek'e Armağan*, Istanbul: Beta, V: II, (2011), p. 1348-1349.

113 Gülsevil Alpagut. *İşyerinin Devri ve İş Sözleşmesinin Fesih Hakkı* (Istanbul: Beta, 2010), p. 183; Ercüment, Özkaraca. *İşyeri Devrinin İş Sözleşmelerine Etkisi ve İşverenlerin Hukuki Sorumluluğu* (Istanbul:Beta, 2008), p. 274; Manav, İşyeri Devri, p. 1372.

114 Mollamahmutoğlu and others, p. 1010.

115 Manav, İşyeri Devri, p. 1372-1373.

116 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 22/05/2019 numbered 2019/4366 E. and 2019/11755 K. (legalbank.com); 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 31/03/2008 numbered 2007/29950 E. and 2008/7008 K. (legalbank.com).

but it has not been finalized yet[117] or the case is finalized but 10 working days to apply to the employer to be reemployed to work has not expired yet[118], relevant court should evaluate these issues as a preliminary issue and wait until the conclusion of these issues. In fact, the invalidity of termination is suspended until the time that an employee applies to the employer within 10 working days and with the application, termination having been deemed as invalid by relevant court shall be void. Therefore, following employee's application, there is going to be a circumstance as if the employment contract was never terminated before. In other words, employee's duty of fidelity and employer's duty of caring employee which are excluded from parties' fundamental principle performances remain until the application of the employee. Indeed, it is accepted that the employer may terminate the employment contract with immediate effect if the employee acts against his/her duty of fidelity within this duration[119]. According to our opinion, in order to evaluate circumstances such as the fact that the employee initiated a reemployment case against termination but it has not been finalized yet or it is decided to invalidity of termination of the employment contract but the employee has not applied to the employer so as to be reemployed and his/her 10 working days period indicated in LC has not been expired yet as preliminary issues, these employees should be considered as being necessary for determining the number of 30 employees working in employer's workplace. Indeed, if the number of employees working in employer's workplace is 30 or more even without these employees or it does not make any difference to add these employees to the number of employees working in employer's workplace in order to reach 30 employees, these circumstances should not be evaluated as a preliminary issue in relevant case. On the contrary, supposing that an employee does not apply to the employer within the period of time indicated by LC, termination having been decided on its invalidity shall be deemed as valid and as a consequence of the finalization of employee's employment contract, it shall not be possible to add this employee to the number of 30 employees.

Workers excluded from LC are clearly indicated in Article 4 of LC and in this regard, workers who work in enterprises or workplaces, where agricultural and forestry works are performed in and where less than 50 (including 50) employees are employed in, are excluded from the scope of LC. As it shall be explained below in detail, another condition in order to evaluate employees as being in the scope of employment security is being subject to LC or the

117 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 28/09/2015 numbered 2015/18105 E. and 2015/26486 K. (legalbank.com); Mollamahmutoğlu and others, p. 1010; Yılmaz, Dava, p. 55; Tulukçu, p. 143.

118 Mollamahmutoğlu and others, p. 1010.

119 Kar, p. 35.

Code numbered 5953. For this reason, although there are more than 30 employees employed to work in these enterprises or workplaces, since it is required to have more than 50 employees in these enterprises or workplaces in order to apply LC to the employees of these enterprises or workplaces and it is required to be in the scope of the LC to benefit from employment security, workers of enterprises or workplaces that agricultural and forestry works are performed in shall not benefit from employment security unless there are more than 50 employees working at these workplaces[120]. In other words, on the condition that at least 51 employees are employed, provisions of employment security shall apply[121]. Additionally, the Turkish Court of Appeals indicates that for determining the number of 50 employees regulated by LC in order that these mentioned enterprises or workplaces might be subject to LC does not only cover the number of agricultural employees but it also covers the number of all other employees working in these enterprises[122].

With all these explanations, this condition regarding employment of 30 or more employees in employer's workplace is a relative imperative provision and it is possible to conclude a provision in employment contract so that employees working in workplaces with less than 30 employees may benefit from provisions of employment security[123]. Also with the collective labour contract, restriction regarding the working sector on this condition may be removed and it may be possible to agree on the application of employment security to all employees working in workplaces without distinction of working sector while determining the number of 30 employees[124]. Indeed, since it shall be on behalf of the employee, it shall be in conformity with the principle of relative imperative provision.

B. Conditions regarding the Employee

1. Being Subject to Provisions of Specific Codes defined by Labour Code numbered 4857

As another condition in order to be in the scope of employment security, an employee has to be employed within the scope of an employment contract which is subject to subject to

120 Ekmekçi and Yiğit, p. 617; Çelik and others, İş Hukuku Dersleri p. 512, Centel, p. 30; Tuncay, 30 işçi, p. 78; Eyrenci and others, (2020), p. 198; Kılıçoğlu, p. 1213; Alp, p. 6; Senyen Kaplan, p. 400.

121 Özkaraca, p.40.

122 9th Civil Chamber of the Turkish Court of Appeals dated 01/06/2020 numbered 2020/1076 E. and 2020/4530 K. (legalbank.com); Ertürk, p. 307.

123 Çelik and others,p. 527; Engin, Sona Erme, p. 141; 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 10/05/2018 numbered 2018/5398 E. and 2018/11553 K. (legalbank.com); 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 20/01/2020 numbered 2016/27237 E. and 2020/730 K. (legalbank.com); Sümer, p. 103; Uysal İbat, p. 47.

124 Canbolat, Toplu İş Sözleşmesi, p. 146.

LC or the Code on Regulation of Relations Between Workers Working in Press Profession and Employers numbered 5953.

Employees who shall be covered by LC are determined by provisions of LC. In this regards, people being deemed as employees in accordance with the first sentence of Article 2/1 of LC and on the other hand, not being in the scope of Article 4 of LC shall benefit from the scope of employment security[125]. Indeed, even though the definition of an employee is indicated in Article 2 of LC, some workers are excluded from the scope of LC with legislative authority. These are workers working;

i. In sea and air transportation
ii. In enterprises or workplaces where less than 50 (including 50) employees are employed and where agricultural and forestry works are performed
iii. In every kind of construction affairs which is within the scope of limits of family economy regarding agriculture
iv. In works performed in homes and as handcrafts without any help of other people among family members and relatives which is up to 3rd degree (including 3rd degree)
v. As apprentices
vi. As athletes
vii. As people being rehabilitated
viii. In workplaces where three people work in accordance with Article 2 of LC of Merchants and Craftsmen numbered 507

in accordance with LC. Since employment security is regulated under LC and these employees may not be deemed as being in the scope of application of LC, these employees indicated in the abovementioned article of LC may not benefit from the protection of employment security. In the same article, exceptions of this rule are listed. In this regard;

i. An employee working in embarking and unshipping works from ship to land and from land to ship at the coast or at the harbor and at the pier
ii. An employee working for all works performed in facilities on land regarding aviation
iii. An employee working for all works performed in industries and workshops where agricultural crafts are made and tools, machines and parts of them are produced for agricultural usage

[125] Centel, p. 29.

iv. An employee working in construction affairs made in agricultural workplaces
v. Employee working for works regarding parks and gardens which are open to the public or which are a part of the workplace
vi. An employee working for works regarding producers of water products who works at sea, who are not covered by the Maritime Labour Code and as an agricultural affair

shall be deemed as being in the scope of LC. With this regard, provided that they have other conditions to be in the scope of employment security, these employees may be covered by the employment security.

Additionally, a person has to be identified as an employee so that s/he may be covered by LC. As it is not possible to evaluate persons working without depending on any employment contract, officers, contract employee, apprentices or interns as an employee; these persons shall be deemed as being excluded from the scope of LC and therefore, from the scope of the protection of employment security[126].

In accordance with the last paragraph of Article 6 of the Code on Regulation of Relations Between Workers Working in Press Profession and Employers numbered 5953, Articles 18, 19, 20, 21, 29 of LC shall apply to employees being subject to the Code numbered 5953 by analogy. Whereas, workers being subject to TCO and Maritime Labour Code numbered 854 may not benefit from employment security[127]. Indeed, there is no regulation giving rise for seamen to benefit from employment security[128]. On the contrary, in accordance with Article 23 of the Code on Publication and Establishment Services of Radio and Televisions numbered 6112, employees with press card to be worked in news department of the press service provider are also subject to the Code numbered 5953 and therefore, should these employees have other conditions too, they may benefit from the scope of employment security[129].

In addition to this, in accordance with Article 25 of CTUCLC, employees whose employment contracts are terminated with issues regarding union may benefit from Articles 20 and 21 of LC. As a result of this, employees may initiate a case for reemployment without having other conditions regarding employment security if these terminations of the

126 Centel, p. 28.
127 Çelik and others,p. 510; Süzek and Başterzi, p. 583; Ekmekçi and others,p. 145; Ekmekçi and Yiğit, p. 614; Uşan and Erdoğan, p. 157-158; Özkaraca, Eleştirel Bakış, p. 93; Müjdat Şakar. *İş Hukuku ve Sosyal Güvenlik Hukuku*. 14th Edition (Beta, Ekim 2021), p. 126.
128 Taşkent, Gemi Adamları, p. 592.
129 Özkaraca, p. 34.

employment contract are arising from issues regarding the union[130]. As another opinion in the doctrine, this regulation, which is determined in CTUCLC and is regulated due to the importance of union rights and freedom, should also be regulated for reasons that are not accepted as valid reason under Article 18 of LC. According to this opinion, especially reasons regulated under Article 18/3-d of LC; employees working with an employment contract with definite duration should benefit from employment security for termination depending on reasons such as nationality, color, gender, marital status, family obligations, pregnancy, birth, religious, political view and similar reasons. Indeed, these circumstances indicated in this subparagraph should be evaluated as the most fundamental human right more than union right and freedom[131].

Since this provision is a relative imperative provision, it is possible that employees who do not benefit from the scope of employment security because they are not subject to LC or the Code numbered 5953 may be added to the scope of employment security by concluding a provision via collective labour contract or individual employment contract with employers[132]. The Turkish Court of Appeals also indicated in one of its judgments that it was possible to make employees working as flight attendance be subject to the scope of the employment security by concluding a collective labour contract[133]. The Turkish Court of Appeals also accepted in another case that it was valid to conclude an agreement regulating that employees working in air transportation may have been benefited from the protection of employment security via a collective labour contract[134]. These evaluations of the Turkish Court of Appeals arise from this provision's feature as a relative imperative provision. With

130 Güzel, Sona Erme, p. 239; Ugan Çatalkaya, p. 203; for an evaluation regarding the fact that even though conditions specified for employment security shall not be sought, the condition regarding employment contracts with definite duration should be sought for termination arising from reasons depending on union and therefore, employees whose employment contracts are concluded for a definite duration and are terminated with reasons depending on union may not claim for reemployment: Ercüment Özkaraca. "Sendikal Tazminat Talepli İşe İade Davasında Altı Aylık Bekleme Süresinin Aranmaması". *Tekstil İşveren Dergisi Hukuk Eki*, I: 160, (December 2013): p. 9.

131 Mollamahmutoğlu and others, p. 1013; for an evaluation in the doctrine indicating that the difference between employees being in the scope of employment security and employees excluded from the scope of employment security should be eliminated when there is breach of discrimination prohobition, there should not be any difference among employees when their dignity and honour is damaged as a consequence of breach of discrimination prohibition; Deniz Ugan Çatalkaya. "İş Hukukunda Eşit Davranma İlkesinin İki Bileşeni, İşverenin Dar Anlamda Eşit Davranma Borcu ve Ayrım Yasağı". *Çalışma ve Toplum*, 2021/2: p. 874.

132 Çelik and others,p. 527; Centel, p. 52; Kar, p. 66.

133 22nd Civil Chamber of the Turkish Court of Appeals's judgment dated 06/05/2013 numbered 2013/6362 E. and 2013/9727 K. (legalbank.com).

134 9th Civil Chamber of the Turkish Court of Appeals's judgment dated 01/06/2020 numbered 2020/1076 E. and 2020/4530 K. (legalbank.com); 22nd Civil Chamber of the Turkish Court of Appeals's judgment dated 04/02/2020 numbered 2019/8764 E. and 2020/1548 K. (legalbank.com).

another explanation, there is no provision in LC indicating that the abovementioned provisions regarding employment security are absolute imperative provisions and that concluding new regulations for other employees is interdicted[135]. In fact, adding employees not being in the scope of employment security into the scope of employment security shall be in favor of employees. Therefore, parties of employment contracts may include employees working in the scope of Maritime Labour Code or the TCO to the scope of employment security.

Also, an employee working as an occupational health and safety professional with an employment contract shall be in the scope of employment security, provided that s/he is subject to the Press Labour Code or LC. On the other hand, it is also possible to make other occupational health and safety professionals benefit from the scope of employment security with provisions concluded under employment contracts. It is indicated in the doctrine that while considering duties and obligations, legal and criminal responsibilities of occupational health and safety professionals all together; it is mandatory to make new regulations so that they may benefit from the scope of employment security directly. It does not seem possible that occupational health and safety professional reporting employers to the Ministry and any other relevant institution will be employed by employers. Many occupational health and safety professionals knowing this situation shall be worried to report employers. Furthermore, according to this opinion, it is not sufficient that occupational health and safety professionals will only be in the scope of employment security directly but they also should be met with more effective regulations regarding employment security. In fact, unless occupational health and safety professionals are subject to more effective regulations regarding employment security, some of them may neglect their duties in order not to be dismissed[136].

It is regulated under Article 8/2 of the Code on Occupational Safety and Security numbered 6331 that termination of employment contract of workplace doctor and occupational safety professionals made by employers just because of reporting to the Ministry or any other relevant institution is forbidden and these employees won't be deprived from their rights in anyway and otherwise, compensation not being less than the amount of wage as 1 year concluded by employment contract shall be obliged to employer. When it is considered that this mentioned compensation to be obliged shall be concerning only with terminations or deprivations of rights to be made just because of reporting the Ministry or other relevant

[135] Canbolat, Toplu İş Sözleşmesi, p. 146-147.
[136] Ocak, p. 227-236.

institutions, workplace doctor and occupational safety professional may be dismissed or discriminated just because of performing their duties; it is more proper to make specific regulations including circumstances of dismissal of workplace doctors and occupational safety professionals or of their deprivation from their rights due to their duties[137]. Furthermore, the abovementioned regulation only regulates compensational obligation as a difference from the scope of employment security and does not regulate that occupational health and safety professionals will be reemployed in circumstances where there is a termination with invalid reason. As a result of this, it causes that occupational health and safety professionals may not benefit from sufficient protection.

Furthermore, when the Code numbered 6331 and other regulations in written law regarding this issue are evaluated together, it is also possible that the compensation specified by the Code numbered 6331 may be requested without initiating reemployment case for employees being in the scope of employment security. In fact, it is indicated as follows; *"rights of workplace doctor and occupational safety professional arising from the Labour Code and other codes shall be preserved"* in the regulation of the Code numbered 6331. Yet, there is no regulation preventing requesting this compensation without initiating reemployment case[138].

2. Obtaining 6 Months or More Seniority

It is clearly regulated by LC that provisions of employment security shall apply to employees obtaining 6 months or more seniority. Additionally, with the amendment dated 10/09/2014 and numbered 6552, it is indicated that this condition shall not be sought for employees working underground. As a result of the fact that the legislative authority did not restrict the type of employees working underground, if they also meet other conditions, employees working in all type of underground works without being restricted with miners shall benefit from provisions of the employment security without seeking this condition regarding seniority.

The reason why LC describes 6 months seniority is to provide a period of time for an employer to try and to know an employee while protecting the employee against employer's arbitrary termination on the condition that the employee has 6 months seniority. Especially, an employer seeing that her/his expectations regarding benefits of employee's abilities,

[137] Ocak, p. 251.
[138] Ocak, p. 255.

personality or work won't be realised may terminate the employment contract without being restricted with provisions of employment security[139]. Additionally, this situation may not be deemed as the probation period. On the one hand, an employer terminates an employment contract without giving notice or paying compensation, if the probation period is concluded between parties of the employment contract; on the other hand, an employer may terminate an employment contract without being subject to provisions of employment security via termination with duration within the duration as 6 months indicated in LC in order for an employee to benefit from employment security[140]. On the contrary, if other conditions exist, the employee may claim for compensation for bad faith damages as a difference from contracts with the probation period.

a. Calculation of the Duration of the Employee's Seniority

In accordance with the definition of the Turkish Language Association, seniority is the duration to be passed under a duty. While calculating the seniority period determined in order that an employee may be evaluated as being in the scope of employment security, the beginning and the end of the duration passing in the workplace is important for the calculation of the duration of 6 months of the seniority. As the beginning of this duration, the time that the employee commences to work *de facto* shall be taken into account[141]. While determining the duration of seniority, not the time that the employment contract is concluded but the time that the employee commences to work *de facto* shall be taken into consideration[142]. Provided that although the employee is ready to commence working and submits his/her workforce to the employer but the employer does not allow him/her to commence working, it shall be appropriate to consider that employee's seniority starts from the time that s/he submits his/her

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139 Münir Ekonomi. "İş Güvencesinde Yararlanma Şartı Olarak İşçinin Altı Aylık Kıdemi (Bekleme Süresi)". *İş Hukuku Ve Sosyal Güvenlik Hukuku Dergisi*, V: 9, I: 34, (2012): p. 10.

140 Gülsevil Alpagut. "İş Sözleşmesinin Feshi ve İş Güvencesi". *III. Yılında İş Yasası*, Bodrum, Türkiye Toprak Seramik. Çimento ve Cam Sanayi İşverenleri Sendikası, (21-25 September 2005), p. 206.

141 Canbolat, Toplu İş Sözleşmesi, p. 148; Centel, p. 46; Yusuf Yiğit. "Türk İş Hukuku Açısından İş Güvencesi Uygulamasında En Az Altı Aylık Kıdeme Sahip olma Koşulu". *Selçuk Üniversitesi Hukuk Fakültesi Dergisi*, V: 20, I: 2, (2012): p. 204; Mustafa Kılıçoğlu. "İş Güvencesi Hukukunda Feshin Geçerli Sebebe Dayandırılmasına İlişkin Yargıtay Uygulaması, Yargıtay Kararları Işığında İş Güvencesi". *Yargıç Güven Çankaya'ya Armağan Semineri,* Ankara, (2008): p. 38.

142 Münir Ekonomi. "Hizmet Akdinin Feshi ve İş Güvencesi", *Çimento İşveren Dergisi, Çimento Müstahsilleri İşverenleri Sendikası Yayın Organı*, V: 17, I: 2 Special Annex, (March 2003), p. 5; Ekonomi, Altı Aylık Kıdem, p. 23; Caniklioğlu, Sona Erme, p. 223-224.

workforce to the employer[143]. In the same way, when parties conclude an employment contract but decide between them that the employee shall commence working at a later date, it should be more appropriate for the essence of the waiting period to take the date that the employee commences working into account, not the date of signing of the contract[144]. Furthermore, even though employee's insurance premiums are paid incompletely by the employer, if it is proven with other proofs, it should be accepted that the employee worked in these periods[145].

In circumstances where even though the employee would commence working in the workplace but s/he may not have started because of illness for a short time and the commencement of working of the employee was postponed because of this, employee's seniority should be calculated from the time that the employee would have commenced to work if he had not gotten sick[146]. In addition to this, if the employee did not commence working because of a reason arising from his/her fault, it should be deemed that his/her seniority did not start[147] and the time that the employee commenced to work *de facto* shall be taken into account while determining the seniority period[148]. Provided that the probation period is concluded in the employment contract, this period shall also be added to this calculation[149].

22nd Civil Chamber of the Turkish Court of Appeals decided in a judgment that the period of time spent by the employee who had signed an employment contract but had taken vocational education for a while may not have been deemed as being in 6 months seniority, indeed, it was certain that the employee had not worked during that period of time and that education was just employer's instruction having been given before effects of the employment contract[150]. On the contrary, as a view of doctrine[151], since vocational education is given for

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143 Çelik and others, p. 524; Ulaş Baysal. "İş Güvencesinde Altı Aylık Kıdem Koşuluna İlişkin Sorunların Yargıtay Kararları Işığında Değerlendirilmesi". *Legal İş Hukuku ve Sosyal Güvenlik Hukuku Dergisi*, V: 8, I: 32, (2011): p. 1324.

144 Centel, p. 46.

145 Günay, p. 131.

146 Baysal, Altı Aylık Kıdem, p. 1324; Öner Eyrenci and others. *Bireysel İş Hukuku*. 9th Edition (Istanbul: Beta, 2019), p. 205.

147 Alpagut, p. 206-207; Ekonomi, Altı Aylık Kıdem, p. 23; Caniklioğlu, Sona Erme, p. 224.

148 Baysal, Altı Aylık Kıdem, p. 1324

149 Günay, p.131; Yılmaz, Dava, p. 57; Tulukçu, p. 154; Yıldız, Fasılalı Çalışma, p. 490.

150 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 28/06/2012 numbered 2011/14966 E. and 2012/12869 K. (legalbank.com).

151 Kar, p. 111.

performing duties of employees and the employee is in the scope of employer's right to manage, this duration should be deemed as a part of seniority.

Condition sought by LC regarding employee's seniority shall be calculated by summing times that the employee spent in one or different workplaces of the employer up. It is not necessary whether different workplaces belonging to the same employer are in the scope of the same working sector or not[152]. Indeed, the important issue in this regard is not spending time in *"same"* workplace but it is important that the employer is the same[153]. In other words, summing up of duration spent in employer's workplace depends on the condition that the employer is the same[154]. In addition to this, as a geographical restriction is not determined by LC regarding durations spent in different workplaces of the employer, neither is the condition regarding the fact that the workplace should be in the scope of the same working sector determined[155]. It is not important that former durations to be summed up are concluded with an employment contract with definite duration, as long as an employee performed his/her duties under an employment contract with indefinite duration at the time of his/her last working duration. Also, it is not obliged that the seniority period expires completely while performing duties being in the scope of LC or the Code on Regulation of Relations Between Workers Working in Press Profession and Employers numbered 5953. Regardless of whether the work performed by the employee is within these two codes for the whole duration of employment or not, if the employment contract is in the scope of one of these two codes at the time that the employment contract is terminated by the employer, it shall be deemed as sufficient for the application of employment security. Therefore, as it is not obliged that the whole part of the seniority period shall be spent in accordance with LC, employment durations spent by being in the scope of different codes such as TCO shall be added to the seniority period as 6 months in the condition that the employee is subject to LC at the time of termination[156].

On the contrary, the duration spent as an apprentice and intern shall not be taken into account while determining the seniority period because individuals may not be deemed as an

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152 Süzek and Başterzi, p. 590; Ertürk, p. 308; Ekonomi, Altı Aylık Kıdem, p. 17; Yiğit, Altı Aylık Kıdem, p. 220; Kılıçoğlu, Geçerli Sebep, p. 38.

153 Centel, p. 48.

154 Kar, p. 116.

155 Sümer, p. 103; Ekmekçi and others, p. 145; Çelik, Süreli Fesih, p. 45.

156 Baysal, Altı Aylık Kıdem, p. 1327; Mollamahmutoğlu and others, p. 1014.

employee for this period of time[157]. In fact, the Turkish Court of Appeals also accepts that the seniority period as 6 months should be deemed as employment seniority and this period must be spent by depending on an employment contract[158]. As a consequence of this circumstance, durations having been spent under representment or partnership relation with the employer before employment relation should not be taken into account while determining the seniority period[159]. A duration spent by the employee in different workplaces that belong to the same group of companies but have different legal personalities shall not be added to the seniority period[160].

There is no difference the employment contract is either for full-time or part-time. Especially concluding that there shall be no work on some days of weeks in some types of part-time contracts shall not make any difference whilst detecting employee's seniority. The seniority period as 6 months shall also continue to process on days of the week that the employee did not work in the workplace. In this regard, the essential issue for the seniority period is continuousness of the employment contract legally. In other words, it is sufficient for the seniority period that calendar days as 6 months are spent by being in the scope of the employment contract, determining the period as working days and days that the employee worked in are not the issue[161].

In accordance with an opinion in the doctrine, seniority periods of employees working with temporary employment relation (with borrowing employment relation) shall be calculated by supposing that the duration spent in the workplace of another employer (borrower) is spent in the workplace of the employer providing the employee (borrowee) by taking Article 7 of LC into consideration[162]. If the employee is employed after a while with a new employment contract in the workplace of the employer borrowing employee, duration having been spent before by being in the scope of a temporary employment contract with

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157 Osman Güven Çankaya and others. *Türk İş Hukukunda İşe İade Davaları*, (Ankara: Yetkin, 2006), p. 203; Centel, p. 49; Yılmaz, Dava, p. 57; Yiğit, Altı Aylık Kıdem, p. 218.

158 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 23/02/2009 numbered 2008/13047 E. and 2009/3265 K. (NJIS).

159 7th Civil Chamber of the Turkish Court of Appeals' judgment dated 14/10/2014 numbered 2014/12921 E. and 2014/18766 K. (legalbank.com).

160 Tulukçu, p. 146.

161 Ekonomi, Altı Aylık Kıdem, p. 15.

162 Çelik and others, p. 524; Yiğit, Altı Aylık Kıdem, p. 229.

borrowing employer shall not be taken into account, while determining the seniority period as 6 months for new employment relation[163].

In order to benefit from protections of employment security, there is no effect of transfer of workplace for whether the employment security shall apply with regard to the seniority period as 6 months. In fact, in accordance with Article 6 of LC, while determining the seniority period of the employee, the duration spent with the employer transferring workplace shall also be taken into account[164]. In other words, as a need of Article 6 of LC, for transfers of workplaces, the employer has to act in accordance with the conditions under which the employee commenced working with the employer transferring workplace regarding the rights arising from the duration of working and therefore, changing of the employer with transfer shall not affect seniority period as 6 months. However, if employees, whose contracts were terminated before the transfer of the workplace, start working with the transferee employer after the transfer, the time spent with the transferor employer will not be taken into account for calculation of the six-month seniority period[165].

6 months regarding employee's seniority period determined by LC should be evaluated as calendar days. In accordance with this, the day which is the same as a number of calendar with the day that the employment contract is started after 6 months shall be deemed as date of finalization of employee's seniority period[166]. 22nd Civil Chamber of the Turkish Court of Appeals indicated in one of its judgments that the duration should have been detected not by calculating days but by calculating months of the year in accordance with Article 92/2 of the Civil Procedural Code numbered 6100[167]. In accordance with LC, working periods determined under Article 66 of LC shall be taken into account for the calculation of the seniority period[168].

Provisions of employment security determined by LC did not use any word meaning that durations instead of times mentioned above and that suspending periods of employment

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163 Yiğit, Altı Aylık Kıdem, p. 230; 7th Civil Chamber of the Turkish Court of Appeals' judgment dated 21/04/2016 numbered 2016/153 E. and 2016/8918 K. (legalbank.com).

164 Süzek and Başterzi, p. 589; Manav, İşyeri Devri, p. 1372; Devrim Ulucan. "İşyeri Devrinin İş İlişkilerine Etkisi ve Devir Nedeni ile Yapılan Fesihlerin Hukuki Sonuçları". *Sicil İş Hukuku Dergisi*, I: 14, (June 2009): p. 36; Erol Akı. "İşyeri Devrinin İş Sözleşmelerine Etkisi". *Sicil İş Hukuku Dergisi*, I: 29, (March 2013): p. 10.

165 Mollamahmutoğlu and others, p. 1016.

166 Canbolat, Toplu İş Sözleşmesi, p. 148.

167 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 10/04/2018 numbered 2018/76 E. and 2018/8482 K. (legalbank.com).

168 Aydın Başbuğ and Mhetap Yücel Bodur. *İş Hukuku*, 6th Edition (Beta yayınları, April. 2021), p. 190; Yiğit, Altı Aylık Kıdem, p. 213.

contracts are generally excluded. In this regard, the suspending period of the employment contract shall be added to the seniority period as 6 months. In fact, in circumstances where employment contracts are suspended, even though principal duties are suspended such as performing work and paying wage, debtor-creditor relation shall continue. In addition to this, the employer shall have the duty of fidelity[169]. Whether the employment contract is suspended or not, the duration spent by depending on the employer shall constitute a seniority period regarding employment security[170]. Hence, duration such that the employee does not work because of illness and leave should be added to the calculation of the seniority period[171]. Whereas, according to one opinion in the doctrine, suspension duration of employment contract arising from the absence of the employee depending on a report for a long time to be taken after the employee commenced to work with an employment contract with an indefinite period of time shall not be taken into account while detecting employee's seniority as 6 months. It means that even though suspension durations arising from illness or unpaid leave with a short period of time should be taken into account while detecting employee's 6 months seniority, the absence of the employee arising from a report to be taken for a long period of time shall not be taken into account for employee's seniority[172]. On the other hand, the duration spent under strike and lockout should be added to this period of time. In fact, it is regulated under the CTUCLC that the duration spent under strike and lockout shall not be taken into account only for the calculation of the severance payment[173].

Regarding employees working with employment contracts concluded for seasonal work, in conformity with the Turkish Court of Appeals' judgments[174], suspension durations spent by employees while waiting next season should not be added to employees' seniority periods as 6 months and their seniority periods should be calculated only in accordance with durations in which employees work. According to an opposite opinion in the doctrine, when it is taken into consideration that employees working for seasonal works commence working again in the workplace following the finalization of the suspension duration and at the beginning of the season without the need of concluding a new employment contract, suspension duration passed by employees in order to wait the next season should be taken into

169 Süzek and Başterzi, p. 590; Başterzi, İş Güvencesi Kuralları, p. 638-639.

170 Çelik and others,p. 524; Mollamahmutoğlu and others, p. 1015.

171 Sümer, p. 103.

172 Günay, p. 131.

173 Mollamahmutoğlu and others,p. 1015; Özkaraca, p. 49

174 9th Civil Chamber of the Turkish Court of Appeals' judment dated 10/10/2008 numbered 2007/27615 E. and 2008/26209 K. (legalbank.com); 9th Civil Chamber of the Turkish Court of Appeals' judment dated 28/12/2009 numbered 2008/12274 E. and 2009/38104 K. (legalbank.com)

account while employees' seniority periods as 6 months. On the other hand, provided that employees work for other employers within this suspension period, the period of time passed by employees under another employer's authority should not be added to employees' seniority periods as 6 months[175]. However, provided that employees work for another work of their same employers, the duration spent for this other work should be taken into account while calculating employees' seniority periods as 6 months[176].

In order that an employee benefits from regulations protecting against termination, it is obliged that this 6 months seniority period must be spent within employment relation depending on employment contract under the authority of the same employer[177]. While detecting 6 months, the first day of working *de facto* and last day of working (and days which shall be deemed that an employee worked at) that employment contract is terminated shall be taken into account[178]. Contrary to issues regarding suspending duration mentioned above, it is not possible for the duration determined for notice period to be taken into account while determining the seniority period. The essential issue for calculating the seniority period of the employee being in the scope of employment security is how much is it at the time of usage of the right to terminate, in other words at the date of the termination notice. Indeed, the Turkish Court of Appeals also indicated in one of its judgments dated 2009 regarding this issue that it could not have been considered that the seniority period would have been completed at the time of finalization of the notice period, by indicating that the seniority period as 6 months would be completed at the time that the termination notice was served to employee[179]. In another explanation, in order to detect the date that the seniority period shall be completed, contrary to the calculation of the seniority period for the severance payment[180], the time that

175 Yiğit, Altı Aylık Kıdem, p. 216.

176 Yiğit, Altı Aylık Kıdem, p. 216; 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 28/12/2009 numbered 2008/12274 E. and 2009/38104 K. (legalbank.com)

177 Kılıçoğlu, p. 1214.

178 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 14/02/2018 numbered 2017/20305 E. and 2018/2781 K. (legalbank.com); Canbolat, Toplu İş Sözleşmesi, p. 148; Centel, p. 46; Yiğit, Altı Aylık Kıdem, p. 204.

179 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 23/02/2009 numbered 2008/13047 E. and 2009/3265 K. (Perosnal Archive); this issue is evaluated in one another judgment of the Turkish Court of Appeals as that working days and days that employees are considered to have been worked between the first day that employees commenced to work de facto and the time that termination notice was served should be taken into account while determining the seniority period as 6 months (9th Civil Chamber of the Turkish Court of Appeals' judgment dated 04/02/2019 numbered 2019/66 E. and 2019/2622 K. (legalbank.com)).

180 For evaluation indicating that seniority period for calculation of severance paymnet shall be deemed as being finalized at the time that notice period expired when there is a termination with duration; Süzek and Başterzi, p. 802; Mollamahmutoğlu and others, p. 1209; Yılmaz, Dava, p. 244.

the termination notice was received by the employee shall be taken into account[181]. As a consequence of this, even though employee's seniority period as 6 months would be fulfilled following the expiration of the notice period, it is not possible to add a notice period to employee's seniority period as 6 months and if employee's seniority period is not 6 months or more at the time of service of termination notice, it shall be accepted that employee's seniority period as 6 months specified in order for him/her to be in the scope of employment security does not exist[182]. Additionally, the Turkish Court of Appeals decided in a case that the employee could not benefit from the scope of provisions of employment security by evaluating that the employee had commenced working in that workplace on 10 June 2015, employment contract had been terminated by the employer, it had been noticed to the employee on 07 December 2015, since the employee had not taken termination notice, termination notice had been also sent via notary on 08 December 2015, the employee declared and accepted in his/her petition that termination date of employment contract had been on 08 December 2015, on the other hand, the seniority of the employee having been commenced to work in the workplace on 10 June 2015 was not completed 6 months at the time of termination[183].

For terminations performed when employees were in the workplace, there shall not be any problem with non-delivery of the termination notice to the employee. Provided that an employee does not accept to receive a termination notice, a minute reporting this circumstance may be concluded. In this circumstance, the date of conclusion of this minute shall be deemed as the date of termination and the seniority period as 6 months shall be evaluated by taking this date into consideration[184]. Provided that the employee is not in the workplace because of having a medical report, the seniority shall also be calculated by taking the time that the termination notice is received into account[185].

Lastly, it has to be mentioned that this regulation regarding the application of employment security is a relative imperative provision and therefore, it is possible that parties

181 Çelik and others, p. 520; Centel, p. 46; Ertürk, p. 308.
182 Yiğit, Altı Aylık Kıdem, p. 205-206; Caniklioğlu, Sona Erme, p. 224.
183 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 27/09/2017 numbered 2016/21327 E. and 2017/14307 K. (legalbank.com).
184 Özkaraca, p. 51.
185 Özkaraca, p. 52.

may remove this condition regarding employee's seniority period or minimize the duration of it by concluding employment contract between them[186].

b. Calculation of the Seniority Period for Intermittent Work

In some circumstances, it may be possible that previously, an employee worked with an employer and following termination of his/her employment contract, s/he is reemployed once again by the same employer. There is a discussion in this regard whether working duration having been spent with the same employer before shall be added to the duration regulated by Article 18 of LC or not.

According to an opinion in the doctrine that we also support, it shall not be sought that employment contract is not separated and it is possible to sum intermittent working periods up[187]. The length of the time between working periods is irrelevant when summing up employment durations across different times and workplaces under the same employer[188]. Besides, in accordance with the view of 9th Civil Chamber of the Turkish Court of Appeals, in order that an employee benefits from the protection of employment security, his/her seniority period spent in workplaces belonging to same employers at the time that termination notice is made should be 6 months, even though it depends on intermittent work[189]. In accordance with another judgment of 9th Civil Chamber of the Turkish Court of Appeals and doctrine, it is not effective for result whether the previous working period is finalized by paying the severance payment and the payment in lieu of notice period, it may not be understood that this period of time shall not be added to the seniority period as 6 months on the conditions that these compensations are paid by considering that employment relation is discharged[190]. In other words, even though compensations are paid to the employee working with intermittent

186 Sümer, p. 104; Ekonomi Altı Aylık Kıdem, p. 28; Yiğit, Altı Aylık Kıdem, p. 203.

187 Sümer, p. 103; Senyen Kaplan, p. 401.

188 Ekonomi, Altı Aylık Kıdem, p. 18; Yiğit, Altı Aylık Kıdem, p. 223.

189 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 21/02/2017 numbered 2016/5422 E. and 2017/2300 K. (legalbank.com); according to the evaluation of 7th Civil Chamber of the Turkish Court of Appeals, even though employment relation has been separated, times spent in workplaces belonging to same employer shall be summed up. Summing up times spent in different workplaces depends on the condition that employers are the same. In the calculation of the seniority period as 6 months, as a difference from the regulation determining the number of 30 employees, as a result of the fact that there is not an explicit regulation, it is not obliged that workplaces that the employee worked in before are in the same working sector (7th Civil Chamber of the Turkish Court of Appeals' judgment dated 14/10/2014 numbered 2014/12921 E. and 2014/18766 K. (legalbank.com)).

190 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 17/02/2009 numbered 2007/36441 E. and 2009/2758 K. (legalbank.com); for opinions supporting this evaluation; Mollamahmutoğlu and others, p. 1015; Kar, p. 112; Tulukçu, p. 148; Ercüment Özkaraca. "İş Güvencesinde Altı Aylık Bekleme Süresinin Hesabında Aralıklı Çalışmalar". *Tekstil İşveren Dergisi Hukuk Eki*, I: 164, (April 2024): p. 6.

employment relation under the control of the same employer for the previous period, the seniority period should be calculated by taking all working periods into consideration and the severance payment should be calculated in accordance with the last gross wage. However, while calculating the seniority period as 6 months, criteria regarding the severance payment may not be taken into consideration[191]. Yet, the severance payment having been paid to the employee for the previous period shall be decreased from the total amount while paying compensations[192]. For example, provided that the employee is dismissed with justified reason and with immediate effect or in probation period without any reason and following that s/he is employed again, on the condition that s/he has the seniority period as 6 months, s/he may benefit from the protection of employment security. As another example, provided that the employee is dismissed on the reasons that s/he stole something and for a while s/he is reemployed, while detecting seniority period as 6 months for specifying whether the employee is in the scope of employment security or not, period of time before stealing shall also be taken into account[193]. Additionally, the seniority period of the employee resigning from his/her work with the reason of being retired shall be detected also by taking previous working period into consideration, it shall not be calculated in accordance only with the last seniority period of the employee and his/her employment contract shall not be terminated without reasonable reason[194].

On the contrary, according to 22nd Civil Chamber of the Turkish Court of Appeals' judgment, in order to be in the scope of employment security regulated under the first paragraph of Article 18 of LC, it had been obliged to have at least the seniority period as 6 months. In accordance with the fourth paragraph of the same article, the seniority period as 6 months should have been calculated by taking the period of time spent in different workplaces belonging to the same employer into account. On the other hand, provided that employee's working period spent in employer's workplace had been terminated in accordance with Article 17 of LC, debts and compensation regarding that period of time had been paid, following, a new working period had commenced by signing a new employment contract concluded between the employer and the employee, the period of time whose debt and compensation had been paid should not have been taken into account while determining the

191 Ekonomi, Altı Aylık Kıdem, p. 12.
192 Yıldız, Fasılalı Çalışma, p. 492.
193 Şahlanan, p. 59-60.
194 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 25/02/2015 numbered 2014/36038 E. and 2015/8016 K. (legalbank.com). For opposite opinion; Günay, İş Güvencesi, p. 185-186.

seniority period as 6 months[195]. Yet, 22nd Chamber abandoned this opinion and evaluated as[196];

> *"In accordance with the case-law concluded following the comprehensive evaluation of our Chamber on the issue regarding whether the previous working period discharged by paying compensation or finalized by a manner not needing compensation payment shall be added to the following working period while determining the seniority period as 6 months in order that provision of employment security shall apply, it is accepted that the seniority period as 6 months should be calculated by summing intermittent working periods up if employee's intermittent working period is terminated by paying compensation or in a manner not needing compensation payment, on the condition that new working period is commenced in 1 year from the time of termination[197].*
>
> *In the concrete dispute, the claimant worked for the employer being the defendant of this case for different 2 periods. According to the reports of Social Security Institution and workplace records, the first working period of the claimant happened between 05/11/2010 and 18/01/2016 and the second working period happened between 30/05/2016 and 07/11/2016. Although the claimant declared that the second working period had commenced on 02/05/2016 and there had been the seniority period as 6 months but could not prove these allegations; since it is certain that the first working period of the claimant was discharged on 18/01/2016 by paying compensation; the second working period commenced in 1 years from the time of termination of working; it is needed to calculate the seniority period as 6 months by summing intermittent working periods up. With this regard, as a result of the fact that the claimant has a condition as having the seniority period as 6 months by summing up two intermittent working period, even if there should have been an examination regarding the merits of the case, dismissal of the case on procedural grounds by depending on the absence of case requirements caused to need to overturn the judgment"*

This decision is criticized by some scholars in the doctrine with the opinion that this 6 months period should happen in one whole service period and the previous period of time should not be added to this calculation[198]. As another opinion in the doctrine, the problem has to be evaluated according to manner of separation of the employment contract. In accordance with this opinion, if separation arises from an employer's authority arising from an employment contract or employer's act that does not depend on the acceptance of the

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195 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 20/10/2011 numbered 2011/1014 E. and 2011/3133 K. (legalbank.com); 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 15/06/2012 numbered 2011/16086 E. and 2012/13572 K. (legalbank.com).

196 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 12/09/2018 numbered 2018/10008 E. and 2018/18413 K. (legalbank.com).

197 For an opinion supporting this evaluation of the Turkish Court of Appeals by indicating that disappearance of purpose waited from working duration as 6 months should be deemed as a basic principle for longness of intermittent duration and until a legal change, it is proper to take the duration for 1 year into consideration as a criterion for constant judicial evaluation: Özkaraca, Aralıklı Çalışma, p. 6.

198 Ekmekçi and Yiğit, p. 621; Canbolat, Toplu İş Sözleşmesi, p. 148.

employee, these working periods should be summed up. However, provided that termination issued by the employer depends on a justified reason, these durations should not be summed up while determining the seniority period as 6 months. Furthermore, if the employment contract is separated because of termination made by the employee, these working periods should not be summed up because there is a duly waiving from a right[199].

c. Termination to be Issued Shortly Before the Complation of Six Months Seniority

It is controversial what would happen, should an employer terminate the employment contract shortly before the expiration of the seniority period regulated by LC so that the employee may not benefit from the protection of employment security. According to one opinion in the doctrine, provided that the employment contract is terminated shortly before the expiration of the seniority period regulated by LC just to prevent the employee from benefiting from the scope of employment security, the employee may not benefit from the protection of employment security. Yet, on the condition that employer's bad faith is proven by the employee, s/he may receive compensation arising from bad faith in the amount of three times of the wage for the notice period which is indicated in Article 17 of LC[200].

Contrary to this, some scholars in the doctrine, that we also support, indicates that an employer shall reach his/her goal if s/he acts to prevent the employee from benefiting from the protection of the employment security and it is accepted that the employee may only receive the compensation regulated under the 6th paragraph of Article 17 of LC. When it is considered that the general measure of abuse of right is to prevent people using their rights in this way from accomplishing their goals that they desire to realise, if it is proven that the employment contract is terminated shortly before the expiration of the seniority period as 6 months regulated by LC just for preventing the employee to benefit from the protection of employment security, the employee should benefit from the protection of employment security and may initiate a case for reemployment[201]. According to an opinion in the doctrine in the same way, on the condition that the termination procedure is processed just to prevent application of protection of employment security, the employee should benefit from the scope

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199 Mehmet Uçum. *Yeni İş Kanunu Seminer Notları*. (Legal, September 2003), p. 136-137; Serkan Odaman. "İş Güvencesi Koşulu Olarak Altı Aylık Süresinin Hesaplanmasında "Birleştirilmenin" Değerlendirilmesi". *Sicil İş Hukuku Dergisi*, I: 29, (March 2013): p. 111-112.

200 Mollamahmutoğlu and others,p. 1017.; Ekmekçi and Yiğit, p. 622; Baysal, Altı Aylık Kıdem, p. 1334; Özkaraca, Eleştirel Bakış, p. 102.

201 Süzek and Başterzi, p. 594; Çelik and others,p. 520-521; Kar, p. 114; Başterzi, İş Güvencesi Kuralları, p. 639; Uysal İbat, p. 53-54; Yiğit, Altı Aylık Kıdem, p. 226.

of employment security in accordance with the good faith[202]. Furthermore, the 9th Civil Cahmber of Turkish Court of Appeals indicated in one of its judgments that, by considering the definition of condition regulated under Article 154 of TCO (Article 175 currently), provided that the employer prevented the occurrence of the seniority period as 6 months in a manner which was against to good faith, it should have been accepted that the condition happened and the employee may have benefited from the protection of employment security[203]. Contrary to this judgment, 22nd Civil Chamber of the Turkish Court of Appeals disagreed with this opinion by indicating that[204];

> *"In accordance with Article 18 of Labour Code numbered 4857, in order to benefit from employment security, employee's seniority period which passed in the same or different workplaces of the employer by depending on employment relation whether it is intermittent working or not should be at least 6 months at the time that termination notice is issued.*
>
> *In the concrete dispute, the claimant worked as a packing technician between 02/10/2006-30/03/2007. The claimant took an education program from 16/08/2006 on which the employment contract was signed by the employer to 01/10/2006.*
>
> *Between these mentioned dates, it is certain that the claimant was educated by the employer for the work that s/he would operate in a specific place and the employee did not work de facto in this period of time. Following the education .... Employee's commencement of working is registered on 02/10/2006. Mentioned education has the characteristics of employer's briefing before the employment contract. Having been participated by the employee before working, the education duration of the employee who failed in this education having provided by the employer because the work performed is dangerous and tough regarding food producing and there is a big risk that the employee may cause serious incidents on packing straps with any small absence of ability should not be deemed as being in the scope of the seniority period. The employee's working de facto is regarding the working passed between 02/10/2006 and 30/03/2007 as it is placed in working records. The seniority period of the employee is 5 months and 29 days so it is below 6 months. The claimant's condition to benefit from the employment security is not accomplished. Even though it is needed to reject the request of the claimant, it is incorrect to decide in a written manner and it caused to need to overturn the judgment"*

with one of its judgments and it is decided that although the employment contract is terminated shortly before the expiration of the seniority period regulated by LC, the employee may not benefit from the scope of employment security[205].

3. Not Being an Employer's Representative with Certain Qualifications

For organizing an enterprise and a workplace, employers should directly use their authority to manage. As they may individually use all or a part of their authorities, they may

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202 Çelik, Süreli Fesih, p. 43; Doğan Yenisey, Sona Erme, p. 447; Güzel, Sona Erme, p. 241.

203 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 26/10/2009 numbered 2009/1971 E. and 2009/29079 K. (Lexpera.com).

204 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 08/06/2012 numbered 2011/14966 E. and 2012/12869 K. (Yargıtay Karar Arama).

205 For supporting evaluation regarding the Turkish Court of Appeals' judgment; Ekmekçi and Yiğit, p. 622.

use their authority via their representatives by transfering management of enterprise, workplace or work to these people[206].

Employer's representative is described by Article 2 of LC as *"people acting on behalf of an employer and taking part in the management of enterprise, workplace or work"*. In accordance with this provision, there have to be two conditions as *"acting on behalf of an employer"* and *"taking part in the management of enterprise, workplace or work"* in order to be considered as an employer's representative[207].

As an enterprise may generally be described as an organized place to which one or more workplaces belonging to an employer are binding for realising economic goals, a workplace is the unit organized with both tangible and intangible elements and employees by an employer in order to produce product and service. As an enterprise is organized for economic goals, workplace is organized for technical purposes[208].

While determining the difference between an enterprise and a workplace, it is not important whether the work performed by employees is for profit or not. Provided that the purpose of performed business is to obtain profit- whether there are one or more workplaces- this place shall be deemed as an enterprise. Generally, an enterprise has a wider scope as a term when compared with the workplace. Yet, an enterprise should not be deemed as an unification of more than one workplace all the time. Sometimes enterprise may occur from only one workplace[209]. When enterprise and workplace are the same, for example an employer has only one factory, the purpose followed by the employer with this business should be taken into account and if the purpose is to obtain profit, this place shall be evaluated as enterprise. However, as the purpose of the business of an union, a foundation or an association is not to obtain profit, there shall be only workplaces for these examples[210].

In order to act on behalf of the employer, there has to be representative authority given by the employer. Restriction and scope of this representative authority of the employer's representative may be regulated by the employer unilaterally or by a provision concluded with an employment contract[211]. The source of representative authority may be employment,

206 Tulukçu, p. 157.
207 Secarettin Göktaş. "İşveren Vekilinin İş Güvencesi". *Çalışma ve Toplum*, I: 20, 2009/1: p. 62.
208 Kar, p. 294-295; Süzek and Başterzi, p. 205; Doğan Yenisey, İşletme ve İşyeri, p. 66.
209 Süzek and Başterzi, p. 205-206.
210 Eyrenci and others, (2020), p. 201
211 Tulukçu, p. 158.

representation and corporation agreement or Administrative Law[212]. Yet, the main representative authority in the Labour Law is the authority arising from employment contract. In this regard, representative authority given by the employer has to be for the employee. There is no formal requirement for giving representative authority to the employee. Representative authority may be given at the time that the employment contract is concluded between parties or during the continuation of the employment contract[213]. According to one aspect in doctrine, provided that representative authority does not arise from the need for any code but it arises from employment contract, it is possible to restrict representative authority or take it back wholly. Additionally, as a need of title, function, position or nature of the work embarked by an employee; if an employee takes this representative authority inevitably, the fact that the employer restricts this authority or takes it back wholly unilaterally shall be deemed as a change of one of essential conditions of the employment contract[214]. In addition to this, taking part in management may be for the whole or for a part of an enterprise, workplace or work[215].

According to provisions of LC, in order to be deemed as an employer's representative, the wideness of the scope of management duty and authority obtained by him/her is not important. Whatever the wideness of the scope of management duty and authority is, the employer's representative represents the employer against and demonstrates the authority of the employer to other employees working in the unit that s/he is responsible for. As long as management duty and authority are increased, it is observed that the employer's representative participates more in the definition of decisions of the employer regarding the enterprise, workplace or work. Employees communicate with representatives of the employer, more than with the employer, and they are affected by decisions or procedures decided and applied by representatives of the employer[216].

In accordance with Article 13/A added with the Code on Amendments to the Labour Code, Union Code and the Code on Regulation of Relations Between Workers Working in Press Profession and Employers numbered 4773, employer's representatives excluded from the scope of employment security was only indicated as employer's representatives managing and administrating whole enterprise. Additionally, by bringing new regulation with LC, it is

212 Süzek and Başterzi, p. 195.
213 Göktaş, İşveren Vekili, p. 62.
214 Mollamahmutoğlu and others p. 237; Süzek and Başterzi, p. 195.
215 Göktaş, İşveren Vekili, p. 63; Süzek and Başterzi, p. 195.
216 Kar, p. 132-133.

indicated that both employer's deputy representatives managing and administrating the whole enterprise and employer's representatives managing and administrating the whole workplace and having authority to employ and to dismiss employees shall not be either deemed as being in the scope of employment security.

In accordance with the provision regulated with LC, provisions of employment security may apply neither for employer's representatives and employer's deputy representatives managing and administrating the whole enterprise nor employer's representatives managing and administrating the whole workplace and having authority to employ and to dismiss employees. The purpose of this provision is to enable an employer to terminate the employment relation of employer's representatives if the trust between the employer and the employer's representative, who closely participates employer's management, is damaged. In fact, this issue is also regulated in Italian Law and in accordance with Italian Labour Law, labour courts apply more flexible criteria compared with strict and obliged regulations for terminations of employment contracts of lower level employees to employer's representatives, by considering the main feature determining employment contract of senior authorized employees and relation depending on the unique characteristic[217].

In accordance with this provision, according to the organization scheme, general managers and their deputies managing the whole enterprise shall be evaluated in this scope. The organization scheme shall be effective while determining employer's representatives [218]. Yet, as it is indicated in judgments of the Turkish Court of Appeals, only usage of the title as general manager or deputy general manager shall not give rise them to be excluded from the scope of employment security. The important issue is whether representative authority is given to them or not and whether they manage the whole enterprise or not. In this regard, the definition of duty and the position of the employee should be taken into consideration[219]. Additionally, according to the one opinion in the doctrine, in order that mentioned employer's deputy representatives are excluded from the scope of employment security, it is not necessary whether they manage and administrate the whole enterprise or not but it is

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217 Luca Failla and Francesco Rotondi. "Italy". in Labour Law A Pratical Global Guide, editor: Agusti Jausas, London: Global Law and Business, (2011): p. 332.

218 Doğan Yenisey, Sona Erme, p. 452.

219 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 01/06/2009 numbered 2008/34062 E. and 2009/15081 K. (legalbank.com); 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 14/06/2017 numbered 2016/14607 E. and 2017/10479 K. (legalbank.com); Ertürk, p. 309; Süzek and Başterzi, p. 595.

sufficient that they are employer's deputy representatives obtaining these kinds of authorities determined by LC[220].

In accordance with the one opinion in the doctrine, as need for literal interpretation of the mandatory provision of LC, employer's representatives having authority to employ and dismiss employees should be separated from employer's representatives managing and administrating the whole enterprise. For this reason, employer's representatives managing and administrating the whole workplace without having authority to employ and dismiss employees and employer's representatives that don't have authority to manage the whole workplace but that may employ and dismiss employees directly and individually without needing any approval or acceptance of the employer or of other employer's representative shall be evaluated as being excluded from the scope of the employment security. According to this, they have authority to employ and dismiss employees but employer's representatives have to take approval or acceptance of the employer or any other more authorized employer's representative so that employment or dismissal shall be effective, even though they have titles as *"human sources manager"* or *"personnel manager"*, they shall not be evaluated as being excluded from the scope of employment security[221].

In accordance with another opinion in the doctrine that we also support, employer's representatives managing and administrating the whole workplace and having authority to employ and dismiss employees shall not benefit from the protection of employment security. These conditions specified for employer's representatives managing and administrating the whole workplace are determined as cumulative. Therefore, in order that employer's representatives managing and administrating the whole workplace may be excluded from the protection of employment security, these representatives should have both authorities to manage and administrate the whole workplace and have authority to employ and dismiss employees[222].

In one of judgments of 9th Chamber of the Turkish Court of Appeals, it is indicated that by explaining that the second group of employer's representatives that do not benefit from the scope of employment security are employer's representatives that manage and administrate not the enterprise but the workplace and have authority to employ and dismiss employees; without seeking any other condition, on the one hand, employer's representatives

220 Eyrenci and others, (2020), p. 200.
221 Mollamahmutoğlu and others,p. 1018-1019.
222 Süzek and Başterzi, p. 595; Çelik and others, p. 525.

managing and administrating whole enterprises shall be deemed as employer's representatives in the meaning of Article 18; on the other hand, in order to be deemed as employer's representatives in the meaning of Article 18, employer's representatives managing not the enterprise but the whole workplace have to have authority to employ and dismiss employees additionally. Once again, in the same judgment, it is indicated explicitly that the authority to manage and administrate the whole workplace and authority to employ and dismiss employees shall be sought together for representatives of authority managing and administrating the whole workplace[223].

As it is explained above, in order to consider that employer's representatives managing and administrating the whole workplace are excluded from the scope of employment security, these representatives also have to have authority to employ and to dismiss employees on behalf of the employer. Furthermore, the fact that there is only authority to employ or authority to dismiss employees is not sufficient either[224]. These two authorities have to be at the same time. It should be more proper to evaluate each case regarding whether employer's representatives may employ or dismiss employees on behalf of the employer, instead of generalizing. However, unless otherwise is indicated, it should be accepted that the chef or headworker as a senior employer's representative has authority to conclude an employment contract and dismiss employees on behalf of the employer. With another explanation, senior employer's representatives working in this workplace should be deemed to have authority to employ and to dismiss an employee on behalf of the employer unless there is a restriction regarding this authority[225]. In conformity with these explanations, a manager of a branch of a bank or factory manager shall not be deemed as employer's representatives in the meaning of Article 18, unless they don't have authority to employ and dismiss employees with their own free will in addition to their authority to manage and to administrate whole workplace[226] and they may benefit from the protection of employment security. In the same way, personal manager or human resources manager having authority to employ and to dismiss employees may benefit from protections of employment security since they don't manage and administrate the whole workplace. Yet, in a workplace depending on the enterprise, employees managing and administrating the whole workplace and having

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223 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 14/06/2017 numbered 2016/14607 E. and 2017/10479 K. (legalbank.com).

224 Kar, p. 136; Çelik and others, p. 526; Kılıçoğlu, p. 1215; Özkaraca, p. 57.

225 Ercan Akyiğit. *İçtihatlı ve Açıklamalı 4857 sayılı İş Kanunu Şerhi*, 2nd Edition, *V: 1-2* (Ankara: Seçkin, 2006), p. 79.

226 Yılmaz, Dava, p. 58.

authority to employ and dismiss employees may not benefit from protection of employment security[227]. In addition to this, although employer's representatives managing and administrating the whole workplace and having authority to employ and dismiss employees are excluded from protections of employment security by LC, as a result of the fact that there is no regulation for employer's deputy representatives managing and administrating whole workplace and having authority to employ and to dismiss employees to be excluded from the scope of employment security, they should be evaluated as being in the scope of employment security[228].

As a rule, an employer's representative's authority regarding employing and dismissing employees should be continuous and has to exist at the time of termination of the employment contract. Provided that this authority is given to an employer's representative temporarily or this authority to employ and to dismiss employees does not exist at the time of termination of the employment contract, this employer's representative has to be deemed as being in the scope of employment security[229]. On the contrary, for the existence of authority to employ and to dismiss employees, it is not necessary that there is a sign of an employer's representative under termination notice issued for other employees and procedure of dismissal is followed by the employer's representative[230].

In practice, even though employer's representatives managing and administrating the whole workplace do not have authority to employ and to dismiss employees actually, it may be demonstrated in the description of their duties as if they had these authorities so that these employees may not benefit from the protection of employment security. In these cases, it is clear that it is tried to deprive employees of the scope of employment security regulated with LC by employers. This circumstance shall be evaluated as a violation of good faith and this type of practice may not be deemed as valid[231].

As another opinion in the doctrine, in accordance with the last paragraph of Article 18 of LC, it may be assumed that employer's representatives being excluded from the scope of employment security may benefit from the provision regarding procedure and objection to

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227 9th Civil Chamber of Turksih Court of Appeals' judgment dated 26.05.2008 numbered 2007/35929 E. and 2008/12484 K. (legalbank.com).

228 Mustafa Kılıçoğlu. "4857 Sayılı Yeni İş Kanunu'nun 18. Maddesinin Yorumu". *A. Can Tuncay'a Armağan*, Istanbul (2005): p. 466.

229 Göktaş, İşveren Vekili, p. 70.

230 Ekmekçi and Yiğit, p. 632.

231 Talat Canbolat." İşe İade Kararlarının Uygulanmasında Dürüstlük Kuralı". *İş Güvencesi ve İşe İade Davaları*, Seminer, 29 Mayıs 2010, Kadir Has Üniversitesi and İstanbul Barosu, Istanbul, (2010): p. 86.

termination notice because Article 20 of LC is not mentioned in this paragraph[232]. On the other hand, in accordance with the opposite opinion in the doctrine, this circumstance is not effective for the result and therefore, Article 20 of LC mentioned above should not apply to these employer's representatives [233]. Besides, in the practice of the Turkish Court of Appeals, requests of employer's representatives being in this aspect are overturned[234]. In accordance with another opinion in the doctrine, it is accepted that the practice of the Turkish Court of Appeals is accurate because employer's representatives do not have any legal interest regarding declaratory judgment that does not give any opportunity to apply to the employer or to be reemployed, but indeed, these employer's representatives may initiate a case for performance to reach the severance payment and the payment in lieu of notice[235]. Also, according to different view in the doctrine, the practice of the Turkish Court of Appeals is accurate, as provisions regarding employment security are whole and provisions regarding litigation procedure may not be evaluated by separating from the request for reemployment[236]. As an opposite aspect in the doctrine, it is evaluated that, since the employment of employer's representatives in different workplaces depends on generally how the employment contract was terminated in the former workplace, Article 20 of LC gives an opportunity for employer's representatives considering that termination reason indicated by the employer is not accurate, considering that it is against their honor and decency or it has a feature to cause evaluation of their personality with doubts to request for a declaration of invalidity of reasons indicated in the termination notice, even though it is not possible to decide for these individuals in accordance with Article 21 as a consequence of the invalidity of termination, it should be more accurate to give them an opportunity to initiate a legal procedure by accepting that there may be a legal interest of them on the declaration of invalidity of termination[237].

As it is mentioned above, it may be emphasized that the condition regarding the fact that employees should not be employer's representatives in specific positions so that they may benefit from the scope of employment security is a relative imperative provision and they may be included into the scope of employment security with collective labour contracts or individual employment contracts. Yet, since employer's representatives managing and

232 Mollamahmutoğlu and others, p. 1021.
233 Şahlanan, Gazeteci, p. 567.
234 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 22/01/2007 numbered 2006/27697 E. and 2007/123 K. (legalbank.com).
235 Kar, p. 138.
236 Özkaraca, p. 60.
237 Mollamahmutoğlu and others, p. 1021; Göktaş, İşveren Vekili, p. 71-72; Tulukçu, p. 161.

administrating the whole enterprise are deemed as employers in accordance with Article 2/2 of CTUCLC and the practice of this code, neither may they be a member of employees' unions nor may they benefit from the scope of collective labour contracts. Because of this reason, employer's representatives managing and administrating the whole enterprise are excluded from the scope of employment security and they may not be included in the scope of the employment security with collective labour contracts. On the other hand, there is no restriction to make these employer's representatives benefit from the scope of employment security with individual employment contracts. Instead of these employer's representatives, employer's representatives managing and administrating the whole workplace and having authority to employ and to dismiss employees may be included in protection of employment security with collective labour contracts, even if they are evaluated as being excluded from the scope of employment security[238].

4. Being Employed with an Employment Contract with Indefinite Duration

It is regulated explicitly by the legislative authority that provisions regarding employment security only apply to employees working in the scope of employment contracts concluded for indefinite duration. For this reason, employees working in the scope of employment contracts concluded for a definite duration are excluded from the scope of employment security[239].

Employment contracts with definite duration are contracts that are concluded in written form between the employer and the employee by depending on objective reasons such as finalizing works with a definite duration or fulfilling a specific work. According to Article 11 of LC regulating employment contracts concluded for a definite duration, the principle is determined by emphasizing that when an employment relation does not depend on a specific period of time, it shall be deemed as an employment relation concluded for an indefinite duration. In other words, it is a principle that employment contracts are concluded for indefinite duration but they can be concluded for a definite duration as an exception[240]. Furthermore, since it is the principle that employment contracts are concluded for indefinite

238 Canbolat, Toplu İş Sözleşmesi, p. 154-155.
239 Sümer, p. 103.
240 Yılmaz, Dava, p. 53; Canbolat, Toplu İş Sözleşmesi, p. 150.

duration, the party claiming that the employment contract is concluded for a definite duration is obliged to prove this claim[241].

According to the Convention, contracting states may exclude some specific group of employers from the scope of application of provisions of this Convention wholly or partially. They are (i) employees working in the scope of the employment contract concluded for a definite duration or a specified task, (ii) employees serving a period of probation or a qualifying period of employment, having been determined previously and for a reasonable duration (iii) employees engaged on casual basis for a short period. However, contracting states should provide adequate precaution so that it shall not be possible to conclude employment contracts signed for definite duration so as to avoid the application of protective provisions of employment security[242].

Employment contracts concluded for definite duration are employment contracts which depend on a due date and which are finalized automatically following the expiry of their due date without a need for notification. In other words, parties of the employment contract are acknowledged about the due date of the employment contract at the time of the preparation of the employment contract. As a consequence of this, there is no need to notice about termination before the due date of the employment contract as a rule[243]. In fact, because of these functions of employment contracts with definite duration, they may not be terminated with a termination notice[244]. Yet, the only exception of this rule is the termination of employment contracts with definite duration having lasted more than 10 years by complying with notice period as 6 months after 10 years expired in accordance with Article 430/3 of the TCO and the effectiveness of this termination at the beginning of the month[245]. Due to these characteristic features of them, employment contracts with definite duration are excluded from the scope of employment security in international law and it is indicated that the scope of employment security only applies to employees working with employment contracts with indefinite duration[246].

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241 Kar, p. 123; Talat Canbolat. "Mevzuatta Öngörülen Bazı İş Sözleşmesi Türlerinin 4857 Sayılı İş Kanununun Belirli Süreli İş Sözleşmesine İlişkin Esasları Yönünden Değerlendirilmesi". *Legal İş Hukuku ve Sosyal Güvenlik Hukuku Dergisi,* I: 13, (2007): p. 191.

242 Ekmekçi and Yiğit, p. 609.

243 Eyrenci and others, (2020), p. 178.

244 Çelik and others, p. 484; Günay, İş Güvencesi, p. 184.

245 Ertürk, p. 298; Tulukçu, p. 100.

246 Çelik, Süreli Fesih, p. 35; Cuma Arif Demir. *Açıklamalı ve İçtihatlı İş Güvencesi ve İşe İade Davaları İş Hukukunda Zorunlu Arabuluculuk* (Ankara: Seçkin Yayınları, 2018), p. 38.

Even though their names are contracts with definite duration, contracts that do not obtain conditions to be evaluated as employment contracts with definite duration are going to be deemed as employment contracts with indefinite duration[247]. In other words, only the fact that parties name a contract as a contract with definite duration shall not mean that this contract shall be deemed as a contract with definite duration and provided that conditions to conclude an employment contract with definite duration do not exist, this contract shall be deemed as contract with indefinite duration[248]. Additionally, even though parties of the employment contract have objective reason to conclude an employment contract with definite duration, they may conclude an employment contract with indefinite duration despite this objective reason[249]. In the same way, just because of the fact there is a contract with definite duration in the relevant case, this reemployment case should not be rejected by the labour court immediately. Employment contracts with definite duration may be concluded more than one time only if there is a legitimate reason to conclude them more than one time. Therefore, when an employee and an employer conclude an employment contract with definite duration, the judge should examine whether there is an objective and essential reason in order to conclude an employment contract with definite duration or not[250]. In this regard, the Turkish Court of Appeals decided that construction of units of weaving and preparing units to commence to produce by installing machines was evaluated as work for a definite duration, because this work contained finalization of a specific work[251]. In addition to this, employment contracts with definite duration may not be concluded more than one (successive) unless there is a legitimate reason and otherwise, these employment contracts will be deemed as employment contracts with indefinite duration from the beginning of these contracts. As employment contracts with definite duration concluded more than one without any legitimate reason are going to be evaluated as employment contracts with indefinite duration, if there are other conditions to be in the scope of employment security, employees working with these employment contracts shall be deemed as being in the scope of employment security[252].

247 Ekmekçi and Yiğit, p. 611.

248 Uysal İbat, p. 58.

249 Canbolat, Değerlendirme, p. 191.

250 Yılmaz, Dava, p. 54.

251 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 01/06/2009 numbered 2008/34128 E. and 2009/15050 K. (lexpera.com).

252 İbrahim Subaşı," İşyerinin Kapatılması Nedeniyle İş Sözleşmesinin Feshinde Geçerli Neden Ve İş Güvencesi İlişkisi", *Sicil İş Hukuku Dergisi*, I: 7, (September 2007), p. 46.

Furthermore, provided that there is not a legitimate reason, it is not possible to conclude an employment contract with definite duration for the first time either[253].

The main purpose to terminate an employment contract with valid reason is to prevent employees and employers from being bound with an unlimited period of time with an employment contract with indefinite duration in accordance with the freedom of individuals. Conversely, the main purpose of immediate termination with justified reason is to enable parties of the employment contract to be free from the scope of the employment contract in accordance with good faith, if they are in a condition that they may not be compelled to continue employment contract, regardless of whether employment contract is concluded for a definite or an indefinite duration[254].

In order that employees working in the scope of employment contracts with indefinite duration are deemed as being in the scope of protection of employment security, it does not matter that this contract is concluded for part-time or full-time work[255] or it regulates, on-call working on the condition that this contract is concluded for an indefinite duration[256].

As seasonal employment contracts are deemed as employment contracts with indefinite duration, employees working with seasonal employment contract may be deemed as being in the scope of employment security[257]. Indeed, it was decided in one of the Turkish Court of Appeals' judgments that employment contracts of employees who had been employed for an indefinite duration and who left the work because of the end of the season would not have been finalized automatically. Yet, these shall be deemed as being suspended until the beginning of the next season. Therefore, the employment contract having been suspended because of the end of the season, unless there is a termination intention of parties, shall not be deemed as being terminated. Provided that an employee is not reemployed at the beginning of the next season, this practice shall be deemed as termination issued by the employer. Whereas, provided that this employee does not work again in spite of employer's invitation, it shall be deemed that employee's employment contract is terminated with justified reason by the employer on the ground of employee's absence or that the employment

253 Başterzi, İş Güvencesi Kuralları, p. 643.
254 Çelik and others, p. 476.
255 Mollamahmutoğlu and others, p. 1021; Ekmekçi and Yiğit, p. 612.
256 Akyiğit, İşçinin Ölümünü, p. 17.
257 Senyen Kaplan, p. 396.

contract is terminated by the employee[258]. Contrary to this, according to the Turkish Court of Appeals, provided that work is for only one season and the employment contract is finalized at the end of the season, this employment contract should be deemed as an employment contract with definite duration and employees being in this scope may not be deemed as being in the scope of employment security[259]. Yet, supposing that the employee is working with successive seasonal employment contracts, these contracts should be evaluated as one employment contract with indefinite duration. Employment contracts of employees who are employed with employment contracts with indefinite duration and who leave the workplace because of the finalization of the season are not finalized automatically, these employment contracts will be suspended until the working season of next year. Employment contract suspended following finalization of season may not be deemed as terminated unless there are intentions of parties of employment contracts. It is not possible for the employee to request for reemployment by claiming invalidity of termination because the employment contract is suspended at the end of the season. Indeed, in such case, the employment contract is not terminated but it is only suspended until the beginning of next season[260].

In accordance with a view in the doctrine, employment contracts with minimum and maximum duration are deemed as employment contracts with indefinite duration due to their feature. In other words, even if these employment contracts contain duration in appearance, they are indeed concluded for indefinite duration[261]. Even though this evaluation may be effective for employment contracts with minimum duration, in our view, it shall not be appropriate for employment contract with maximum duration. An employment contract with minimum duration is not finalized automatically following the expiry of minimum time, only with the expiry of this time, parties of the employment contract get their authority again to terminate the employment contract[262]. In this regard, if an employer terminates an

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258 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 05/06/2018 numbered 2017/8205 E.and 2018/12612 K. (legalbank.com); 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 29/11/2017 numbered 2017/7395 E. and 2017/19354 K. (legalbank.com); 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 11/02/2014 numbered 2014/54911 E. and 2014/3976 K. (legalbank.com).

259 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 21/04/2009 numbered 2009/39576 E. and 2009/11409 K. (legalbank.com).

260 Özkaraca, p. 39; 7th Civil Chamber of The Turkish Court of Appeals' judgment dated 14/11/2016 numbered 2015/7067 E. and 2016/19345 K. (legalbank.com).

261 Centel, p. 36; Mollamahmutoğlu and others, p. 1021-1022; Kar, p. 125; Muhittin Astarlı. "İş İlişkisinin Sona Ermesi ve Kıdem Tazminatı". *Yargıtay'ın İş Hukuku ve Sosyal Güvenlik Hukuku Kararlarının Değerlendirilmesi 2015*, Istanbul: Onikilevha, Seminer, (25-26 November 2016): p. 337-338.

262 Tulukçu, p. 122; Şükran Ertürk, "Belirli- Belirsiz Süreli İş Akidlerinin Sona Ermeleri ve Sonuçları Arasındaki Farklar", *Prof. Dr. Mahmut Tevfik Birsel'e Armağan*, Izmir, (2001): p. 98.

employment contract during or after the period of minimum time determined in an employment contract with minimum duration, employees working with these employment contracts may benefit from protection of employment security. The reason of this circumstance is that employment contracts for minimum duration shall not be finalized following the expiry of time automatically and these contracts maintain in effect as employment contracts with indefinite duration[263]. With another definition, employment contracts with minimum duration are contracts that parties restrict their rights to terminate an employment contract for a certain period of time and which are concluded for indefinite duration[264].

On the other hand, it is not possible to make the same evaluation for the expiration of maximum duration. Employment contracts with maximum duration are contracts that parties indicate how long the employment contract shall continue the longest and that they preserve their right to terminate. Since an employment contract may be terminated with duration within this maximum duration, this kind of employment contract shall be deemed as an employment contract with indefinite duration until the maximum duration specified by parties. In fact, at the time that maximum duration expires, the employment contract with maximum duration shall be finalized automatically, without the need for either the employer's or the employee's termination. In this regard, since the employment contract shall be finalized automatically at the end of maximum time, it shall not be possible for employees to benefit from employment security. Yet, on the other hand, employment contract with maximum duration is terminated before the expiry of the time by the employer, it may be possible for the employee to apply for protection of employment security[265]. Whereas, according to one opinion in the doctrine that we also support, since employment contract shall be finalized at the end of the maximum time specified in the employment contract, these employment contracts should be subject to one of the objective reasons which is indicated for employment contracts with definite duration and which is regulated under Article 11 of LC[266]. On the other hand, according to one another opinion in the doctrine, since an employment contract with the maximum duration is a contract with indefinite duration, the expiry of the maximum time shall not finalize the employment contract directly. As termination action is, indeed, an employer's

263 Tulukçu, p. 123; Kar, p. 124-125.
264 Astarlı, Sona Erme, p. 337.
265 Centel, p. 37; Süzek and Başterzi, p. 269; Tulukçu, p. 124.
266 Süzek and Başterzi, p. 269; Tulukçu, p. 124.

action to terminate an employment contract, the employee may request his/her reemployment in the scope of provisions of employment security[267].

The on-call working system is one of the systems regulated by LC. In accordance with Article 14 of LC, employment relation that is regulated by written contract and which regulates that an employee shall perform his/her duty to work only if there is a need for the employee regarding duties undertaken by him/her is a part-time employment contract depending on on-call working. The employer having the right to request from an employee to perform his/her duty to work by calling has to make this call at last in 4 days before the time that the employee shall work, unless agreed otherwise. Following the call made in accordance with this period of time, the employee has to perform his/her duty to work. Provided that daily working duration is not regulated in the employment contract, the employer has to employ the employee at least 4 hours successively in one day for each call. Employment contracts regulating on-call working are part-time employment contract due to their features[268]. This kind of employment contract may be concluded as employment contract with definite duration, provided that conditions to conclude an employment contract with definite duration are met, otherwise this contract shall be deemed as an employment contract with indefinite duration[269].

Remote working regulated under LC is employment relation that is regulated with a written employment contract and which regulates that an employee performs his/her duty to work at his/her home or outside of the workplace with technological communication devices in the scope of working organization provided by the employer. Even though this type of working is one of the flexible working manners, this employment contract shall not be deemed as an employment contract with definite duration just because of its feature, since this shall be deemed as an employment contract with indefinite duration, if the employee meets other conditions to be in the scope of employment security, the employee working with this type of employment contract benefits from protection of employment security[270].

In some circumstances, employment contracts should be concluded as contracts with definite duration more than one in need of provisions of relevant codes. As an example, in

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267 Mollamahmutoğlu and others, p. 1021-1022.

268 Öner Eyrenci. "4857 Sayılı İş Kanunu İle Getirilen Yeni Düzenlemeler Genel Bir Değerlendirme". *Legal İş Hukuku Ve Sosyal Güvenlik Hukuku Dergisi*, I: 1, (2004): p. 28.

269 Tulukçu, p. 120; Süzek and Başterzi, p. 283; 9th Civil Chamber of the Turkish Court of Appeals' decision dated 22/05/2006 numbered 2006/5115 E. and 2006/14969 K. (legalbank.com).

270 Tulukçu, p. 121.

accordance with paragraph 1 of Article 9 of the Private Education Institutions Code numbered 5580, employment contracts to be concluded between the manager, teacher, experienced teacher and professional teacher working in the institution and founder or representative of the founder may be concluded as a contract with definite duration and as written form at least one calendar year in accordance with the principles regulated by relevant regulation. This provision caused a conflict regarding whether employees working in the scope of this code may benefit from the scope of employment security or not among case-laws of different Civil Chambers of the Turkish Court of Appeals. In accordance with the opinion of 7th Civil Chamber and 9th Civil Chamber of the Turkish Court of Appeals, when it was taken into consideration that teaching and education activities of educational personals being in the scope of the Code numbered 5580 was continuing and despite the expression as at least 1 calendar year indicated in the Code numbered 5580, this employment contract should have been deemed as employment contract with minimum duration and educational persons should have been benefited from the scope of employment security[271]. On the other hand, 22nd Civil Chamber of the Turkish Court of Appeals was deciding that these contracts were contracts concluded for a definite duration[272]. This conflict between different Civil Chambers of the Turkish Court of Appeals is discussed in Decisions on the Unification of Conflicting Judgments of The Turkish Court of Appeals and it was declared as follows [273];

> *"While it is being understood that the features of employment contracts indicated in Article 9 of the Private Education Institutions Code numbered 5580 are contracts with definite duration, with the condition specified in Labour Code, it should be accepted that the objective condition specified under Article 11 of Labour Code numbered 4857 exists. In other words, when the provision of code obliges to conclude a contract with definite duration, the existence of an objective condition shall not be sought. In the circumstance that a contract should be concluded with a definite duration because of the provision of code, successive contracts with a definite duration may not remove features of these contracts as being with a definite duration.*
>
> *As a consequence of this situation, it is decided that the employment contract indicated in Article 9 of the Private Education Institutions Code numbered 5580 shall be deemed as an employment contract with a definite duration"*

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271 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 18/03/2015 numbered 2015/2422 E. and 2015/10971 K. (Yargıtay Karar Arama); 7th Civil Chamber of the Turkish Court of Appeals' judgment dated 25/11/2015 numbered 2015/309 E. and 2015/23221 K. (legalbank.com); For evaluations supporting this opinion in the doctrine: Canbolat, Değerendirme, p. 203 ff.

272 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 13/04/2015 numbered 2015/10818 E. and 2015/13309 K. (legalbank.com).

273 Grand General Chamber of Unification of Conflicting Judgments of the Turkish Court of Appeals' judgment dated 23/02/2018 numbered 2017/1 E. and 2018/2 K. (legalbank.com).

In this regard, it is indicated that employment contracts of employees working in the scope of this code are employment contracts with definite duration and therefore, protection of employment security may not apply to employees working in the scope of this code.

Finally, it should be declared that, since Article 18 of LC determining that employment security shall only apply to employment contracts with indefinite duration may not be changed by contracts, it is not possible to conclude provisions with employment contracts encompassing that employees working with employment contracts with definite duration shall also benefit from the application of employment security[274]. Indeed, the reason why employment contracts with definite duration may not be added to the scope of employment security is that these employment contracts may not be terminated unilaterally by one party of employment relation because of their unique feature.

5. Employer's Termination of the Employment Contract

a. Circumstances to Be Deemed as Employer's Termination

As it is understood explicitly from Article 18 ff. of LC regulating employment security, in order that employees may benefit from the protection of employment security, an employment contract should be terminated by the employer, in other words, by the unilateral intention of the employer without taking employee's consent. Provided that an employee terminates an employment contract or an employment contract is finalized with a mutual rescission contract, reemployment of this employee may not be taken into consideration anymore[275].

The right to issue a termination notice belongs to each party of the employment contract as a rule. It is sufficient to inform the other party about the declaration of intention regarding the termination notice and the validity of the declaration does not depend on the counter-party's acceptance. Furthermore, the intention to terminate the employment contract of the party issuing the termination notice should be understood explicitly[276].

Although an employment contract obliges parties of the contract to perform their duties continuously, each party may terminate this relation with a declaration of intention directed to counter-party in order to terminate the employment relation. The right to terminate an employment contract is a disruptive formative right giving authority to terminate relation

[274] Çelik and others, p. 528; Mollamahmutoğlu and others, p. 1136.
[275] Çelik and others, p. 511; Süzek and Başterzi, p. 596; Günay, p. 128.
[276] Çelik and others, p. 476-477.

immediately or after a while[277] and it is also a right that should be directed to the counter-party. As it gives authority to its owner to make changes in the counter-part's legal area unilaterally, the usage of formative rights depends on some general principles. Formative right regime regulated in this regard is formulated by principles as finalization of it with usage, as that it may not be taken back following usage of it, as that it may not be used by depending on conditions and time limit. This regime is consolidated by the period of prescription regulated by legislative authority. In fact, by making formative rights depend on a limited time, it is prevented that other party of the employment contract is in the risk of changing of legal circumstances for all the time[278].

Since a termination is a formative right and it affects the legal area of the other party directly, it should be made in a clear and explicit sense. With this same reason, as a rule, it is not possible to issue a termination notice depending on a condition[279]. On the other hand, according to an opinion in the doctrine, an exception of termination notice depending on a condition demonstrates itself in circumstances where conditions depend on voluntary intention and discretion of the counter-party of the employment contract[280]. In these circumstances, there is a termination notice depending on dilatory condition and provided that condition is not fulfilled by the counter-party of the employment contract, termination shall be effective from the time that condition is not performed in time. As an example, there is going to be effective termination depending on a condition if it is noticed that the employment contract shall be terminated when s/he acts in the same way following the warning penalty issued by the employer or does not accept changing of duty. In this circumstance, notice period shall commence from the time that condition happens[281]. Besides, a phrase such as *"provided that my wage won't be increased for next term, termination notice shall be effective from that time"* may also be demonstrated as an example of a declaration of intention[282]. The Turkish Court of Appeals accepts that employer's termination may be depended on a condition which shall be performed by employee's voluntary behaviors such that employee's

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277 Eyrenci and others, (2020), p. 179; Çelik and others, p. 476; Süzek and Başterzi, p. 546; Muhittin Astarlı. *İş Hukukunda İkale (Bozma Sözleşmesi)*. (Ankara: Turhankitabevi, 2016), p. 81.

278 Gaye Baycık. "İş Hukukunda Yenilik Doğuran Hakkın Etkisizleşmesi". *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası*, V: LXXII, I: 2, (2015), p. 59; Baycık, Gaye. *İş Hukukunda Yenilik Doğuran Haklar*. (Ankara: Yetkin, 2011), p. 231 ff.

279 Güzel, Sona Erme, p. 215; Çelik and others,p. 479; 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 28/02/2013 numbered 2012/14712 E. and 2013/4107 K. (legalbank.com).

280 Güzel, Sona Erme, p. 215; Çelik and others,p. 479; Kar, p. 336-337; Mustafa Kılıçoğlu and Kemal Şenocak. *İş Güvencesi Hukuku* (Istanbul: Legal, 2007), p. 55-56.

281 Kar, p. 143.

282 Çelik and others,p. 479.

employment contract shall be terminated if the employee does not accept the change of work[283]. However, according to the Turkish Court of Appeals, a resignation petition bounded to the existence of some conditions by the employee shall not constitute a resignation and it should be deemed as an offer for concluding a mutual rescission contract[284].

The right to terminate employment contract unilaterally is a right depending on individuals and as a result of this, it is not possible to waive from this right, it is not either possible to transfer this right totally to a third party in a manner that means waiving from a right. Additionally, collective labour provisions preventing employers' usage of the right to terminate employment contract or making usage of these rights difficult indirectly are not effective and therefore, they are not binding for employers[285]. Provided that there is no provision preventing the usage of the intention of termination, it is possible to restrict this right with example like a restriction issued in a manner that does not mean waiving from this right or with a provision indicating that termination made without the decision of discipline committee shall not be effective[286]. On the other hand, collective labour provision regulating that there has to be unanimity of the discipline committee to terminate an employment contract or that this committee has to take a decision in a very short period of time to terminate an employment contract may not be deemed as valid[287]. On the other hand, provided that the provision which is regarding termination notice periods specified in collective labour contracts and which regulates excessively long notice periods makes indirectly employer's right to terminate an employment contract impossible, this provision shall be deemed as invalid. In this case, instead of a provision which is not valid, legal termination notice periods indicated in Article 17 of LC shall be taken into account[288].

Supposing that there is no regulation in LC regarding the venue and time of termination notice, it is possible to issue a termination notice any time in a reasonable period and anywhere, whether in the workplace and in working period or not. Yet, a termination notice should not be issued at venue or at a time which is not in conformity with objective

283 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 01/06/2009 numbered 2008/36528 E. and 2009/ 16179 K. (legalbank.com).

284 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 24/11/2015 numbered 2015/23251 E. and 2015/33400 K. (legalbank.com); for the supporting evaluation in doctrine: Astarlı, İkale, p. 94-95.

285 Canbolat, Toplu İş Sözleşmesi, p. 155; Kemal Tunçomağ and Tankut Centel. *İş Hukukunun Esasları*, (Istanbul: Beta, July 2022), p. 218.

286 Başbuğ and Yücel Bodur, p. 185.

287 Canbolat, Toplu İş Sözleşmesi, p. 155-156.

288 Süzek and Başterzi, p. 556.

principles of good faith. Otherwise, termination shall be deemed as invalid[289]. Furthermore, although a termination notice may be issued at the period of time that the employment contract is suspended, the notice period may not continue to pass during the period of suspension[290].

Termination notice is a disruptive formative right to be used unilaterally so that it shall be effective following service of this intention to the counter-party and it may not be taken back unilaterally after the counter-party is acknowledged. Taking termination notice back during the notice period is only possible with the consent of the counter-party to take it back. In this circumstance, employment relation shall be evaluated as if it was not interrupted before. On the contrary, provided that an employee continues to work uninterruptedly and the employer does not prevent the employee from working following the termination notice, it may not be evaluated that the employment contract is terminated[291]. Indeed, it is evaluated in one of the Turkish Court of Appeals' judgments that, by indicating that it is possible to invalidate termination notice with counter-party's consent within the duration of the notice period, the fact that employees work without any interruption should be deemed as the consensus of parties regarding the fact that termination of the employment contract shall be void[292].

Due to the fact that employment contract continues, obligations and duties of parties to each other will continue during notice period specified above as if employment contract was never terminated[293]. After the expiration of notice period, employment contract shall finalize. Following this period of time, an employer may not take his/her termination notice back unilaterally and also, the fact that an employer informs the employee that s/he renounces termination and wants him/her to come back to work shall not be binding for the employee. According to one opinion in the doctrine that we also support, should the employee accept to come back to work, it should be evaluated that parties conclude a new employment contract. This new employment contract may be concluded with old conditions or parties may determine new conditions for this new employment relation[294].

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289 Şükran Ertürk." İş Sözleşmesinin E-posta veya Kısa Mesaj (SMS) ile Feshi". *Sicil İş Hukuku Dergisi*, I: 36, (2016): p. 36.

290 Süzek; 528; Başbuğ and Yücel Bodur, p. 187.

291 Eyrenci and others, (2020), p. 180; Çelik and others, p. 481; Mollamahmutoğlu and others, p. 938.

292 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 03/04/2023 numbered 2023/5511 E. and 2023/4901 K. (legalbank.com).

293 Eyrenci and others, (2020), p. 182; Tulukçu, p. 103.

294 Eyrenci and others, (2020), p. 180.

On the condition that an employer makes changes on employment contracts in order to force an employee to terminate the employment contract, it should be accepted that there is a termination issued by the employer and, if other conditions are also met, this employee should benefit from the scope of employment security. Yet, intentions of parties of these employment contracts should be examined in detail and employers' intentions to force employees to terminate employment contract should be presented explicitly[295]. Abovementioned changes on employment contracts should be interpreted as unilateral essential changes on employment contracts. Indeed, inessential changes in working conditions being conditions of the employment contract may be regulated by the unilateral management authority of the employer[296]. Employer's authority to manage unilaterally is restricted by the principle of good faith regulated by Article 2 of the Turkish Civil Code. As it is effective for every right, employers are also obliged to use their authority to manage in accordance with good faith[297].

In this regard, a difference between the Turkish legal system and French legal system regarding terminology occurs. When only conditions that may be changed by employers in the scope of employer's authority to manage are named as *"working conditions"* in French Law, in Turkish law, all changes, whether it is essential or not, for all conditions, no matter they are conditions of employment contract or not, shall be deemed as changes in working conditions[298].

In addition to this, the Turkish Court of Appeals evaluated in one of its judgments[299] indicating that an employee who had not been reemployed following the regular military service may not have benefited from the scope of employment security as follows;

> "*Claimant claimed that s/he had terminated his/her employment contract for regular military service, s/he requested his/her reemployment by claiming that he had not been reemployed after s/he had come back from regular military service. Conditions to benefit from the scope of employment security are determined in Article 18 ff. of Labour Code numbered 4857. The main condition of reemployment is that the employment contract is terminated by the employer. In the concrete dispute, since the party having terminated the employment contract is the employee and there is no termination made by the employer, there is no claimant's right to request for reemployment. Without taking into consideration that s/he may request for the compensation specified by Article 31 of the Labour Code on the condition*

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295 Nurşen Caniklioğlu. "İşçinin Çalışma Koşullarında Tek Taraflı Değişiklik Sözleşmeyi İşverenin Feshetmiş Sayılacağı". *Sicil İş Hukuku Dergisi*, I: 18, (2010): p. 110.

296 Güzel, Sözleşmenin Değiştirilmesi, p. 550.

297 Güzel, Sözleşmenin Değiştirilmesi, p. 561.

298 Güzel, Sözleşmenin Değiştirilmesi, p. 549.

299 9th Civil Chamber of The Turkish Court of Appeals' judgment dated 23/09/2014 numbered 2014/9686 E. and 2014/27726 K. (Yargıtay Karar Arama).

that following the finalization of claimant's regular military service and that s/he is not commenced to work, deciding on reemployment of claimant is incorrect and it needs to be overturned."

This evaluation is deemed as appropriate by the doctrine by taking into consideration that the employment contract is not suspended during the period of regular military service and there is no employment relation between parties, as a result of these, there is no termination made by employer[300]. With another explanation, in these circumstances, when the employee is commenced to work by the employer in accordance with the last paragraph of Article 31 of LC, it shall be deemed that a new employment relation is concluded between parties of this relation[301].

Regarding military service by payment, according to paragraph 4 of Provisional Article 55 added to the Military Service Code numbered 1111 on 26/07/2018, by indicating that employees that will participate *de facto* in the basic military education for 21 days by benefiting from relevant provisions regarding military service with payment will be deemed as being in unpaid leave by their employers, it is accepted that employment contracts will be deemed as being suspended during this military service. When an employee comes back to the workplace in order to commence working after military service, provided that this employee is not commenced to work by the employer, this action shall be deemed as termination made by the employer and this employee may initiate a lawsuit by requesting for declaration of invalidity of termination and reemployment[302].

b. Existence of a Mutual Rescission Contract

A mutual rescission contract should be evaluated due to their unique features. A mutual rescission contract is a contract which is concluded between parties of employment contract with their consensus and finalizes the employment contract binding them. Mutual rescission contract may be concluded with explicit or implicit declarations of parties[303]. Due to the fact that there is going to be a unity between both employer's and employee's declarations in order to finalize the employment contract concluded between them, it may not be considered anymore that there is a termination made by the employer and because of this,

300 Süzek and Başterzi, p. 596-597; Centel, p. 33.
301 Kar, p. 38.
302 Kar, p. 39-40.
303 Mollamahmutoğlu and others, p. 789; Astarlı, İkale, p. 77.

provisions of employment security may not apply anymore. Yet, as it is for every contractual relation, this right may not be used as an evasion of the law[304].

A mutual rescission contract has not been codified in the Turkish legal system. As a consequence of freedom of contract, it is possible for parties of the employment contract to finalize legal relation having been concluded between them before normal finalization date of the contract[305]. It is also indicated in one of the judgments of the Turkish Court of Appeals that as a consequence of freedom of contract, it is possible to finalize contractual relation having been accepted before, that parties may finalize contractual relation instead of natural finalization of contract and that it may be called as mutual rescission contract[306]. As a legal qualification, a mutual rescission contract is not a promissory transaction but it may be qualified as a dispositive transaction. In fact, the right to claim arising from the contract is affected directly by this transaction and it shall be finalized. Parties renounce their claims and debts arising from a contract having been concluded between them mutually and finalize their titles and circumstances as creditor and debtor with this contract[307]. As a principle, a mutual rescission contract gives rise to retroactive consequences.

It may not be accepted that a mutual rescission contract always gives rise to circumstances being against the employee. Indeed, termination of employment contract by paying the severance payment and the payment in lieu of notice period to employees desiring to quit their work with their own wills shall not be deemed as being against employees' rights[308]. According to the Turkish Court of Appeals, in circumstance where it is not proven that there is the will of the employee or explicit benefit of the employee, there has to be extra payment on behalf of the employee in addition to the severance payment and the payment in lieu of notice period[309]. In other words, a mutual rescission contract finalizes an employment contract with mutual wills of parties and it has to be based on free wills of parties because it is

304 Centel, p. 30; Astarlı, İkale, p. 38.

305 Çelik and others, p. 458; Süzek and Başterzi, p. 541; Mollamahmutoğlu and others p. 786; Kar, p. 78; Güzel, Sona Erme, p. 193; Caniklioğlu, Sona Erme, p. 186; Astarlı, İkale, p. 6.

306 15th Civil Chamber of the Turkish Court of Appeals' judgment dated 02/10/1995 numbered 1995/2259 E. and 1995/5181 K. (lexpera.com).

307 Fikret Eren. *Borçlar Hukuku Genel Hükümler*, 20th Edition (Ankara: Yetkin, 2016), p. 1284; Astarlı, İkale, p. 30.

308 Centel, p. 31.

309 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 02/10/2007 numbered 2007/15135 E. and 2007/28823 K. (legalbank.com); Mustafa Alp. "İş Hukukunda İkalenin (Bozma Sözleşmesi) Geçerlilik Koşulları". *Legal İş Hukuku ve Sosyal Güvenlik Hukuku Dergisi*, I: 17, (2008): p. 39.

a contract by its nature[310]. Furthermore, provided that a request for concluding a mutual rescission contract is made by the employer, there have to be extra reasonable benefits provided to the employee in addition to compensations regulated by LC. Otherwise, it may not be deemed that the employment contract is finalized with a mutual rescission contract[311]. Reasonable benefit is a fact that should be sought in order to accept that there is not an evasion of law made with a mutual rescission contract and that there is no purpose to deprive an employee of his/her rights. Indeed, *as per* usual, employees may not abandon their rights arising from termination of the employment contract without taking reasonable benefits[312]. By determining the amount of the benefit to be provided to the employee; notice period, wage, severance payment and payment to be made from unemployment insurance and other factors shall be taken into account. Besides, compensation to be received in reemployment case should also be taken into account with a certain percentage[313].

In order to prevent cases being initiated without good faith, the Turkish Court of Appeals specified criteria as reasonable benefit regarding conditions for the validity of mutual rescission contracts. In accordance with this, if employees may examine the legal consequences of the contract signed by them due to their educational level and position of them and it is not proven that employees' wills are damaged concretely; a mutual rescission contract should be deemed as valid[314].

There is another very important basis of the reasonable benefit in Labour Law; employers' duties to observe employees. This duty is also effective while concluding a mutual rescission contract. As a need of this duty, employers should not make pressure on employees while concluding a mutual rescission contract, they have to inform them or provide reasonable circumstances so that employees may receive these information, they have to give clarified information to employees about consequences of mutual rescission contract and right

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310 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 30/03/2012 numbered 2011/13286 E. and 2012/6011 K. (legalbank.com); 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 12/07/2013 numbered 2013/18127 E. and 2013/17379 K. (legalbank.com).

311 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 03/02/2014 numbered 2014/402 E. and 2014/1341 K. (legalbank.com).

312 Alp, İkale, p. 35; Caniklioğlu, Sona Erme, p. 188.

313 Münir Ekonomi. "İş Sözleşmesinin Sona Erdirilmesinde Tarafların Anlaşması, İbraname ile İş Güvencesi Davasından Feragat ve Sulh". *Legal Yargı Kararları ve İncelemeleri Dergisi,* I: 1, (September 2006), Legalbank.com İş Sözleşmesinin Sona Erdirilmesinde Tarafların Anlaşması, İbraname ile İş Güvencesi Davasından Feragat ve Sulh (legalbank.net); for evaluation indicating that just providing employee's wage for 4 months should not be deemed as being sufficient for reasonable benefit: Güzel, Sona Erme, p. 199-200.

314 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 19/06/2012 numbered 2012/282 E. and 2012/13883 K. (legalbank.com).

to be deprived from, they should not hurry employees to conclude mutual rescission contract[315]. The scope and level of information may be changed in accordance with social and cultural level, working position and request to conclude a mutual rescission contract comes from whom[316]. As employees do not normally give consent to conclude mutual rescission contract without reasonable benefit, employers observing employees working with them should struggle in order that employees do not get harmed from the mutual rescission contract and they may receive reasonable benefits. Otherwise, a mutual rescission contract shall be deemed as invalid[317].

While concluding a mutual rescission contract, intentions of employees should not be damaged with any defective intention regulated by Article 30 ff. of the Turkish Code of Obligations numbered 6098. If a mutual rescission contract is concluded with fault, fraud or coercion, this contract shall not be binding and it is possible to request for invalidity of this contract[318]. Although Article 30 ff. of TCO indicates period of prescription as 1 year for the individual whose intention is damaged, it is not possible to apply this regulation to the Labour Law. The reason of this is, as it shall be explained below in detail, the period of prescription as 1 month in order to initiate a reemployment case is regulated in accordance with the scope of employment security and when this period of time expires, an employee may not request for reemployment from relevant labour court. It means that this employee may request for the severance payment and/or the payment in lieu of notice period by using his/her right of cancellation following figuring out reasons causing damage of his/her intention but this employee may not request for reemployment by claiming invalidity of the contract[319].

Regulations regarding excessive benefiting regulated by the TCO may apply to mutual rescission contracts concluded by parties[320]. In addition to this, as the employee worked in a managerial capacity as senior bank personnel and s/he may have known consequences of the contract signed by him/her, the Turkish Court of Appeals indicated in one of its judgments

315 Ekonomi, Tarafların Anlaşması, Legalbank.com.

316 Başak Güneş. "İş Sözleşmesinin İşçi Tarafından Feshi ve Güven Sorumluluğu (Karar İncelemesi)". *Prof. Dr. Sarper Süzek'e Armağan*, Istanbul: Beta, V: II, (2011): p. 1420; Ahmet Sevimli. "İş Hukukunda İbra ve İkale Sözleşmelerinin Geçerlilik Koşulları Konusundaki Gelişmeler". *Sicil İş Hukuku Dergisi*, I: 14, (June 2009): p. 96.

317 Alp, İkale, p. 37-38.

318 Ekonomi, Tarafların Anlaşması, Legalbank.com; Astarlı, İkale, p. 164-165.

319 Centel, p. 32.

320 Centel, p. 31.

that subjective condition of excessive benefiting may not have existed and mutual rescission contract should have been deemed as valid[321].

In addition to this, it is not possible to consider that provisions regarding fault, fraud, coercion and excessive benefiting regulated by TCO are sufficient to determine that the will of the employee is defected. An employee, who has to make meeting with his/her employer or employer's representative one to one mostly, may prove slightly that his/her intention is received by being pressured or with fraud. Furthermore, sufficient precautions are not provided to employees in contrast to the difficulty of conditions sought for acceptance of coercion. It is possible that an employer may receive employees' intentions by making pressure on them in meeting organized for the conclusion of a mutual rescission contract. On the other hand, these behaviors of employers may not be deemed as coercion mostly in the meaning of regulations of TCO. There is a need to legislate regulations against mutual rescission contracts that do not cause defective intentions but that depend on *"reluctant"* intention of employees[322].

c. Existences of Settlement Agreement

Settlement agreements concluded out of court are similar to mutual rescission contracts. Contrary to 22nd Civil Chamber of the Turkish Court of Appeals[323] introducing settlement agreements signed after termination made by the employer as mutual rescission contract, 9th Civil Chamber of the Turkish Court of Appeals indicated that the settlement agreement may not have removed consequences of termination made by the employer, settlement agreement may not have been deemed as mutual rescission contract. Special Chamber accepted that the contract which was concluded and named as mutual rescission by parties of employment relation after the reemployment case had been initiated should have been evaluated as a settlement agreement concluded out of the court[324]. According to one opinion in the doctrine, settlement agreements concluded following the termination of the employment contract should be evaluated in accordance with Article 420 of the TCO and in this scope, when employee's credits are regulated in the settlement agreement, it shall have provisions regarding discharge in one sense. According to this evaluation, in conformity with

321 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 10/12/2010 numbered 2009/39907 E. and 2010/37193 K. (kazanci.com).

322 Alp, İkale, p. 30-31.

323 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 22/01/2014 numbred 2013/37844 E. and 2014/638 K. (legalbank.com).

324 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 26/01/2017 numbered 2016/2808 E. and 2017/999 K. (Yargıtay Karar Arama).

Article 420 of TCO, (i) this agreement must be in written form, (ii) there must be at least 1 month between the time of termination and the time that this agreement is concluded and (iii) the credit, whose type and amount shall be indicated in this agreement wholly and clearly, should be paid completely via bank. Provided that this agreement is concluded within 1 month following termination of employment contract, this settlement agreement should be evaluated as invalid, as a consequence of the abovementioned regulation[325].

Following the employment contract with indefinite duration is terminated by the employer, it is not possible anymore to conclude any contract regarding the fact that the employment contract shall be deemed as being finalized with the agreement of parties of the employment contract. *"Termination"* and *"Agreement of Parties"* are two totally different terms finalizing an employment contract. As an employment contract is terminated with a termination notice and its effects occur in accordance with this procedure, it shall not be deemed anymore that the employment contract is terminated with the agreement of parties as if there was an employment contract being effective[326].

There is no termination issued by the employer in a mutual rescission contract, leave of employment occurs both with employer's and employee's intention. There is no waiving from a reemployment case, in fact, this right does not occur because there is no termination made by the employer. There is a termination made by the employer in the settlement agreement and therefore, there is no consent of the employee in order to finalize the employment contract. With another explanation, on the one hand, a mutual rescission contract is a procedure finalizing an employment contract; on the other hand, a settlement agreement eliminates conflicts arising from the finalization of the employment contract[327]. Despite the existence of employee's right to initiate a reemployment case, an employee waives from the right to initiate a reemployment case by signing the settlement agreement[328]. In addition to this, there is no obligation to initiate a case in order to conclude a settlement agreement, parties have to make self-sacrifice mutually in settlement agreement. Unless there is a mutual self-sacrifice in agreement, this agreement may be deemed as a release agreement, waive,

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325 Kar, p. 78-79.

326 Ekonomi, Tarafların Anlaşması, Legalbank.com.

327 Erdem Özdemir. "Sulh Sözleşmesi" Yargıtay 9. Ve 22. Hukuk Daire Kararlarının İncelenmesi". *Sicil İş Hukuku Dergisi*, I: 30, (2013): p. 60; Mustafa Alp. "İş İlişkisinin Sona Ermesi ve Kıdem Tazminatı". *Yargıtay'ın İş Hukuku ve Sosyal Güvenlik Hukuku Kararlarının Değerlendirilmesi 2013*, Istanbul: Onikilevha, Seminer, (21-22 November 2014): p. 222-223.

328 Bektaş Kar. "Feshin Geçersizliğinin Tespiti Davalarında Uygulanacak Usule İlişkin Yargıtay Uygulamaları". *Prof. Dr. Turhan Esener II. İş Hukuku Uluslararası Kongresi*, Ankara: Seçkin, (October 2017): p. 491.

donation or acceptance of a debt but it may not be deemed that there is a settlement agreement concluded between parties[329]. Indeed, a settlement agreement is an agreement specifying debts for both of parties wholly[330].

Chronologically settlement agreement is one step further when compared with a mutual rescission contract[331]. The settlement agreement does not regulate the finalization of the employment contract but it regulates consequences of the employment contract having been finalized before. Before everything, it has to be accepted that there is a conflict between parties so that they want to conclude a settlement agreement. It is tried to resolve this conflict by making self-sacrifice mutually. Especially, even though an employer has reasonable and logical reasons to terminate an employment contract, it is possible that the employer fails in judicial procedure. Indeed, provided that employer's proofs are not sufficient and/ or applications of principles such as *ultima ratio* are controversial, an employer may agree with the employee instead of taking a risk. Such circumstances, settlement agreements may be used as a legal remedy in order to resolve conflict between parties[332].

d. Resignation of an Employee

On the condition that the employment contract is terminated with immediate termination or termination with duration by an employee, this employee may not benefit from the scope of employment security anymore. Indeed, if there is a termination made by employee's free intention, it is not considered anymore that there is a termination made by the employer.

On the other hand, if an employer compels an employee to terminate an employment contract by making pressure on him/her, this employee shall have the right to initiate a reemployment case, if other conditions are also met[333]. In this circumstance, it shall be accepted that the resignation petition is invalid and the termination is actually employer's termination. However, a resignation petition may be deemed as invalid only if this is taken by the employer with the existence of real and serious pressure or threat[334]. Indeed, the Turkish

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329 Erdem Özdemir. "Sulh Sözleşmesi" İkale Uygulamalarının Olumsuzluklarına Çözüm Olabilir Mi?". *Prof. Dr. Turhan Esener II. İş Hukuku Uluslararası Kongresi*, Ankara: Seçkin, (October 2017): p. 393.

330 Özdemir, İnceleme, p. 59.

331 Özdemir, Sulh p. 400.

332 Özdemir, Sulh, p. 394; Özdemir, İnceleme, p. 60.

333 Sarper Süzek. *İş Hukuku.* 19th Edition (Istanbul: Beta Yayınları, September 2020): p. 570.

334 Erdem Özdemir. "Yargıtay Kararları Işığından İstifa Dilekçeleri". *Sicil İş Hukuku Dergisi,* I: 7, (September 2007): p. 14.

Court of Appeals also indicated in one of its judgments properly that it should have been sought whether or not termination intention of the employee arose from his/her own intention and on the condition that resignation petition was taken by making pressure or intention of the employee was damaged by declaring that the severance payment and/or the payment in lieu of notice period would not be paid to him/her, termination intention of the employer was concealed under the resignation intention of the employee and provisions of employment security should have applied[335].

In addition to this, the Turkish Court of Appeals accepts that resignation petition bounded to the existence of some conditions by the employee shall not constitute a resignation and it should be evaluated as an offer for concluding a mutual rescission contract[336]. Also, on the condition that an employee quits by believing the trust established by the employer regarding the fact that the severance payment shall be paid, this trust should be protected. Therefore, employer's obligation to pay the severance payment is the need of trust liability[337]. Similarly, on the condition that an employee leaves a caution on a printed resignation petition regulated by the employer, it shall not be deemed that there is a resignation issued by employee[338]. Besides, the Turkish Court of Appeals examines whether an employee was compelled to resign actively, as an example whether an employee was compelled to resign by making working conditions difficult, while detecting whether resignation depends on the free intention of the employee or not[339].

As abovementioned, following termination notice, it is possible to prevent the arising of legal consequences of termination notice with the agreement of parties by providing constituency of employee's working uninterruptedly. Because of this, the fact that an

335 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 14/10/2010 numbered 2010/40996 E. and 2010/30125 K. (legalbank.com).

336 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 24/11/2015 numbered 2015/23251 E. and 2015/33400 K. (legalbank.com); Ender Kızılrat. "Davacının İşyerinden Koşullu Olarak Ayrılma İsteğine İlişkin Dilekçesi, İstifa Niteliğinde Değerlendirilemez". *Sicil İş Hukuku Dergisi*, I: 5, (March 2007): p. 94 ff.; Kar, p. 83.

337 General Assembly of Civil Chambers of the Turkish Court of Appeals' judgment dated 10/02/2010 numbered 2010/9-39 E. and 2010/71 K. (legalbank.com).; for opposite opinion: Eda Karaçöp. "Karar İncelemesi: Kıdem Tazminatının Ödeneceği Konusunda İşverence Kendisinde Haklı Bir Güven Oluşturularak İstifa Eden İşçinin Talebinin Güven Prensibi Çerçevesinde İrdelenmesi". *Sicil İş Hukuku Dergisi*, I: 21, (March 2011): p. 149-150.

338 Ekmekçi and Yiğit, p. 613.

339 General Assembly of Civil Chambers of the Turkish Court of Appeals' judgment dated 19/09/2018 numbered 2015/3097 E. and 2018/1339 K. (legalbank.com).

employer puts a resignation petition into progress after a long time shall be deemed as employer's unilateral transaction and it does not make the resignation petition valid[340].

Similarly, according to the Turkish Court of Appeals, filling gaps being on printed resignation petition lately should be evaluated on behalf of the employee. The fact that names and dates on printed resignation petitions given by more than one employee are lately filled and resignation petitions are occurred by same sentences give rise to invalidity of resignation. When additional proofs demonstrate that gaps in documents are lately fulfilled by the employer with pen, it should be accepted that there is not a free intention of the employee to terminate the employment contract[341].

[340] Halil Yılmaz. "İşçinin İş Sözleşmesini İstifa Beyanıyla Feshi (Yargıtay Kararına Genel Bakış)". *Prof. Dr. Sarper Süzek'e Armağan*, Istanbul: Beta, V: II, (2011): p. 1234.

[341] Yılmaz, p. 1237; 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 26/03/2007 numbered 2007/273 E. and 2007/8421 K.(legalbank.com).

SECOND CHAPTER

TERMINATION PROCEDURE OF EMPLOYMENT CONTRACT OF EMPLOYEES COVERED BY EMPLOYMENT SECURITY

An employee having abovementioned conditions is going to be in the scope of employment security and will be able to benefit from some protections preventing an employer to terminate an employment contract arbitrarily. These protections are; (i) that an employer may not terminate the employment contract without demonstrating valid reason, (ii) that an employer has to issue a warning before terminating employment contract (iii) that an employer has to give termination notice in written form, (iv) that termination reason has to be demonstrated explicitly and certainly by the employer, (v) that an employer may not terminate employment contract without taking employee's defence except some circumstances and (vi) that an employer has to observe some principles while terminating employment contract. In this section of our study, protection provided by employment security for employees being in the scope of employment security shall be examined in detail.

I. OBLIGATION TO BASE TERMINATION ON A VALID REASON

In accordance with the explicit explanation of LC, while terminating employment contracts of employees being in the scope of employment security, an employer has to demonstrate a valid reason depending on employee's incapability or behavior or a reason arising from needs of enterprise, workplace or work. In accordance with one view in the doctrine, since it is possible that termination decision to be taken by the employer shall depend on only one of these reasons, it is not possible to depend on more than one reason at the same time[342]. According to our opinion, provided that an employer has one or more valid/justified reasons to terminate an employment contract, an employer may show one of these reasons just as s/he may submit all of his/her termination reasons at the same time. In our opinion, if one of termination reasons shown in the termination notice by the employer is deemed as invalid, an employer should be allowed to defend his/her other termination reasons

[342] Yeliz Bozkurt Gümrükçüoğlu. "İşletmenin, İşyerinin ve İşin Gerekleri ile Fesih". *Prof. Dr. Turhan Esener II. İş Hukuku Uluslararası Kongresi*, Ankara: Seçkin, (October 2017): p. 301.

during the case so that s/he is not compelled to continue an employment relation which is not endurable for him/her. On the contrary, should an employee declare a termination intention, it is not obligated for him/her to depend on a valid reason against the employer[343].

One of the most important legal regulations separating employees being in the scope of employment security from employees that do not benefit from employment security is employer's obligation to demonstrate a valid or justified reason while terminating the employment contract. There is not any difference whether an employer terminates an employment contract with indefinite duration with invalid or unjustified reason, the same legal consequences exist. Employees being faced with unjustified termination may also benefit from provisions of employment security. As the difference between termination with valid or justified reason and abuse of right; if there is an invalid or an unjustified termination, even though the right to terminate the employment contract does not occur, termination is issued; on the other hand, in circumstance that there is a abuse of right, right to terminate employment contract occurs but this right is used against objective good faith[344].

By accepting that employers and employees do not have equal rights to declare their termination intentions, the fact that termination to be issued by the employer has to depend on a valid reason is regulated as a condition for the validity of termination issued by the employer. Indeed, employment security is a unilateral right to be used by an employee[345]. Although employee's work is terminated with termination issued by the employee, since it shall not be deemed that this termination is made to be unemployed, it is possible to assume that the employee will commence working soon. Conversely, when it is taken into consideration that termination of employment contract made by the employer may lead to employee's unemployment and that the employee lives with wage obtained from work, it is clear that it causes different consequences when compared with termination made by the employee and therefore, it is essential to take precautions against termination made by the employer[346].

The valid reason shall be deemed as important only for employees being in the scope of employment security. As it is explained above in detail, employees having some positive and negative conditions may be considered as being in the scope of employment security and

343 Uşan and Erdoğan, p. 150; Ertürk, p. 305.
344 Süzek, Yetersizliği veya Davranış, p. 568.
345 Kar, p. 26; Kar, Güvence, p. 561.
346 Centel, p. 55.

their employment contracts may not be terminated by employers without showing valid reason. In fact, a condition demonstrating as valid reason is a condition for validity for terminations made by employers. On the contrary, as demonstrating valid reason is not a condition for the validity of terminations of employment contracts of employees that may not benefit from employment security, these employees' employments may be terminated by employers without any need to demonstrate valid reason.

A valid reason, as a term, shall be important provided that there is a termination with duration regulated under Article 17 of LC. Indeed, party wanting to terminate employment contract with indefinite duration has to give notice to the other party regarding this issue. This obligation to give notice is binding for both employers and employees. Following this notice, even if it may not be taken back, provided that parties of an employment contract may agree, it is possible to get the employment contract continued[347]. Specific period of times, which shall commence passing from the date of the notice, are fixed for termination with duration and it is regulated that the employment contract shall be deemed as terminated following these periods expired in order that the employee may find another work and that the employer may employ new employee and also in order that work performed in the workplace continues. During this specific period of time, the employment contract shall continue with its all obligations. As a consequence of this, employer's duty to observe the employee and employee's duty of fidelity remain in effect during these specific period of times[348]. These period of times are called as *"notice period"* in the doctrine and in practice. Notice period is changed in accordance with employee's seniority. In fact, it is regulated that;

i. For an employee whose work lasted less than six months, following two weeks from the time of notification of the other party,
ii. For an employee whose work lasted for six months to one and half years, following four weeks from the time of notification of the other party,
iii. For an employee whose work lasted for one and half years to three years, following six weeks from the time of notification of the other party,
iv. For an employee whose work lasted more than three years, following eight weeks from the time of notification of the other party,

347 Ertürk, p. 302.

348 For more information regarding to the fact that the employer have right to choose to make the employee work in same situation, to suspend employment contract or to excuse the employee from duty to work during notice period in Danish Labour Law: Jeppe Høyer Jørgensen."Denmark". in Labour Law A Pratical Global Guide, editor: Agusti Jausas, London: Global Law and Business, (2011): p. 182.

it shall be deemed that employment contract is terminated. This notice period is regulated differently for employees working by being in the scope of TCO and it is regulated in Article 432/2 of TCO as follows;*"service contract shall be finalized, by starting from the receipt of notification by other party; following 2 weeks for a worker whose service contract lasted up to one year, four weeks for a worker whose service contracts lasted from one year to five years and six weeks for a worker whose service contract lasted more than five years"*

Provided that the employment contract is terminated by the employer by depending on a valid reason but this termination is made without observing the notice period or without paying cash the payment in lieu of notice period, this circumstance shall not affect the validity of the termination. It means if there is a valid or justified reason to terminate the employment contract, whether employer observes the notice period or not shall not affect the validity of the termination. Supposing that termination is made in accordance with its procedure and by depending on a valid reason, this termination shall be deemed as valid. However, because of not complying with the notice period, the employer will be obliged to pay compensation in the amount of wage regarding notice period. This compensation is called as *"the payment in lieu of notice"*. While calculating this payment, in addition to employee's gross wage at the time of termination, all payments and benefits that may be valued with money shall be taken into account[349]. Besides, due to the fact that this compensation is not depended on *"damage"* condition, even though there is no damage, the party who does not observe notice period has to pay this compensation to the counter-party of the employment contract[350].

The notice period shall commence to process after the termination notice is served to the counter-party of the employment contract. Additionally, in the event that the employment contract is suspended, the notice period shall not process. In other words, even though termination notice is made at the time that employment contract is suspended, the notice period shall commence processing from the end of the suspension period[351]. As a result of this, even though the employment contract of the employee whose employment contract is suspended is terminated, this employee may benefit from the collective labour contract that

[349] For more information about same calculation method specified for the payment in lieu of notice in Belgian Law; Philippe François and Van Tamar Colenberghe. "Belgium". in Labour Law A Pratical Global Guide, editor: Agusti Jausas, London: Global Law and Business, (2011): p. 53.

[350] Eyrenci and others, (2020), p. 186; Ertürk, p. 338; Sümer, p. 111.

[351] Savaş Taşkent. "İş Sözleşmesinin Askıya Alınması ve Ücretsiz İzin Uygulaması". *Sicil İş Hukuku Dergisi*, I: 3, (September 2006): p. 21.

comes into effect during the suspension period[352]. Furthermore, notice period and annual paid leave may not merge and during annual paid leave, notice period shall not process[353].

On the other hand, it is regulated for employers by both LC and TCO that they may terminate employment contract by paying wage regarding the termination notice period in cash. Yet, this exception is not provided for employees that are counter-parties of employment contracts[354].

In the event that the employment contract is terminated by employers by paying the payment in lieu of notice in cash, according to the one opinion in the doctrine, the employment contract is not finalized immediately but it shall be finalized following expiration of the notice period and notice period should be taken into account while calculating credits arising from LC and employment contract and depending on the working period of the employee, such as severance payment and annual paid leave, and an employee should benefit from increases made in his/her wage[355]. On the contrary, the Turkish Court of Appeals decided that in the event that employers terminated employment contracts by paying the payment in lieu of notice in cash, employment contracts would be terminated immediately and an employee may not have benefited from increases made in his/her wage during notice period. However, it was indicated that on the condition that there was an abuse of the right to terminate the employment contract immediately by paying the payment in lieu of notice in cash, an employee may have benefited from rights occurring during notice period[356]. In addition to this, according to the Turkish Court of Appeals, as notice period shall be evaluated wholly, even though the notice period is separated after it started to pass and even though remained period is paid as the payment in lieu of notice; in this scenario, employer shall also be responsible for rights which will arise during the notice period[357].

Instead, the Turkish Court of Appeals declared in one of its judgments that, for termination having been made by the employer without providing a notice period and without paying the payment in lieu of notice, an employee should have been benefited from increases

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352 Çelik and others, p. 487.

353 Ertürk, p. 301.

354 Okur, p. 130; *For an opinion criticizing this provision*; Mollamahmutoğlu and others, p. 969-970.

355 Ertürk, p. 304-305; Çelik and others, p. 493; Okur, p. 135.

356 9th Civil Chamber of Turksih Court of Appeals' judgment dated 08/04/1991 numbered 1990/4473 E. and 1991/7311 K. (legalbank.com).

357 General Assembly of Civil Chambers of the Turkish Court of Appeals' judgment dated 25/09/1991 numbered 1991/9-338 E. and 1991/426 K. (Journal of Judgment of the Turkish Court of Appeals, V: 18, I: 10, October 1992).

occurred on behalf of the employee during notice period, with another explanation, those kinds of terminations would be deemed as termination with duration and therefore, unless the payment in lieu of notice was paid, the employment contract was effective until the finalization of notice period[358].

Although it is considered that the payment in lieu of notice shall generally be paid following termination notices issued by employers, unless employees observe notice periods even though they have to observe them, there are going to be payment liabilities of employees too. Whereas, the Turkish Court of Appeals indicated in one of its judgments that in the event that resigning employees had left the workplace in the notice period without complying with the notice period, since it was not requested from the employee to comply with the notice period by employers and this became a workplace practice, this employee was not liable to pay compensation because of not complying with notice period[359].

Employee's right to terminate the employment contract immediately in Article 24 of LC and employer's right to terminate the employment contract immediately in Article 25 of LC are regulated. In accordance with these, when an employee or an employer chooses to terminate an employment contract with a reason determined by these articles, it is not obliged to comply with notice periods regulated by Article 17 of LC anymore while terminating employment contract and neither the employee nor the employer shall be obliged to pay the payment in lieu of notice.

As it is understood explicitly from the regulation of the Turkish Labour Law, there is going to be a *"valid reason"* in order to terminate an employment contract being subject to provisions of employment security by notice and there is going to be a *"justified reason"* in order to terminate the employment contract with immediate effect whether it is subject to the scope of the employment security or not[360]. Even though each justified reason is a valid reason, not each unjustified reason is an invalid reason[361].

In accordance with the provision which is almost the same translation of Article 4 of the Convention, a valid reason for termination shall be deemed as a valid reason which arises

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358 9th Civil Chamber of Turksih Court of Appeals' judgment dated 01/03/2004 numbered 2003/13738 E. and 2004/3888 K. (legalbank.com).

359 General Assembly of Civil Chambers of the Turkish Court of Appeals' judgment dated 06/06/2012 numbered 2012/116 E. and 2012/349 K. (legalbank.com).

360 Centel, p. 58.

361 Kar, p. 196.

from employee's personality, it means reasons connected with the capacity and behavior of an employee, or which is based on operational requirements of enterprise, workplace or work.

Even though there is not an explicit explanation of valid reason in LC, valid reasons are only separated as reasons arising from enterprise and employee[362]. In the reasoning of LC, by indicating *" in regard of this article, valid reasons are, even though they are not as serious as reasons regulated in Article 25, circumstances affecting normal process of the work and workplace. As a result of this, reasons that may be demonstrated for valid termination may be reasons that have serious negative effects with reasons arising from employee's him/herself or workplace and that do not allow the employee to perform his/her duty to work properly. As a result, in reasonable and serious circumstances that it may not be requested from the employer to sustain employment relation, it should be accepted that termination is based on valid reasons",* it is tried to explain the definition of valid reason. According to one opinion, a valid reason is so serious that it makes impossible to continue to employment contract without damaging to enterprise or workplace[363]; on the other hand, according to another opinion, a valid reason is not as serious as a justified reason but it is an objective fact showing that termination of employment contract is reasonable[364].

As an example of a valid reason to be happened with a reason connected with employee's behaviors, provided that an employee makes impossible to continue to the employment contract with his/her behaviors and it is clear that continuance of the employment contract shall not be managed, it should be accepted that there is employer's right to terminate the employment contract with immediate effect. On the other hand, even though it may not be deemed that continuance of the employment contract is impossible because of employer's behaviors that do not give rise to terminate the employment contract immediately, yet, provided that normal process of work is disrupted, unity in workplace is affected negatively and it is not expected from employer to continue to employment relation reasonably, it should be accepted that employer's right to terminate the employment contract with valid reason exists[365]. As a consequence of objective evaluation, provided that employee's behavior may be deemed as making the employment contract impossible for an

362 Kar, p. 195.
363 Mollamahmutoğlu and others, p. 1023.
364 Akyiğit, Şerh, p. 787; Sümer, p. 104.
365 Süzek and Başterzi, p. 613-614; Uysal İbat, p. 3.

employer to endure during notice period as the need of the principle of good faith, it should be accepted that there is a termination reason giving rise to termination with justified reason[366].

"Valid reason" is every circumstance and incident regarding the employee or the workplace that is not as serious as to give rise to terminate the employment contract immediately but that shall affect workplace negatively provided that the working of the employee is continued[367]. It should be expected that objective reasons make continuous employment relation impossible and has effects on work performed by the employee and unless these effects are demonstrated, the existence of a valid reason should not be accepted[368]. With this regard, valid reasons should be evaluated by judges in every specific case because it is not possible to count valid reasons *numerous clauses* and this is not accurate either[369]. In other words, the scope of the definition of valid reason shall be more obvious in time with the examination of doctrine and judicial judgments[370]. Indeed, this issue is indicated as follows; *"the fact that reasons arising from employee's capacity or behavior may be deemed as a valid reason in which conditions and may be deemed as reasons arising from needs of enterprise, workplace or work in which condition will be able to be obvious only with judicial judgments in time. Especially, it is necessary to differ immediate termination with justified reason regulated under Article 25 from reasons sought for termination with valid reasons and to specify differences between them; it shall be necessary to evaluate concrete issues with regard to these two different types of termination and legal techniques, to detect differences between these two types of termination by taking country's condition into account in the necessary scope of the issue shall be provided not only by judicial authorities but also by contribution of doctrine"* in the reasoning of LC and it is evaluated that valid reasons may not be counted *numerous clauses*, yet, it shall be more obvious with opinions of doctrine and judicial practice.

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366 Gülsevil Alpagut. "İş Sözleşmesinin Feshinde Haklı- Geçerli Neden Ayrımı ve Yargıtay'ın Konuya İlişkin Kararlarının Değerlendirilmesi". *Sicil İş Hukuku Dergisi*, I: 1, (March 2006), p. 77.

367 Günay, p.133; Başbuğ and Yücel Bodur, p. 191; Aslıhan Kayık Aydınalp. "Baskı Feshine İlişkin Alman Federal İş Mahkemesi Kararının İncelenmesi". *İnönü Üniversitesi Hukuk Fakültesi Degisi*, V: 9, I: 2, (2018): p. 226.

368 Alp, p. 17.

369 Ömer Ekmekçi. "4773 sayılı İş Güvencesi Yasası Karşısında Yargının Durumu ve Ortaya Çıkabilecek Uygulama Sorunları Üzerine". *Mercek*, I: 28, (October 2002): p. 99; Ali Güzel. "İş Güvencesine İlişkin Temel İlke Ve Eğilimler Işığında Yasa Tasarısının Değerlendirilmesi, İş Güvencesi Yasa Tasarısının Değerlendirilmesi". *Türk İş Hukukunun Güncel Sorunları 2001 Toplantısı*, İstanbul Barosu Yayınları, Istanbul, (2001): p. 31.

370 A. Murat Demircioğlu. *Labour Law in Turkey* (Istanbul: Istanbul Chamber of Commerce Publications, Publication No: 2010-43, 2010), p. 47.

Besides, in accordance with the practice accepted by the Turkish Court of Appeals, even though employer terminates employee's employment contract with justified reason immediately and it is detected that reason of termination made by the employer is not sufficient to terminate employee's employment contract immediately with justified reason specified under LC in legal procedure executed before relevant labour court but it is detected that this reason may give rise to termination with valid reason, employee's claims should be rejected by indicating that employment contract is terminated with valid reason even if there is not a sufficient reason to terminate employment contract immediately with justified reason[371]. Yet, in this scenario, provided that other conditions exist, the severance payment and the payment in lieu of notice should be held on behalf of the employee. With this regard, according to the Turkish Court of Appeals, provided that the employment contract is terminated by the employer with justified reason following the period of prescriptions specified in Article 26 of LC in order to terminate the employment contract immediately with justified reason expired, this termination issued by employer may be deemed as termination with valid reason[372]. This practice of the Turkish Court of Appeals is criticized by some scholars in the doctrine[373].

Valid reasons for termination are indicated as reasons connected with employees, breach of or abuse of contract and excessive employment arising from the operation of enterprise on the German Protection Against Dismissal Act[374]. In the French Labour Law, it is indicated that while terminating an employment contract, it is obliged to depend on a real and serious reason arising from economical or personal reasons[375]. In Turkish legal system, it is possible to classify valid reasons in two groups as reasons arising from the employee and reasons arising from needs of enterprise, workplace or work. On the other hand, valid reasons

371 9th Civil Chamber of Turksih Court of Appeals' judgment dated 01/12/2008 numbered 2008/6259 E. and 2008/32583 K. (lexpera.com); 9th Civil Chamber of Turksih Court of Appeals' judgment dated 28/04/2008 numbered 2007/34009 E. and 2008/10347 K. (lexpera.com); 9th Civil Chamber of Turksih Court of Appeals' judgment dated 23/06/2008 numbered 2007/42970 E. and 2008/17131 K. (lexpera.com).

372 9th Civil Chamber of Turksih Court of Appeals' judgment dated 19/06/2006 numbered 2006/13620 E. and 2006/17779 K. (NJIS); 9th Civil Chamber of Turksih Court of Appeals' judgment 12/04/2010 numbered 2009/49570 E. and 2010/10149 K. (NJIS); 9th Civil Chamber of Turksih Court of Appeals' judgment 05/05/2008 numbered 2007/32768 E and 2008/11113 K. (NJIS).

373 For more information; Ünal Narmanlıoğlu. "Kanuna Aykırı Olarak Yapılmış Bildirimsiz Feshin İş Güvencesi Prosedürü İçinde Kanuna Uygun Fesih Bildirimine Dönüşmesi (Kanuna Aykırı Olduğu Anlaşılan Bir Feshin Mahkeme Kararıyla Kanuna Uygun Sayılması)". *Prof. Dr. Fevzi Şahlanan'a Armağan*, İstanbul Üniversitesi Hukuk Fakültesi Mecmuası, V: I, Legal, (2016): p. 557 ff.; Mollamahmutoğlu and others, p. 896-897

374 Kathrin Vossen and Alexander Willemsen. "Germany". in Labour Law A Pratical Global Guide, editor: Agusti Jausas, London: Global Law and Business, (2011): p. 260; Kirchner and others, p. 137.

375 Jacques Perotto and Edith Yapo. "France". in Labour Law A Pratical Global Guide, editor: Agusti Jausas, London: Global Law and Business, (2011): p. 245; Süzek and Başterzi, p. 602; Subaşı, İşyerinin Kapatılması, p. 47; Ugan Çatalkaya, p. 466.

arising from the employee may be classified in two groups as reasons connected with employee's behaviors and reasons connected with employee's incapability. In the rest of our study, valid reasons accepted for termination of employment contract are going to be explained in detail.

A. Valid Reasons Arising from Employee

1. Valid Reasons arising from Employee's Incapability

In accordance with the explicit provision of LC, employee's incapability may be demonstrated as a valid reason in order to terminate an employment contract. In this circumstance, the main reason to terminate employment contract for the employer is that an employee is not capable for the work that s/he performs.

In the reasoning of LC, it is mentioned as examples what kind of circumstances shall be deemed as employee's incapability. In this regard, valid reasons arising from employee's incapability are indicated as working less productive than average employees working in similar works; having less performance than expected from the qualification demonstrated by the employee; decreasing of concentration on work gradually; not fitting into job; incapability to learn and improve himself/herself; getting sick frequently; even though it does not cause an employee not to be able to work, illness affecting employee's performance to perform his/her duties properly; incapability to adapt; retirement for termination to be made because of reasons arising from employee's incapability. These reasons indicated in the reasoning of LC are just examples and valid reasons arising from employee's incapability are not restricted just with these circumstances[376]. On the contrary, even though these circumstances are specified as valid reasons in the reasoning of LC, some of them shall not be deemed as valid in current practice. Indeed, the Turkish Court of Appeals decided in one of its judgments that only gaining right to be retired or old age pension may not have been deemed as a valid reason[377].

Valid reasons arising from employee's incapability are reasons arising from the fact that an employee is not capable to perform his/her duties properly and the distinctive factor is that employee's talents and features are not in conformity with the performance of duties

[376] Centel, p. 67; Nurşen Caniklioğlu. "İş Sözleşmesinin İşçiden Kaynaklanan Geçerli Sebeplerle Feshi". *Prof. Dr. Turhan Esener II. İş Hukuku Uluslararası Kongresi*, Ankara Seçkin, (Ekim 2017): p. 74.

[377] 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 15/04/2004 numbered 2004/6141 E. and 2004/7644 K. (legalbank.com).

undertaken with the employment contract[378]. With another explanation, the fact that an employee loses his/her talents and features in order to perform his/her duties constantly or for a long time constitutes employee's incapability[379]. Besides, it is not important that the employee had talents and features regarding the performance of his/her duties before. The important issue is that the employee is deprived of his/her talents and features for future[380]. In this regard, reason of termination is not the employee's incapability itself but it is potential breach that will be able to happen as a result of the appearance of the incapability of the employee while performing his/her work[381]. Moreover, at the time of termination, the employee's incapability should cause disruptions and errors in the normal process of work and producing errors arising from employee's incapability should not be fixed without precautions giving rise to additional expenses, in other words, it should not be possible for this employee to acquire these talents and features in a short span of time with help of others such as a doctor, therapist, psychologist or coach in order to perform his/ her duties properly[382].

According to the Turkish Court of Appeals, capability is a term that means the talent, the knowledge and the ability needed to perform responsibilities and needing for executing one duty. This term emphasizes knowledge and talent needed in order to perform a duty in an acceptable level, shortly his/her capacity[383]. On the contrary, the Turkish Court of Appeals did not declare from which moment the work to be performed by an employee would have been deemed as being performed in an acceptable level. As a consequence of this, it is more proper to accept that it is evaluated by judge by taking every specific cases' times and features into consideration. In this regard, the judge will decide whether employment relation will continue mutually by comparing the reciprocal benefits of employers and employees[384].

Besides, there has to be a negative foresight for termination with valid reasons arising from employee's incapability. With another explanation, in order that employee's incapability is deemed as valid reason, it has to be proven that an employee won't be able to perform

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378 Devrim Ulucan. *İş Güvencesi*, 2nd Edition, Türkiye Toprak, Seramik, Çimento ve Cam Sanayii İşverenleri Sendikası, p. 30.

379 Ulaş Baysal. " İşçinin Yetersizliğinden Kaynaklanan Geçerli Sebeple İş Sözleşmesinin Feshi" (Ankara, 2011), p. 36; Caniklioğlu, p. 75.

380 Baysal, p. 37; Centel, p. 68-69.

381 Mahmut Kabakçı. *Geçerli Fesih Nedeni Olarak Yetersiz (Kötü Ve Eksik) İş Görme* (Istanbul: Beta, October 2012), p. 161.

382 Ertürk, p. 312.

383 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 15.12.2008 numbered 2008/8488 E. and 2008/33641 K. (legalbank.com).

384 Centel, p. 69.

her/his duties partially or wholly because employee's incapability will continue in the future and as a result of this, employers' benefits regarding enterprise and workplace will be damaged[385].

Although all circumstances regarding immediate termination with justified reason being in the scope of Article 25/II of LC depend on fault, fault is not obligatory for termination with valid reason[386]. Indeed, fault shall be taken into consideration for termination reasons arising from employee's behavior. On the other hand, as employee's incapability may depend on employee's fault, it may also exist without employee's fault[387]. It may be said that valid reasons arising from employee's incapability, as a rule, do not depend on fault[388].

In accordance with German Law, the difference between valid reasons depending on personal and behavioral is that while in case of termination with personal reasons, it is thought that employee's breach of employment contract does not depend on employee's fault; in case of termination with valid reasons arising from employee's behaviors, it shall be thought that an employee may control his/her behaviors and because of this, it is possible that an employee may show faulty behaviors[389].

Some of valid reasons arising from employee's incapability are encountered frequently in practice. Because of this, these valid reasons arising from employee's incapability are going to be explained in detail below.

a. Illness

Illness as a term in terms of Labour Law differs from illness as a term in terms of medical practice. Indeed, an illness that does not affect the duty to work which is employee's essential debt in employment relation, as an example illness such as flu, shall be deemed as illness in terms of medical practice but it may not be evaluated as illness in terms of Labour Law. With this regard, in order for the existence of illness as a term in Labour Law, two conditions should be cumulatively. These conditions are;

i. The fact that there has to be a spiritual or physical circumstance which is not normal and which should not be cured medically with inpatient treatment or ambulatory

385 Kar, p. 207; Tulukçu, p. 166.
386 Süzek and Başterzi, p. 602-603.
387 Süzek and Başterzi, p. 602-603; Demir, Arabuluculuk, p. 99; Bektaş Kar. "Performans Düşüklüğü veya Yetersizliği Nedeni İle Fesihte Yargısal Denetim". *Sicil İş Hukuku Dergisi*, I: 11, (September 2008): p. 34.
388 Caniklioğlu, p. 75; Kılıçoğlu and Şenocak, p. 334.
389 Krebber, p. 517; Kirchner and others, p. 139.

treatment. It is not important in this circumstance whether abnormal circumstances may be changed or whether it is certain that this may give rise to lose capacity to work at the beginning of the illness

ii. Illness should give rise that an employee may not perform his/her duty to work. Not being able to perform duty to work shall happen when the employee may not perform his/her duty to work that has been performed by him/her until now or when s/he will worsen if s/he continues to work[390]

In order to explain effects of the illness to employment relation in terms of Labour Law, there has to be a reasonable causal relation between illness and incapability for work[391].

Regarding illness, when the reasoning of LC is analyzed, it is seen that there are two circumstances indicated in LC. One of them is *"getting ill frequently"* and the other one is *"even though it does not prevent an employee from being able to work, illness affecting employee's performance to perform his/her duties properly".* As a difference from absence because of illness lasted for a long time, there is no explanation for getting ill frequently. Provided that getting ill or taking medical report frequently affects the performance of duties in a manner that it has to be and disrupts the normal process of work, an employer may use his/her right to terminate the employment contract with valid reason[392]. Besides, even though a specific period of time that an employer has to comply with before using his/her right to terminate an employment contract with immediate effect because of employee's illness lasting for a long time is regulated in Article 25 of LC, since the issue in question is getting ill once and getting ill frequently is not regarding this issue, this reason may be deemed as valid without waiting the period of time regulated by LC[393]. Furthermore, in accordance with the explicit explanation of Article 18 of LC, because of illness or incident, temporary absence of the employee passed during the period of time regulated by the sub-paragraph b of paragraph

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390 Hediye Ergin. *Türk ve Alman Hukukunda İş Sözleşmesinin Sağlık Nedeniyle Sona Ermesi*. (Istanbul: Beta, October 2009), p. 8.

391 Nurşen Caniklioğlu. *Hastalık ve Sakatlığın Hizmet Akdine Etkisi* (Istanbul: Beta, May 2002), p. 10

392 *"In the concrete dispute, in the textile workplace that s/he is working in, within last 2 years and especially within a period of time as 6 or 7 months before termination, it is understood that claimant took reports issued for more than 60 days. It is clear that the fact that the claimant took reports frequently and intermittingly, when the continuity of work performed in the workplace is taken into account, causes negative effects in the workplace and disturbs the workflow. With this regard, it may not be waited from the employer to continue this employment relation. By understading that termination depends on a valid reason, even though a claim regarding reemployment should have been rejected, it is not accurate to decide in written form."*(22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 14/06/2016 numbered 2016/16287 E. and 2016/17801 K. (Yargıtay Karar Arama)).

393 Centel, p. 71.

(I) of Article 25 of LC shall not be used as a valid reason to terminate an employment contract.

Should illness constitute a justified reason in the meaning of Article 25/I of LC, there is no need to analyze valid reason. In this circumstance, an employer has the right to terminate employee's employment contract without giving any notice period. However, although it is not as serious as illness and circumstances indicated in Article 25/I of LC, reasons affecting progress of work and workplace or management of them negatively constitute valid reasons[394].

According to one opinion in the doctrine, in case of getting ill frequently, it is not mandatory to examine separately whether the absence of employees affects enterprise or workplace negatively or not. Indeed, according to this opinion, the absence of the employee a definitely affects the normal progress of the work and inevitably causes damage[395]. Contrary to this, according to another opinion, it is focused on whether the absence of the employee causes damages to the enterprise or workplace in order that getting ill frequently shall be deemed as a valid reason and it is indicated that existence of this kind of damage is a condition in order that getting ill frequently may be used as a valid reason to terminate the employment contract[396]. Similarly, in accordance with another opinion in the doctrine, solely illness may not constitute a valid reason for termination and the employment contract of the employee who performs his/her duty to work and whose conditions are suitable to work in the workplace may not be terminated because of illness[397].

Provided that there is not a sufficient amount of absence to cause justified reason but the fact that an employee takes medical report frequently causes negative effects on progress of work, employee's performance and on the productivity of the employee, in this circumstance, an employer may terminate the employment contract with duration by depending on valid reason[398]. Besides, taking medical report frequently shall be evaluated separately for every specific case[399]. Indeed, circumstances such as whether an employee takes a medical report frequently affect the progress of work in the workplace or not, whether it increases the workload of other employees working in the same workplace or not should be

394 Mollamahmutoğlu and others, p. 1027.
395 Centel, p. 72.
396 Baysal, p.65 ff.; Çelik and others, p. 537.
397 Mollamahmutoğlu and others, p. 1027.
398 Tulukçu, p. 173.
399 Ekmekçi and Yiğit, p. 637.

taken into consideration and it has to be examined whether the termination of the employment contract depends on a valid reason or not[400]. The Turkish Court of Appeals evaluated in one of its judgments[401] that, since taking reports declaring employee's incapacity to work and that not continuing to work in the workplace as a result of these reports at different times had affected management of work negatively and it may not have been excepted from an employer to continue to employment relation in these conditions, it should have been accepted that termination of employment contract having been made by the employer depended on a valid reason. In one another judgment of the Turkish Court of Appeals, it was indicated that, by taking the work performed by the employee into consideration, when it was taken into account that being the absent of flight personnel taking 11 different reports for resting in 21 days may have caused to delay in flight plan having been prepared before and caused to change in workload plan, termination having been made by the employer was deemed as a valid reason[402]. However, it is not important for termination with valid reason depending on taking reports frequently whether reports are issued for short or long period of time. Reports taken for really short period of time but issued frequently may also cause negative effects in the workplace[403].

According to one opinion in the doctrine, in order to issue a termination depending on employee's illness, there has to be a negative estimation regarding the fact that employee's illness may also continue in the future. Indeed, if it is understood that an employee got well or reason giving rise to employee's absence at work disappeared, it is not possible anymore to issue a termination depending on employee's illness[404].

In the concrete case that employee's employment contract was terminated in accordance with Article 25/II of LC with the reason that the employee had not been sick but

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400 Uysal İbat, p. 8.

401 *In the abovementioned judgment, it is explained as follows; "termination reason of claimant's employment contract is that s/he took reports regarding incapability for work for a total 29 days between 25/06/2014 and 22/07/2014 and that claimant's works were affected negatively during that period of time. When claimant 's working period (6 months and 23 days) is taken into account, since it is understood that not to continue to work by taking more than one report regarding incapability for work at different times affects workflow negatively and it may not be waited from the employer to continue employment relation in this circumstance, even though it should have been accepted that termination made by the employer depended on a valid reason, it is inaccurate to decide in written form."* (22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 30/09/2015 numbered 2015/25672 E. and 2015/26095 K. (Yargıtay Karar Arama)).

402 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 19/11/2015 numbered 2015/22940 E. and 2015/32996 K. (Yargıtay Karar Arama).

403 Caniklioğlu, p. 85.

404 Çelik and others, p. 539; Caniklioğlu, Sona Erme, p. 230; Alp, Sona Erme, p. 196-197.

s/he had taken medical reports from various medical units and the employee had been absent from work, the Turkish Court of Appeals decided that even though it was not proven that medical reports were fake, as the employer had indicated on termination notice that the employee had brought medical reports and had been absent because of those reports, the employer depended on this fact as a material fact, judge was obliged to examine legal interpretation and the scope of regulation to be applied to issue having been shown *ex officio,* it was clear that employee's behavior that may not have been deemed as justified reason and that had been demonstrated as material fact by the employer may have disrupted workflow, it was not expected from the employer to endure this circumstance, termination of employment contract did not depend on justified reason but behaviors of the employee taking medical reports for 60 days in different days in 1 year constituted a valid reason for termination of employment contract[405].

On the other hand, according to the Turkish Court of Appeals, provided that the source of decreasing in employee's capacity and adaptation is only the working relation, for example, should it depend on occupational illness or accident, this circumstance should be evaluated on behalf of the employee. With this regard, provided that employee's illness occurs because of activities of the workplace, this fact should be evaluated on behalf of the employee. Supposing that employee's occupational illness occurs because of not taking adequate occupational safety measures and precautions, the validity of the termination of the employment contract should be examined strictly. It should be also taken into account whether the occupational accident occurred because of employee's or employer's fault. The absence rate of the employee should be also taken into account[406].

AIDS and drug/ alcohol additions should be evaluated specially in the scope of illness. Indeed, should sole HIV infection does not reach to AIDS level, this illness may not be used as a valid reason for termination. Similarly, should drug/ alcohol additions do not affect progress or management of work, it may not be deemed as a valid reason for termination of employment contracts[407].

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405 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 10/09/2015 numbered 2015/18155 E. and 2015/25176 K. (Yargıtay Karar Arama).

406 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 30/06/2008 numbered 2008/1935 E. and 2008/20014 K. (legalbank.com); 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 21/01/2016 numbered 2015/25369 E. and 2016/1485 K. (Yargıtay Karar Arama); 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 21/03/2014 numbered 2014/5769 E. and 2014/6835 K. (legalbank.com).

407 Centel, p. 71; Baysal, p. 75 ff.

Illness about which an employee informed the employer before commencing to work may not be used as a valid reason for termination[408]. Besides, in 22nd Civil Chamber of the Turkish Court of Appeals' judgment, in the concrete case that there is a written termination notice issued by the employer indicating that even though there is a justified reason in accordance with Article 25/II (a) of LC, employee's employment contract is terminated with valid reason with the reasons that an employee was not informed the employer about his/her illness during working application while being employed, although, due to the working sector on which they were working, informing about illness that was gotten through and about health conditions was a crucial importance, s/he had hidden these information from the employer, it was decided that it had to be observed, following taking expert report indicating starting date of illness of the employee, whether illness of the employee was an obstacle for working, whether working sector was suitable for employee's illness, whether there was a suitable another work for the employee in working sector, whether there was possibility to employ the employee for another work in workplace by taking the principle of termination of ultimate remedy into account[409].

In addition to all these, employee's health condition may not enable an employee to work for some specific work (hard work). In this circumstance, as a need of employer's duty to observe, an employer has to provide work which is suitable for employee's health condition to the employee. Yet, provided that there is no work in this quality in the workplace or the employee does not accept to work which is suitable for his/her health conditions, this employer may use his/her right to terminate the employment contract with valid reason[410].

b. Decrease in Employee's Performance

It is explained in the reasoning of LC with an example when it shall be mentioned that there is a decrease in employee's performance. In the reasoning of LC, *"having less performance than qualification shown by and waited from employee"* is indicated and this criterion shall be changed for each employee. According to one opinion in the doctrine, the issue that legislative authority is trying to explain is that employee's performance is less than an average of performances of similar employees working in similar work and this also needs

408 7th Civil Chamber of the Turkish Court of Appeals' judgment dated 13/02/2014 numbered 2013/27510 E. and 2014/3891 K. (legalbank.com).

409 22nd Civil chamber of the Turkish Court of Appeals' judgment dated 27/02/2017 numbered 2017/3483 E. and 2017/3865 K. (legalbank.com).

410 Süzek, Yetersizliği veya Davranış, p. 571-572.

a specific time criterion[411]. With another explanation, employee's performance should be compared with performances of other employees working for the same or similar work and employee's performance should be determined in accordance with this[412]. While comparing, it should be considered that circumstances such as the type of work performed by employees, the workplace in which work is performed, age and experience are similar or the same[413]. Indeed, the Turkish Court of Appeals also decided that, by making evidentiary investigation in workplace with help of expert, it should have been inspected whether the work performed was suitable for its standards, if it was suitable, whether employee's performance had decreased in a reasonable period of time when compared with the performance of other employees working for same work, if there was such decrease in performance, whether this was temporary or constant and whether decreasing of productivity happened as a consequence of that or not and it was indicated that these circumstances should have been evaluated by taking Article 18 of LC consideration and the judgment should have been held in accordance with this evaluation[414]. With a more explicit explanation, in order to terminate an employment contract with valid reason by accepting that employee's performance is insufficient, it is needed that duty to work is not performed as it should be[415].

Furthermore, while taking the reasoning of Article 18 of LC into account, provided that an employee is qualified person and it is taken into account while employing him/her, employee's performance should be detected in accordance with employee's subjective criteria. On the other hand, with regard to unqualified employees, their performance should be detected in accordance with objective criteria. In other words, it should be inspected whether their performances are poor or not by basing on the performance of the employee being at an average level[416].

Previously employee's performance shall be inspected by observing the employment contract. In the event that employee's performance is not determined by the employment contract, it should be identified by employer's instructions. With this regard, an employee has

411 Mollamahmutoğlu and others, p. 1028.
412 Centel, p. 75; Ertürk, p. 312; Doğan Yenisey, Sona Erme p. 467.
413 Baysal, p. 94 ff.
414 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 24/06/2004 numbered 2004/3740 E. and 2004/15625 K. (legalbank.com).
415 Çankaya and others, p. 74-78; Uysal İbat, p. 12.
416 Çelik and others, p. 535; Caniklioğlu, p. 79.

to do his/her best to determine performance criteria. Yet, it is obliged to evaluate whether an employee performs sufficiently or not with a performance evaluation system[417].

Performance evaluation systems are used for evaluating personal performances within the context of corporate performance[418]. 9th Civil Chamber of the Turkish Court of Appeals indicated one of its judgments as[419];

> *"Performance is an evaluation of productivity in the simplest term. Level and quality of work that an employee performes during working period and contributes to production of work from employee's performance. The level of production that is the consequence of work that an employee spends per unit time demonstrates the productivity of the employee. In other words, performance is a dimension of work happening during work, productivity is the result of work spent per unit time. In accordance with this, it is expected that an employee who has high performance has high productivity.*
>
> *In order the result of employee's performance and productivity become a base for a valid reason, objective criteria have to be described. Criteria for performance and productivity should be unique for the workplace. Objective criteria should apply as employees working for the same work in that workplace have to be bounded to the same rules. The standard of performance and productivity should be realistic and reasonable. For the existence of valid reason depending on consequences of performance and productivity, there have to be constant poor results or results tenting to decrease. Result changing according to conditions and not being constant may not be deemed as being sufficient for valid reason. Besides, failure to achieve goals for improving performance and productivity may not be deemed as a valid reason solely. Provided that employee's capability is sufficient for high targets but this employee is not struggling sufficiently for these targets, it shall be deemed that there is a valid reason. (our judgment dated 08/04/2008 and numbered 2007/27829 E. and 2008/7831 K.)*
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> *On the other hand, in order to be objective while evaluating performance and to accept valid reason, criteria of evaluation of performance shall be determined previously, these criteria should be served to the employee, these criteria should be based on talents needed for work such as knowledge, capability and experience, behaviors being suitable for work and personal development and work waited from an employee to perform. In other words, employee's qualifications, behaviors and goals that have been accomplished by an employee at the end are important. These criteria have to be determined objectively and perceptibly in accordance with employee's definition of work, productivity, employer's corporate principles, working rules that must be followed and performance evaluation forms have to be issued in this regard. Performance Evaluation System which is unique for the workplace and which performances*

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417 Centel, p. 74.

418 Erol, Akı and Tunç, Demirbilek. "Performans Değerlendirme Sistemi ve Performans Düşüklüğü Nedeniyle İş Sözleşmesinin Feshi". *Prof. Dr. Ali Güzel'e Armağan, Marmara Üniversitesi Hukuk Fakültesi*, Istanbul: Beta, (2010): p. 6.

419 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 14/11/2017 numbered 2017/398 E. and 2017/18166 K. (legalbank.com).

of employees shall be evaluated with should be developed and should apply. (judgment of our Chamber dated 24/09/2007 and numbered 2007/12994 E. and 2007/27720 K.)"

and it is indicated that a performance evaluation system is a mandatory fact for termination with valid reason depending on decrease of employee's performance and it is emphasized that this system should be issued by depending on which principles. In this regard, in order to be objective and to be accepted as valid reason while evaluating performance, performance evaluation criteria should be issued previously, these criteria have to be served to the employee and these criteria should be based on talents needed for work such as knowledge, capability and experience, behaviors being suitable for work and personal development and work waited from an employee to perform[420]. With another explanation, these performance criteria should be determined uniquely for the workplace, it should be detected that an employee should have which capabilities to obtain accomplishments on performance and that criteria which are not in the scope of employee's definition of work. On the other hand, cirteria which do not arise from the employee herself/himself, especially criteria depending on external factors, should not be taken into consideration[421]. These performance evaluation criteria should be determined objectively and perceptibly in accordance with employee's definition of work, productivity, employer's corporate principles, working rules that must be followed[422].

A performance evaluation system provides an opportunity for an employer to determine the performance level waited from an employee. For this reason, it is possible to benefit from a performance evaluation system in evaluation of employee's decrease in performance. Furthermore, in Turkish Law, terminations with valid reasons arising from a decrease in performance are generally considered as terminations made as a result of evaluation of performance in workplaces having a performance evaluation system[423].

Performance standards should be realistic and reasonable[424]. In other words, determining targets which are not realistic and which are super high shall cause that the employee does not accomplish targets in any manner even though employee's performance develops over the years and as a consequence of this, even though the employee works

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420 Ertürk, p. 311.

421 Kar, p. 287; Kar, Yargısal Denetim, p. 37-39; Güzel, Ali. "Yetki ve Değerlendirme". *Prof. Dr. M. İlhan Ulusan'a Armağan*, V: III, Ankara: Seçkin, (July 2016), p. 382-383.

422 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 04/05/2015 numbered 2015/12319 E. and 2015/15935 K. (Yargıtay Karar Arama).

423 Mollamahmutoğlu and others, p. 1030.

424 Güzel, Yetki, p. 384.

properly, there will be fewer performance of the employee. Because of this, these kinds of performance standards should not be determined[425].

When the target and standard shall be accomplished should be indicated by the employer while determining performance criteria. At the end of a specified duration, evaluation should be made for every employee simultaneously. Termination to be issued as a consequence of evaluation made before waiting expiration date of duration or made for only one employee shall not be deemed as valid[426]. The clearer and more accurate performance standards are determined, the more objective the performance evaluation shall be[427].

Employee's low performance shall also affect employee's productivity negatively[428]. On the one hand, performance is a dimension of work placed during working, on the other hand, productivity is a result of work performed in every unit of time. Even though performance level depends on the employee, productivity level is not only a consequence determined by the employee. In other words, employer's working organization is as effective as the employee for productivity. Even though employee's performance is high, provided that factors that will provide productivity and that will comply with this performance such as working conditions, equipment, usage of technology and employment of the employee for suitable work are insufficient, productivity shall be low. For this reason, evaluation of performance and productivity determined only by depending on the employee shall not always give fair results[429]. It means, while evaluating employee's performance, it should not be ignored that there may be conditions affecting performance negatively but not arising from the employee[430]. In one of its judgments, in the concrete case that after the change of employee's work without employee's consent, vocational education regarding this new work was not provided and employee's employment contract was terminated with the reason that the employee insisted not to perform his/her work, in spite of reminding and with the reason depending on decreasing of employee's performance after 5 months; the Turkish Court of

425 Kar, p. 290.
426 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 21/04/2008 numbered 2007/30802 E. and 2008/9237 K. (NJIS).
427 Akı and Demirbilek, p. 8.
428 Akı and Demirbilek, p. 13.
429 Kar, p. 282-283; Çelik and others, p. 535-536
430 Caniklioğlu, p. 80.

Appeals indicated accurately that this reason that was not arising from the employee may not have been deemed as valid or justified reason for termination[431].

It should be deemed as normal that the employee who has been working in the workplace for a long time and accomplishes performance that has to be waited from him/her during his/her working duration may fall below his/her required performance during a part of his/her working life[432]. In other words, decreases for a short period of time to be seen in the performance of the employee that has been working in the workplace for a long time shall not be deemed as a valid reason for termination. Issuing termination by demonstrating this decrease in performance for a short period of time shall be deemed as an abuse of the right[433].

Also, the determination of a decrease in performance means negative foreseen and therefore, negative foreseen sought for termination with valid reason arising from incapability shall rule for a decrease of performance too. With another explanation, there should be negative foreseen showing that the decrease in performance shall continue in the future too[434].

On the contrary, if the fact that employee' performance is lower than the performance of the average employee performing similar work is known by the employee while concluding the employment contract, since this circumstance is known by the employer while concluding the employment contract, this reason may not be demonstrated by the employer as a valid reason for termination. Besides, for the existence of a valid reason depending on consequences of performance and productivity, there should be the existence of consequences of constant decrease and tendency to decrease[435].

Without a doubt, on the condition that employee's decrease in performance depends on natural reasons arising from employee's nature such as getting old, an employer has to endure employee's decrease in productivity and performance. Termination of employment contract with valid reason may be possible only if it is accepted that an employee does not fit wholly into the profile needed for this employee to work in the workplace. Yet, in order that the employment contract of the employee whose productivity has been decreased may be terminated, it should be examined whether there is a probability that an employee may continue to work in another work that is in conformity with employee's performance and

431 9th Civil chamber of Turksih Court of Appeals' judgment dated 28/09/2009 numbered 2008/42886 E. and 2009/24409 K. (legalbank.com).
432 Çankaya and others, p. 73.
433 Mollamahmutoğlu and others, p. 1028.
434 Centel, p. 76.
435 Kar, p. 283.

productivity. In this regard, in conformity with the examination to be issued, if transfer of the employee to another work is not seen as possible, an employer may terminate the employment contract with a valid reason. Furthermore, provided that profile needed for the employee to work performed by himself/herself is needed to have vocational knowledge improving and renewing constantly, an opportunity to obtain this knowledge has to be provided to the employee by the employer[436].

In Turkish Law, in order to mention about the decrease in employee's performance, it is not possible to determine a certain rate regarding how much performance is shown by the employee lower than performance waited from him/her to show. In every specific case, the judge will examine whether it is not waited from an employer to maintain the employment contract because of negativity caused by employee's decrease of performance. Even though the rate of employee's decrease in performance is not in a serious level, provided that decrease of performance has lasted for a long time and it has not gotten better, an employer may not be compelled to continue the employment contract[437].

The Turkish Court of Appeals decided that on the condition that the employer showed reason based on employee's decrease in performance, it was obliged to submit reports regarding performance; provided that reports were not submitted to the court, termination would have been deemed as invalid. Hence, the Turkish Court of Appeals indicated that it should have been examined whether employee's performance had felt below the performance of average employee working in similar work during a reasonable period of time, if there was a decrease in performance like that, it should have been detected whether that was constant or temporary and as a consequence of that, whether there was a decrease of production or not[438].

There is not any doubt that educations to be given by employers to employees whose performances felt shall affect evaluations of employees' performances positively. Evaluation of performance is an important issue for determining educations to be needed to be given in workplace in the future. Indeed, it shall be possible to determine deficiencies in the workplace with performance evaluations and to provide suitable education to employees. In this regard, performance evaluations should be a part of education procedures empowering individual's courage. In order to be successful in these education and evaluation, it is needed that an

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436 Kılıçoğlu, p. 1220-1221.

437 Mollamahmutoğlu and others, p. 1030.

438 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 26/04/2004 numbered 2004/3740 E. and 2004/15625 K. (legalbank.com).

employee wants to be educated, an employer should provide assistance in order to increase the working level of the employee and that an employer has to provide a suitable education[439]. With this regard, the principle of reciprocity as one of the main principles is seen for employment contracts too.

As employee's decrease in performance may be arisen from employee's vocational incapability, it may also arise from employee's behaviors. The fact that an employee does not work properly and in a manner needed, an employee causes to some deficiencies during performance of work, employee's fitting into work, adaptation, focus and working tempo decrease gradually, an employee does not comply with technological and scientific developments and new managements and an employee does not perform needs of work are circumstances of vocational incapability[440]. Provided that an employee insists on not performing his/her duties despite warnings, because of the existence of a circumstance in which the employee resist to perform a work that s/he may perform, this circumstance may be deemed as a decrease in performance arising from employee's behavior. In this situation, it may not be considered anymore that there is a decrease of performance arising from incapability but it shall be deemed that there is a decrease of performance arising from employee's behavior[441]. With another explanation, the fact that the employee whom has sufficient capacities and vocational knowledge, it means features sought for vocational capability and suitability, although s/he was warned previously, continues to work with lower productivity than the performance of the average employee working in the same or similar work shall be a valid reason arising from employee's behavior[442].

Since an employee who does not focus on work given by the employer or whose focus decreases gradually may not focus on work or his/her focus on different thing which are not regarding the work increases, it may be accepted that these circumstances disrupt work. This circumstance may occur because of employee's personal problems and/or working conditions regarding the workplace[443]. This circumstance is also deemed as a valid reason in the reasoning of LC. On the contrary, if source of the mentioned reason may be accepted as if it was attributable to the employee, this circumstance may give rise to termination with valid

439 Kar, p. 283
440 Tulukçu, p. 177.
441 Uysal İbat, p. 13.
442 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 18/03/2008 numbered 2007/27584 E. and 2008/5327 K. (legalbank.com).
443 Centel, p. 82-83.

reason[444]. On the other hand, provided that reasons affecting employee's performance are not attributable to the employee, the employer has to do his/her best to eliminate circumstances affecting employee's performance before termination[445]. Unless precautions to eliminate them are taken by the employer, it shall be accepted that termination of the employment contract does not depend on any valid reason[446].

c. Missing the Goal Specified with the Contract for Goal

Parties of employment contract may conclude a contract specifying that the employee shall be promoted with a bonus if s/he accomplishes performance goals within a specific period of time[447]. The difference of a contract for goal from unilateral goals determined by the employer within the scope of his/her right to manage is an agreement of an employee and an employer bilaterally[448]. However, it should be answered here whether the employment contract may be terminated by depending on a valid reason, if an employee does not accomplish the goal specified in the contract concluded between an employer and an employee[449]. Provided that the employee who has to struggle to reach the goal specified with the contract for goal does not fulfill this obligation, it may be deemed that the employee acts against his/her duty of care[450]. Determining in the contract that not showing a performance higher than objective and reasonable facts waited from average employee is a valid reason to terminate the employment contract shall be against Article 18 of LC[451]. Goals should be reachable, realistic and clear within the scope of objective conditions[452]. The Turkish Court of Appeals also, by declaring *"not accomplishing goals determined for increasing performance and productivity shall not only be deemed as valid reason. Even though employee's capacity is high and it is sufficient for goals but the employee does not struggle sufficiently for these goals, this may be a valid reason"* in its judgment, supported the opinion of doctrine and in addition to this, it mentioned that on the condition that the employee demonstrated

444 Ercan Akyiğit. *Açıklamalı ve İçtihatlı Türk İş Hukukunda İş Güvencesi (İşe İade)* (Ankara: Seçkin, 2007), p. 262.

445 Bektaş Kar. "Ölçülülük İlkesinin İş Güvencesinde Uygulanması". *Sicil İş Hukuku Dergisi*, I: 15, (September 2009): p. 65; Ugan Çatalkaya, p. 494-495.

446 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 18/10/2017 numbered 2016/25049 E. and 2017/16105 K. (legalbank.com).

447 Mahmut Kabakçı. "İş Hukuku Uygulamasında Hedef Sözleşmeleri". *İş Hukukunda Genç Yaklaşımlar II*, Istanbul: Onikilevha, (October 2016): p. 213.

448 Kabakçı, Hedef Sözleşmesi, p. 214.

449 Süzek and Başterzi, p. 610.

450 Kabakçı, Hedef Sözleşmesi, p. 221.

451 Süzek and Başterzi, p. 610.

452 Kabakçı, Hedef Sözleşmesi, p. 222.

performance lower than his/her capacity while s/he may reach the goal determined with contract for goal, it may have been deemed as a valid reason[453].

d. Losing of Permission and Licence

In some conditions, an employee needs a licence or permission issued by authorized institutions and private companies in order that an employee may perform his/her duties embarked with an employment contract. Licence and permissions to be needed for work shall change according to the work performed by the employee. Working with the employee or employment of the employee in the workplace without this licence or permission will be against the law. Working permission needed for foreign employee to work in Türkiye shall be evaluated in this scope. The main purpose to oblige for foreign employees to receive working permission is to regulate the workforce market. Therefore, the employment contract of a foreign employee working without working permission shall be deemed as null and void[454]. On the other hand, provided that an employee has never started to work in the workplace because of the absence of licence or permission, it may not be mentioned that there is an employment relation. Whereas, one of issues that has to be solved is what will happen when an employee loses his/her conditions to obtain licence or permission so as to work while working in an enterprise or workplace even though s/he had started to work in the enterprise or workplace with licence or permission having been issued duly and it should be clarified whether this circumstance may give opportunity for the employer to terminate employment contract or not.

Provided that an employer is obliged to provide needed licences of the employee whose necessary permission or licence having been annulled, having been frozen for a period of time, having not been renewed or having not been postponed in order that the employee may perform his/her duties specified with employment contract; previously this employer has to do his/her best in order that the employee may receive this licence or permission. Besides, even though this employer is not obliged to provide such licence or permission, this employer may positively contribute to obtaining such licence or permission. Therefore, before termination, this employer has to demonstrate this effort. Provided that the obliged person to reobtain or to prolong permission or licence to perform work embarked with an employment

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453 7th Civil Chamber of the Turkish Court of Appeals' judgment dated 03/11/2015 numbered 2015/19018 E. and 2015/21250 K. (legalbank.com); for supporting opinion for the Turkish Court of Appeals' judgment: Kabakçı, Hedef Sözleşmesi, p. 221-222.

454 Ömer Uğur. *İş Sözleşmesi İle Çalışanlar Bakımından Yaşlılık Sigortası* (Onikilevha, August 2022), p. 213-214.

contract is an employee and there is a need for personal application of the employee, this employee has to apply for this licence or permission. Unless this employee applies to authorized institutions to receive such licence or permission and performs his/her duties, if other conditions also exist, the employer has a right to choose for termination. As the employer may choose to terminate the employment contract with a reason arising from employee's behavior since this employee does not perform his/her obligations, in this circumstance, the employer may also choose to terminate the employment contract with a reason arising from employee's incapability since this employee loses his/her qualifications needed for performance of work[455].

In the event that an employee is employed only for specific work needing licence or permission, the fact that the employee loses permission or licence obliged for work performed by the employee, even though there is no fault of the employee, there may be employer's right to terminate the employment contract by depending on force majeure in accordance with Article 25/III of LC. On the condition that situations causing lose licence and permission may also arise because of the existence of employee's behavior too, justified reason regarding circumstances that are inconformity with moral and good faith regulated by Article 25/II of LC and termination with valid reason arising from employee's behavior should be discussed. Unless an employee is employed for a specific work needing licence or permission, meaning that this employee may perform some other work too, the employer has to try to make employee work in different works or with different manners previously. If there is no possibility for this employee to act differently the time of termination, the employer may choose to terminate employment contract by depending on valid reason arising from employee's incapability[456]. The fact that employee loses licence or permission having been obtained before, unless it causes problem for performance of the employee, it shows its consequences only on employee's private life, shall not be deemed as valid reason[457].

e. Termination Depending on Suspicion

Termination depending on suspicion is deemed as another example of termination depending on employee's incapability in Turkish Law. With this regard, if there is an explicit suspicion regarding the fact that an employee breached his/her duties arising from employment contract seriously or committed a crime, foundations of trust of employment

455 Mollamahmutoğlu and others, p. 1032.
456 Baysal, p. 122.
457 Mollamahmutoğlu and others, p. 1032-1033

relations shall be damaged and termination of employee's employment contract with this reason may exist[458]. This issue is mentioned in the judgment of 9th Civil Chamber of the Turkish Court of Appeals dated 22/10/2007 for the first time and termination depending on suspicion was mentioned repeatedly in its different judgments[459].

Termination depending on suspicion, on the condition that there is an unrelieved suspicion regarding the fact that an employee breached his/her duties arising from the employment contract seriously or committed a crime, is a termination giving opportunity for an employer to terminate unilaterally because of collapse of foundation of trust of the employer. In this kind of termination, employer's suspicions for the employee damages the foundation of trust between them. Employee's availability needed for the continuation of employment contract shall disappear because of a suspicion which makes employment relation undurable for the employer. As a consequence of this reason, suspicion causing damage of foundation of the trust between the employer and the employee shall be evaluated as reason arising from employee's personality[460]. On the other hand, the main issue is not employee's behavior but it is that unrelieved suspicion makes constant and personal employment relation unbearable for employer. For this reason, it should be accepted that instead of termination depending on employee's behavior, it is a termination depending on employee's incapability and it has to be inspected legally in this regard[461].

Without any doubt, every reason damaging the foundation of trust may not give rise to the termination of the employment contract. Suspicion regarding the fact that something happened has to have a qualification that may justify termination[462]. This suspicion in question is not subjective losing of the trust but losing of the trust supported with objective facts[463]. Although basic unreasoned predictions and outcomes obtained from issues that do not

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458 Mollamahmutoğlu and others, p. 1033; Ulaş Baysal. "Şüphe Feshi Kavramı ve Şüphe Feshine İlişkin Yargıtay Kararlarının Değerlendirilmesi". *Sicil İş Hukuku Dergisi*, I: 35, (2016): p. 87; Doğan Yenisey, Sona Erme, p. 477.

459 For other case-laws with this regards: 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 22/10/2007 numbered 2007/16878 E. and 2007/30923 K. *(*taken from; Kübra Doğan Yenisey. "Şüphe Feshi". *Sicil İş Hukuku Dergisi,* I: 11, (September 2008): p. 65-67*);* 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 17/12/2015 numbered 2015/34482 E. and 2015/35755 (Yargıtay Karar Arama); 7th Civil Chamber of the Turkish Court of Appeals' judgment dated 06/05/2015 numbered, 2015/1784 E. and 2015/8200 K. (Yargıtay Karar Arama); 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 07/12/2015 numbered, 2015/30405 E. and 2015/33757 K. (Yargıtay Karar Arama).

460 Kar, p. 316.

461 Mollamahmutoğlu and others, p. 1034; Astarlı, Sona Erme, p. 323.

462 Caniklioğlu, p. 125-126.

463 Doğan Yenisey, Şüphe, p. 68; Kar, p. 316; Tulukçu, p. 183; Mollamahmutoğlu and others, p. 1034; Caniklioğlu, p. 127.

have reasonable casual connection do not constitute a strong and objective suspicion, concrete outcomes obtained from information received following inspection made by persons in the workplace or security video camera records taken duly may be used as a base of suspicion[464]. However, termination issued by the employer, by depending on proofs collected with an illegal manner, shall not be deemed as valid[465]. The Turkish Court of Appeals also indicates in its judgments that it has to be obliged to depend on specific objective issues or signs at the time of termination of employment contract for termination depending on suspicion. Also, it is indicated that employer's subjective evaluation is not sufficient for termination, as a consequence of examination, it has to be revealed that the existence of suspected circumstance is highly probable[466]. Bases of suspicion have to be objectively reasonable, this has to be evaluated as suspicious by every fair employer and the probability of the fact that crime or behavior in question was made by the employee has to be high[467].

The Turkish Court of Appeals, by declaring that;

> *"If it is suspected that an employee committed a crime or breached of contract and, because of this, provided that employment contract was terminated with the reasons of collapse or serious damage of trust needed for the continuation of employment relation between parties, it shall be mentioned about termination depending on suspicion. In this type of termination, employer's suspicion against his/her employee causes damage to the trust relation between them. Because of suspicion that it may not be expected from the employer to endure and because employee's suitability needed for the continuation of employment relation disappeared; suspicion causing damage of trust relation is a reason arising from employee's personality. Since the doubt justified by serious, important and concrete issues removes employee's suitability for work that may not be performed without the foundation of trust, termination depending on suspicion shall be considered as termination depending on employee's incapability. In order for termination depending on suspicion to be valid, there has to be strong suspicion depending on objective issues and circumstances and being capable to damage trust needed for the continuation of the employment relation and also, the employer has to demonstrate all efforts waited from him/her in order to clarify concrete issue."*

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464 Baysal, Değerlendirme, p. 88.

465 Deniz Ugan Çatalkaya. "İşçinin İletişiminin İşverence İzlenmesiyle Elde Edilen Verilerin İş Sözleşmesinin Feshine Gerekçe Yapılması: İş Yargısı ve Anayasa Mahkemesinin Konuya Yaklaşımı". *Legal İş Hukuku ve Sosyal Güvenlik Hukuku Dergisi*, Special Annex, V: 21, (2024): p. 537.

466 Higher Court explained the need for the occurrence of serious and objective suspicion for termination depending on suspicion as *"in order that termination depending on suspicion may be valid, there has to be a serious suspicion depending on objective cases and circumstances being able to break the trust which is needed for continuity of employment relation".* For details of this judgment; 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 19/12/2014 numbered 2014/24976 E. and 2014/38866 K. (lexpera.com).

467 Doğan Yenisey, Şüphe, p. 68.

determined the termination depending on suspicion in one of its judgments. In the concrete case, the employment contract of the employee working as authority for banking processes in a workplace belonging to a bank was terminated with allegations of justified reasons by showing reasons that there was a serious suspicion regarding embezzlement and serious negligence in the case that one of bags (that contains 8.050,00 TL) that must have been twenty-one totally had been lost. Because of the alleged issue, even though it had been held on the acquittal of the employee with the reason of insufficiency of proof in the criminal case, at the decision date of this judgment, that criminal case was at the appeal stage and it was not *res judicata*. While proceeding with a criminal investigation, video records recorded by security cameras in workplace was examined by an expert and from those records, it was seen that the employee had opened the money bag by cutting its clip, s/he had put the money bag to the edge of the table that may not have been seen by cameras, s/he had done something by leaning under the table that s/he had put money bag on, yet, because it had not been in the scope of cameras, it had not been certain what s/he had been doing, following leaving the room, s/he had comeback with a bag, s/he had taken something by leaning under the right side of the table with bag, s/he had put something that s/he had taken from under the table in the bag that s/he had brought as being empty and s/he had closed the bag, and then s/he had put it in his/her handbag. The Turkish Court of Appeals decided on this concrete case, by evaluating that even though it was not certain in this level whether the employee had taken this money in question and therefore, termination was justified or not and although the criminal case was at the appeal stage, it was understood that a suspicion that was against the employee reasonably and may not have been expected from the employer to endure existed from behavior shown in video records, that suspicious caused to damage to employment relation between the employee and the employer and it was not expected from the employer to maintain employment relation, due to the fact that conditions of termination depending on suspicion occurred in the concrete circumstance, that it should have been accepted that at least termination was depending on valid reason[468].

In some circumstances, proofs obtained by an employer may validate termination depending on suspicion by giving rise to the collapse of the foundation of trust between an employee and an employer even though the criminal procedure is finalized with acquitment because of lack of evidence. On the other hand, it is not sufficient for the occurrence of

[468] 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 24/01/2017 numbered 2017/482 E. and 2017/818 K. (Yargıtay Karar Arama).

objective and serious suspicion that a criminal investigation is started about an employee by itself, each criminal investigation started against an employee does not give rise to termination depending on suspicion. Provided that an employer may predict that this investigation shall remain inconclusive, s/he should not terminate the employment contract with suspicion just because of the pending criminal investigation[469].

In termination depending on suspicion, as the action may be against an employer, it may also be against third parties by breaching duties arising from the employment contract[470]. As a typical example of this circumstance, suspicion regarding the fact that an employee commits a crime against his/her colleague's assets may be shown[471]. However, suspicion regarding the fact that an employee committed a crime regarding external issues which do not concern employee's duty to perform work may not give rise to termination depending on suspicion[472]. Some cases as examples that may give rise to termination depending on suspicion and that are given by German Federal Courts may be listed as; suspicion regarding selling and buying of stolen phones in a parking spot belonging to the workplace[473], suspicion regarding the fact that mills gained from a flight program were transferred by the employee to his/her account unduly[474], suspicion regarding the fact that sales person stool something[475], suspicion regarding the fact that the employee performing his/her duties arising from employment contract gained an improper personal benefit[476], suspicion regarding abuse of security[477], suspicion regarding obtaining food payment unduly[478], suspicion regarding sexual harassment[479] suspicion regarding the fact that bank employee embezzled client's money[480] and etc.

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469 Baysal, Değerlendirme, p. 90-91.

470 Canan Erdoğan. *İş Hukukunda Şüphe Feshi*. I: 11, (Yetkin, 2019), p. 143-144; Baysal, Değerlendirme, p. 88

471 Baysal, Değerlendirme, p. 88.

472 Baysal, p. 175; Mollamahmutoğlu and others, p. 1035; Baysal, Değerlendirme, p. 88.

473 BAG, 06/11/2003, AP BGB § 626 Verdacht strafbarer Handlung Nr 39 (transferred from; Mollamahmutoğlu and others, p. 1035).

474 BAG, 03/07/2003, AP BGB § 626 Verdacht strafbarer Handlung Nr 38 (transferred from; Mollamahmutoğlu and others, p. 1035).

475 BAG, 12/08/1999, AP BGB § 626 Verdacht strafbarer Handlung Nr 28 (transferred from; Mollamahmutoğlu and others, p. 1035).

476 BAG, 26/09/2002, AP BGB § 626 Verdacht strafbarer Handlung Nr 37 (transferred from; Mollamahmutoğlu and others, p. 1035).

477 BAG, 06/12/2001, AP BGB § 626 Verdacht strafbarer Handlung Nr 36 (transferred from; Mollamahmutoğlu and others, p. 1035).

478 BAG, 06/07/2000, Reshtsprechung zum Kündigungsrecht, I, 8c, Nr 54 (transferred from; Mollamahmutoğlu and others, p. 1035).

479 BAG, 08/06/2000, AP BeschSchG § 2 Nr. 32 39 (transferred from; Mollamahmutoğlu and others, p. 1035).

480 BAG, 05/05/2001, AP BGB § 626 Verdacht strafbarer Handlung Nr 34 (transferred from; Mollamahmutoğlu and others, p. 1035).

Another condition of termination depending on suspicion for its compliance with laws is that an employer has to show all his/her best to eliminate suspicions before terminating the employment contract[481]. In order to use the right to terminate in accordance with good faith, this kind of effort shall be expected from an employer. The manner that an employer may apply previously and easily in order to eliminate suspicion is meeting with the employee herself/himself. Taking employee's defence indicated as an obligation to obtain for termination regarding behavior and incapability in Article 19 of LC due to the fact that it may give an opportunity to eliminate suspicion should be obtained in the procedure of termination depending on suspicion too[482]. Because, obtaining of employee's defence shall be essential regarding determining whether the termination reason really exists or not and while depending on its consequence, regarding the usage of the right to terminate the employment contract in compliance with good faith. Furthermore, it is not sufficient that the employer only asks questions which is intangible and whose content is unclear. Therefore, the employer has to ask questions that give opportunity for the employee to eliminate concrete suspicion regarding issues giving rise to suspicion while obtaining defence. Despite employee's explanations, provided that suspicions continue to exist, the employer may apply to termination depending on suspicion[483]. Yet, it is not mandatory to obtain employee's defence face to face all the time[484].

f. Retirement and Elderliness

Another reason indicated in the reasoning of LC is retirement. For the first time, it is made possible that workers, except workers who commenced to work by being subject to Code numbered 5510, may continue to work by paying security supporting premiums even though they are retired[485]. The fact that an employee reaches to a certain age does not constitute a valid reason, with another explanation, the fact that an employee gains the right to

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481 Doğan Yenisey, Şüphe, p. 68; Erdoğan, p. 174; Caniklioğlu, p. 126; Baysal, Değerlendirme, p. 89; Astarlı, Sona Erme, p. 322.

482 Doğan Yenisey, Sona Erme, p. 477; Astarlı, Sona Erme, p. 322.

483 Baysal, p. 177-178; Baysal, Değerlendirme, p. 89-90.

484 Doğan Yenisey, Şüphe, p. 68.

485 Fevzi Şahlanan. "İş İlişkisinin Sona Ermesi ve Kıdem Tazminatı". *Yargıtay'ın İş Hukuku ve Sosyal Güvenlik Hukuku Kararlarının Değerlendirilmesi 2008*, İş Hukuku ve Sosyal Güvenlik Hukuku Derneği, Türk-İş, Ankara, (2010): p. 153; Ulaş Baysal. "Emekliliğin Fesih İçin Geçerli Sebep Oluşturması ve Personel Yönetmeliğinde Değişiklik". *Sicil İş Hukuku Dergisi*, I: 28, (December 2012): p. 148; Ali Rıza Okur, "İşe İade Davası ile Yaşlılık Aylığı Talebinin Çakışması", *Sicil İş Hukuku Dergisi*, I: 17, (March 2010): p.134-135*; on the contrary, it is not possible for individulas having insurance after the Code numbered 5510 entered into effect to receive both retirement payment and wage. Self employed individulas are exception of people having insurance after the Code numbered 5510 entered into effect within the scope of this issue* (Mollamahmutoğlu and others, p. 1037).

be retired or reaches a certain seniority does not constitute a valid reason[486]. Discrimination arising from employees' ages is restricted explicitly with European Union Directive numbered 200/78 in European Union Law[487]. This Directive aimed to eliminate direct and indirect discrimination depending on age. Therefore, it may be considered that termination to be applied only because of employee's age shall be deemed as being in this scope.

In the event of the existence of termination of employment contract just depending on gaining the right to be retired or reaching a certain age, this termination shall be deemed as invalid[488]. In this circumstance, if otherwise is accepted, termination of the employment contract made with the reasoning of reaching a certain age and gaining the right to be retired shall give rise to a breach of Article 5 of LC regulating restriction of discrimination[489]. Indeed, legislative authority restricted indirect discrimination in addition to direct discrimination on employment contract with the mentioned provision[490]. The reason for this is that effects of elderliness change from person to person. On the other hand, provided that elderliness affects employee's performance negatively and seriously, it gives rise to disrupt the working process and it prevents the performance of duty to work properly; it shall be deemed as a valid reason arising from employee's incapability[491].

In some employment contracts and collective labour contracts, there is a regulation indicating that employment contract shall be terminated when an employee reaches a certain age. When reaching a certain age or gaining the right to be retired is regulated as a valid reason in a source qualified as contract's annexes with collective labour contract or personal

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486 Ekonomi, p. 9; Süzek, Yetersizlik veya Davranış, p. 572; Mustafa Alp. "Otuz Hizmet Yılını Doldurmuş ve Emekliliğe Hak Kazanmış Olmak İş Sözleşmesinin Feshi İçin Geçerli Sebep Midir?". *Legal Yargı Kararları ve İncelemeleri Dergisi*, I: 2, (2006), Legalbank.com, Otuz Hizmet Yılını Doldurmuş ve Emekliliğe Hak Kazanmış Olmak İş Sözleşmesinin Feshi İçin Geçerli Sebep midir? (legalbank.net); A. Can Tuncay , "Geciken Yaşlılık ve Zorunlu Emeklilik Üzerine", *Sosyal Güvenlik Dergisi*, V:2, I: 2, (June 2012): p. 99; 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 18/03/2021 numbered 2021/1681 E. and 2021/6382 K. (lexpera.com).

487 Süzek and Başterzi, p. 606; Dilek Baybora, *Çalışma Yaşamında Yaş Ayrımcılığı*, (Eskişehir, T.C. Anadolu Üniversitesi Yayınları, 2007), p. 62-63.

488 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 25/05/2009 numbered 2008/27908 E. and 2009/14184 K. (lexpera.com).

489 Canan Ünal. *İş Hukukunda Yaş Ayrımcılığı*, (Istanbul: Onikilevha, February 2018), p. 345-346.

490 Kar, p. 233.

491 Süzek and Başterzi, p. 606; Uysal İbat, p. 10; Alpagut, Değişiklik, p. 92; Münir Ekonomi. "Belirli Hizmet Süresi Doldurmanın (Yaş Sınırına Gelmenin) ve Emekliliğe Hak Kazanmanın Geçerli Sebep Sayılabilmesi". *Legal Yargı Kararları ve İncelemeleri Dergisi*, I: 2, (December 2006): Legalbank.com Belirli Hizmet Süresini Doldurmanın (Yaş Sınırına Gelmenin) ve Emekliliğe Hak Kazanmanın Geçerli Sebep Sayılabilmesi (legalbank.net); Şahlanan, Sona Erme, p. 153; Erol Akı. "İş Sözleşmesinin Feshinde Geçerli Neden Olarak "Emeklilik". *Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi*, V: 9, Special Issue, (2007): p. 6; Efe Yamakoğlu. "Emekliliğe Hak Kazanmanın İş İlişkisine Etkisi". *Sicil İş Hukuku Dergisi*, I: 40, (2018): p. 149.

directives, consequences of terminations of employment contracts depending on these regulations are controversial. In accordance with an opinion in the doctrine, it should be decided whether regulations placed in contract and internal directives regulating age limit regarding termination of employment contract are valid or not by taking specialties of work and employee into account. These regulations should be valid only if employee's age results in employee's incapability to work[492]. On the other hand, as the reason in question should eliminate the opportunity to make an employee work in order that termination is made with valid reason, this reason may not either give rise to termination arising from enterprise, workplace or work solely[493]. Since individuality is the base of employment security, aging and retirement may not be deemed as a valid reason although it applies generally and objectively[494]. According to another opinion in the doctrine, provided that there is a general practice which is not personal and it is indicated that employees gaining the right to be retired shall not be employed anymore with objective internal regulations in the workplace, termination issued by demonstrating this regulation as a termination reason and by applying this regulation generally and objectively should be evaluated as depending on a valid reason[495]. On the other hand, in accordance with another opinion, if it is important for the specialty of work (such as being pilot), age limit may be deemed as valid reason[496]. The Turkish Court of Appeals decided that regulations of personal internal directives and collective labour contracts indicating that employment contract would be terminated in the event of gaining the right to be retired and reaching a certain age would have been deemed as valid, on the condition that they were objective and general[497]. Additionally, in accordance with an opinion in the doctrine[498] and the Turkish Court of Appeals[499], if there is a workplace's need causing dismissal of employees working in the workplace, it is possible to

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492 Tulukçu, p. 176-177.

493 Mollamahmutoğlu and others, p. 1039; Ünal, p. 353-354; Baysal, Emeklilik, p. 151.

494 Ünal, p. 354.

495 Şahlanan, Gazeteci, p. 571; Tuncay, Yaşlılık, p. 99.

496 Süzek and Başterzi, p. 606; Kılıçoğlu, 18. Madde, p. 476; Alpagut, Esaslı Değişiklik, p. 93; Tulukçu, p. 175; Alp, Emeklilik, legalbank.com.

497 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 15/05/2006 numbered 2006/12635 E. and 2006/14038 K. (Legalbank.com).

498 Fevzi Şahlanan." Emekliliğin Fesih için Geçerli Bir Neden Olması (Karar İncelemesi)". *Tekstil İşveren Dergisi-Hukuk Eki*, I: 329, (June 2007): p. 3-4; Ekonomi, Emeklilik, Legalbank.com; Fevzi Demir. *En Son Yargıtay Kararları Işığında İş Hukuku ve Uygulaması*. 10th Edition, / Izmir: February, 2017), p. 309; Şahlanan, p. 66; Süzek and Başterzi, p. 604; Centel, p. 79; Akı, p. 5; Yamakoğlu, p. 152.

499 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 19/11/2007 numbered 2007/32998 E. and 2007/34482 K. (lexpera.com); 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 13/02/2007 numbered 2007/4908 E. and 2007/3354 K. (lexpera.com).

terminate employment contracts of employees having already gained the right to be retired previously while dismissing employees working in the workplace.

g. Termination Arising from Pressure

As a principle, termination arising from pressure may constitute in two manners. In the first manner, there is a reason arising from employee's behavior or incapability and the third party wants the employer to terminate the employment relation with the relevant employee by using his/her right to terminate. In the doctrine, it is named as unreal termination arising from pressure[500]. In this unreal termination arising from pressure, termination of the employer terminating employment contract by depending on the valid or justified reason that s/he has shall not be deemed as invalid only because of pressure made by a third party for termination[501]. On the other hand, in the second manner, there is no reason to justify or validate the termination of the relation between the employee and the employer but there is a third party's request only arising from another reason. In the doctrine, it is named as real termination arising from pressure[502]. In addition to this, provided that an employer gives rise to circumstances causing pressure herself/himself, it does not constitute a termination arising from pressure[503]. Since a third party gives rise to this termination arising from pressure, the employee may request from third party to compensate[504]. Also, it has to be indicated immediately whether there is a possibility to make the employee work *de facto* and whether making the employee work constitutes a serious risk for the employer or not. Indeed, the issue damaging employment relation and making it unbearable for the employer is a third party's action. In other words, the reason for termination is an action of a third party preventing employee's performance. For this reason, it is not possible to apply to justified reason arising from force majeure regulated by Article 25/III of LC[505].

A termination arising from the pressure was constituted with judgments of German Federal Labour Courts. According to the definition made by German judgments and doctrine, it is determined as the circumstance that the employer is forced to terminate an employment contract because of pressure made by a third party instead of parties, even though the

500 Kılıçoğlu and Şenocak, p. 115; Süzek and Başterzi, p. 599; Centel, p. 82; Kayık Aydınalp, p. 220.
501 Mollamahmutoğlu and others, p. 1040; Kılıçoğlu/ Şenocak, p. 115.
502 Kılıçoğlu and Şenocak, p. 115; Süzek and Başterzi, p. 599; Centel, p. 82; Kayık Aydınalp, p. 221.
503 Kayık Aydınalp, p. 223.
504 Baysal, p. 165.
505 Mollamahmutoğlu and others, p. 1041.

employer considers to and plans to terminate employee's employment contract[506]. In this circumstance determined as *sui generis*, termination reason arises from external of the employment relation[507]. Circumstances in which employees threaten the employer with terminating collective labour contract and starting to strike, or when a business partner notices that s/he may terminate the partnership, may be used as pressure manner in termination arising from pressure.

In the relation between the primary employer and sub-employer, the fact that the primary employer wants the sub-employer to terminate sub-employer's employee's employment contract shall be deemed as termination arising from pressure[508]. It is also understood from one of judgments of the Turkish Court of Appeals that, by noticing behaviors of sub-employer's employee causing complaints from clients and people to whom the primary employer provides service, primary employer's request from the sub-employer to terminate relevant employee's employment contract should be deemed as a valid reason. Besides, according to the relation concluded between the primary employer and the sub-employer in compliance with its regulations, it is also indicated that the request made by the primary employer should be evaluated as a valid reason for the sub-employer[509].

As another example of termination arising from pressure, provided that transferee declares that s/he won't conclude the procedure of transfer of workplace unless employment contracts of a specific group of employees are terminated by transferor before the transfer of the workplace, this circumstance may be deemed as a valid reason for termination arising from pressure. In order to deem this situation as a valid reason for termination, it is needed that the employer who is transferor shall encounter with serious economic difficulties if s/he resists to this pressure[510].

In termination arising from pressure, it should be needed that the employer may not prevent pressure made against him/her, even though s/he does his/her best. Otherwise, the employer will comply with every pressure, which shall not be accepted legally in accordance with provisions of employment security[511].

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506 Mollamahmutoğlu and others, p. 1039; Centel, p. 81-82.

507 Kar, p. 319.

508 Kar, p. 321.

509 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 26/09/2017 numbered 2017/38955 E. and 2017/19353 K. (Legalbank.com).

510 Ulucan, İşyeri Devri, p. 43; Kayık Aydınalp, p. 218

511 Centel, p. 82; Kayık Aydınalp, p. 221.

According to one opinion in the doctrine, an employer does not have to take employee's defence before terminating the employment contract as a difference from termination depending on suspicion. Also, an employee may be reemployed by the employer when reasons giving rise to pressure dissapeares[512].

h. Other Reasons Arising from Employee's Incapability

Termination reasons arising from employee's incapability are not restricted with only reasons indicated in the reasoning of LC. Because of this, every reason arising from employee's incapability which is not as serious as the termination reason indicated in Article 25 of LC but which makes it unbearable for the employer to continue to employment relation may be deemed as a valid reason arising from employee's incapability.

In the reasoning of LC, being unfit to work is deemed as another valid reason. The circumstance whether an employee may be fitted to work or not shall be determined in the progress of time. For this reason, it is not possible to determine whether an employee will be able to fit to work at the beginning of employment. In this circumstance, the employee wants to perform his/her duties but s/he may not perform them because s/he does not fit to work[513]. In this regard, even though an employee works during the probation period or the seniority period of six months, provided that it is determined that this employee does not fit to work, employee's employment contract may be terminated with valid reason[514].

Another issue that has to be evaluated is reorganization in an enterprise or an workplace. When an employer reorganizes an enterprise or workplace, provided that employee's capacity is enough for old working conditions but it is not sufficient for new reorganized working conditions, vocational educations have to be provided so that the employee may gain the necessary qualification for these new reorganized working conditions. This education's cost and qualifications have to be affordable for the employer. Despite provided education, if the employee does not demonstrate performance waited from her/him, the employer may terminate the employment contract with the reason of decrease in performance[515]. In addition to this, an employer is not obliged to provide vocational education

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512 Kayık Aydınalp, p. 224.

513 Centel, p. 83.

514 Güneş Topal. *İş Kanunu'na Göre Geçerli Nedenle Yapılan Fesih ve İş Güvencesinin Uygulanmadığı Durumlarda Bildirimli Feshin Karşılaştırılması* (Ankara 2008), p. 39; Ekonomi, p. 8-9.

515 Mollamahmutoğlu and others, p. 1028-1029.

to employee regarding a work which is completely different from the work that has to be performed by the employee[516].

On the other hand, when an employee may not adapt properly to duties that the employee has to perform or that s/he is not capable because of the absence of adaption to the working organization having been established before[517], this circumstance shall also cause to a valid termination of the employment contract depending on employee's incapability.

Regarding the feature of work performed, for example, the fact that an employee gains weight or gets old may be deemed as a valid reason. Even though the fact that a model working with a fashion company that does not work on oversize gains weight does not cause a physical or legal obstacle for the employee to work, when employer's benefits to be taken from this employment contract is considered, it may be deemed as a valid reason for termination[518]. This circumstance may also be the same for that model working with a company working on young fashion gets old. Even though there is no incapability for the employee to perform this work, when mentioned speciality of the employee working as a model is taken into account, it may cause a termination with a valid reason[519].

2. Valid Reasons Arising from Employee's Behaviors

Reasons arising from employee's behavior are faulty breaches of employment contract that are not as serious as terminating employment contract with immediate effect but are not as slight as to be ignored with a warning. In this regard, they affect employment relation negatively and they make termination of employment contract with valid reason possible[520]. Valid reasons arising from employee's behavior should always depend on faulty action[521]. If an employee acts against the employment contract with his/her faulty actions and because of this, the employment contract is affected negatively, a valid reason arising from employee's

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516 Güzel, Son Çare, p. 80.

517 Centel, p. 84.

518 *In one of judgments of 22nd Civil Chamber of the Turkish Court of Appeals, the fact that the employee working as a flight attendant for an airline company overweighted more than the weight specified for flight attendants is deemed as a valid reason but it is indicated that it should have been examined whether or not there was any appropriate work for that the employee in workplace situated on the ground in accordance with the principle of last resort. For more information:* 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 25/09/2012 numbered 2012/11598 E. and 2012/19726 K. (lexpera.com).

519 Caniklioğlu, p. 77-78.

520 Çelik and others, p. 541-542; Demir, İş Hukuku Uygulaması, p. 309-310.

521 Bektaş Kar. "İş Güvencesinde İspat Yükü Ve Deliller". *Legal İş Hukuku Ve Sosyal Güvenlik Hukuku Dergisi*, I: 7, (2005): p. 1041.

behavior occurs[522]. However, employee's behaviors and habits that do not affect employment relation and producing process negatively but that shall be evaluated negatively in social and ethical regards may not be accepted as valid reason for termination of employment contract[523]. Besides, if an employee performs his/her duties insufficiently and improperly and this issue reaches a certain level; this may be used as a termination reason[524]. According to one opinion in the doctrine, termination arising from employee's behaviors is made in order to eliminate employee's constant action that is against the employment contract because the employee does not fulfill his/her obligations[525].

Even though there is a view supporting that termination is a punishment in the doctrine[526], the aim followed in termination arising from employee's behavior is not to punish or to impose sanction on employee's behavior having been shown before but it is to prevent the continuance or a repeat of breach of employment contract[527] and taking precautions for the probability of damage caused by the employee to workplace[528].

Before all, in order to terminate employee's employment contract with a reason arising from employee's behaviors, employee's duties have to be determined clearly and previously. Indeed, due to this determination, an employee may understand what s/he has to do or do not. The scope of employee's duties may be determined legally with individual employment contracts or collective labour contracts. With this regard, it shall be needed to detect initially which contractual duties were obliged for the employee tangibly and then the employee acted against concrete contractual regulation with which behaviors[529]. Not only a breach of primary performance duties but also auxiliary performance duties arising from good faith and codes

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522 Kılıçoğlu and Şenocak, p. 371.

523 Çelik and others, p. 529; Ekmekçi and Yiğit, p. 637; Centel, p. 85; Aslı Çalışkan Yıldırım and Ömer Uğur. "İşveren Bakımından Fesih Sebebi Olarak İşçinin Sosyal Medya Kullanımları". *İstanbul Hukuk Mecmuası*, V: 80, I: 4, (2022): p. 1216; Deniz Ugan Çatalkaya and Hande Heper. "Romantic Relationships in the Workplace: a Critical Approach to the Tukrish Courts' Case Law on the Employee's Right to Respect for Private Life". *Annales de la Faculté de Droit d'Istanbul*, I: 74, (2024): p. 166; Senyen Kaplan, p. 402; Kayık Aydınalp, p. 228.

524 Caniklioğlu, p. 101.

525 A. Eda Manav. *İş Hukukunda Geçersiz Fesih ve Geçersiz Feshin Hüküm ve Sonuçları* (Ankara, 2009), p. 80-81.

526 Kar, Ölçülülük, p. 62.

527 Demir, Arabuluculuk, pp. 104; Ertürk, p. 315; Kılıçoğlu, p. 1221; Kılıçoğlu and Şenocak, p. 216; 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 01/07/2019 numbered 2019/1651 E. and 2019/14538 K. (Legalbank.com).

528 Çelik and others, p. 530.

529 Yılmaz, Dava, p. 69.

and additional duties should be taken into account[530]. Breaches that an employee caused with his/her faulty actions will be important for the termination of the employment contract.

Additionally, employee's duty to work shall be determined with instructions given by the employer in accordance with his/her right to manage. Opposite of employer's right to manage is employee's duty to obey employer's instructions. Within the scope of his/her right to give instruction, an employer regulates when, where, and how the duty to work will be performed with the main lines. Instruction to be given regarding starting and finishing hours of daily working duration, application of breaks, distribution of work or tool, equipment and technics shall be accepted with this kind of instructions. Employer's right to manage also contains providing organization in the workplace and giving instruction on employee's behaviors. On the other hand, employer's right to give instruction may not cover primary issues of employment contract such as the amount of wage and duration of working period obliged for an employee. An employer has no right to increase the total working period or to decrease the amount of wage unilaterally. If an employer gives instructions within the scope of primary issues of the employment contract or if a balance between performance and counter-performance in employment contract is damaged, it shall be deemed as evasion of provisions of employment security. It is possible to restrict or to extend employer's right to give instruction with individual employment contract or collective labour contract. From another aspect, employer's right to give instruction is restricted by codes, collective labour contracts and individual employment contracts. With this regard, an employer may not give instructions which are against regulations of criminal and administrative law and an employee is not obliged to obey such instructions. Additionally, an employer may not give instructions against employee's personal rights either. Furthermore, in accordance with the restriction of the abuse of the right regulated by Article 2 of the TCC, an employer may not give instructions against good faith. Hence, as an employer may not give instructions which will give rise to unequal consequences on behalf of some employees but against one or more other employees, s/he may not give instructions in order to cause harm to the employee either. An employer is obliged to observe equal treatment principle while giving instructions[531].

As employee's improper or insufficient performance may arise from incapability, it also may arise from breach of employment contract existed because of employee's behavior.

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[530] 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 01/07/2019 numbered 2019/1651 E. and 2019/14538 K. (Legalbank.com); Çelik and others, p. 542; Caniklioğlu, p. 96.

[531] Kılıçoğlu, p. 1222; 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 22/04/2019 numbered 2018/10548 E. and 2019/9475 K. (lexpera.com).

With another explanation, it may arise from employee's fault. Even though the employee has the proper physical and vocational capacity, provided that an employee performs his/her duties insufficiently or improperly, there will be valid reason arising from employee's behavior[532]. In other words, on the one hand, provided that action or inaction of the employee giving rise to the termination of the employment contract may not be controlled by the employee, there will be termination arising from incapability; on the other hand, if mentioned action or inaction of the employee may be controlled by the employer, it shall be proper to accept that there will be termination arising from employee's behavior[533]. Indeed, employee's behavior giving rise to a valid reason may be a negative or positive action, in another word, employee's actions related not to do something as well as those related to do something may constitute the subject of employee's behavior[534].

Although as a principle there is not an employer's right to terminate an employment contract depending on employee's behavior without employee's faulty behavior, as this fault may exist as a consequence of employee's malice, it may also occur as a consequence of employee's negligence or breach of duty of care[535]. Provided that an employee does not act differently, even though it is possible, and s/he acts against the provision of the employment contract, then this behavior may be deemed as being faulty[536]. Besides, the Turkish Court of Appeals decided in one of its judgments that as a consequence of the feature of work performed by the employee, employee's duty to care was heavy, despite this, the employee did not perform his/her work properly or in accordance with rules, despite having been warned twice before, the employee caused the injury of another employee by hitting him/her in the day of incident. Employee's behavior was evaluated as being faulty and it was emphasized that fault was sufficient for terminating the employment contract depending a reason arising from the behavior, existence of malice was not mandatory and with this regard, even though employee's behaviors were not sufficient to be deemed as a justified reason but they should have been accepted as a valid reason[537].

However, since it is not possible to consider that an employee is responsible for his/her behaviors which do not arise from his/her malice or negligence, termination with valid

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532 Caniklioğlu, p. 101.
533 Baysal, p. 40-41.
534 Centel, p. 86.
535 Demir, Arabuluculuk, p. 105-106.
536 Caniklioğlu, p. 97.
537 7th Civil Chamber of the Turkish Court of Appeals' judgment dated 13/05/2014 numbered 2014/5828 E. and 2014/10540 K. (Legalbank.com).

reason arising from employee's behavior shall not be taken into consideration[538]. In other words, employee's slight faults that do not damage employer's trust objectively or that do not affect the workplace or working process shall not be shown as a valid reason[539]. In this circumstance, other precautions should be taken[540].

It is not possible to accept employee's all behaviors which are against provisions of an employment contract as valid reasons directly. In fact, it is possible that an employee may make mistakes during the duration of an employment contract constituting constant debtor-creditor relation. An employee sometimes may make actions that are against the employment contract but this may be eliminated with slighter precautions when the mutual interest of parties is compared. As a consequence of this, provided that when employee's interest regarding the continuation of the employment contract and interest of the workplace are compared, termination of the employment contract seems fairer and more proper, then termination shall be deemed as valid[541].

As it is indicated in the reasoning of LC, even if it is not as serious as reasons regulated for termination with immediate effect under Article 25 of LC, there may be employee's behavior which is against provisions of the employment contract. Circumstances such as hurting the employer or threatening to hurt; requesting money from colleagues in the workplace with an annoying manner; provoking other employees against the employer; performing his/her duties insufficiently or improperly in spite of warning; communicating with others in a manner that may affect workflow and working environment negatively; making long calls that may stop workflow; being late frequently and ramble around the workplace by delaying his/her work; having redundant and frequent disputes or serious problems with his/her superior and colleagues may be given as an example for this. Yet, for the existence of termination with a valid reason arising from employee's behavior, it is not mandatory that this behavior happens in borders of the workplace[542]. Indeed, the Turkish Court of Appeals declared in one of its judgments that even though employee's behavior had happened outside of the workplace, since the employee had acted this action against a single woman with whom the employee worked together and stayed in the same hotel together, when employment contract was not terminated, it was inevitable that this negativity would

538 Ertürk, p. 316; Yılmaz, Dava, p. 69.
539 Süzek, Yetersizliği veya Davranış, p. 578.
540 Tulukçu, p. 182.
541 Caniklioğlu, p. 98.
542 Ekmekçi and Yiğit, p. 642.

affect the workplace and even though termination may not have been deemed as justified reason, it should have been evaluated as a valid reason[543].

In this part of the study, some examples of valid reasons arising from employee's behavior that are encountered in practice frequently shall be explained.

a. Employee's Speech against the Employer

An employee's speech against the employer may be a criticism about the employer or an insulting word directed to the employer. It is crucial to detect the difference between these two speeches. The fact that an employee makes constructive criticism or warning to a manager or uses the freedom of expression guaranteed by the Turkish Constitution may not be deemed as this kind[544]. Freedom of expression means that a person may receive news, information and other's opinions; is not criticized because of his/her thoughts and opinions; may express, explain, defence, tell and spread these freely with different manners alone or with others. Including opponents against the majority; explanation of thoughts in any kind of manner, having supporters for explained opinion, struggling to persuade others to realise opinion and welcoming this struggle are needs of the system of pluralistic democracy. So that having a social and political majority depends on the free and peaceful explanation of all kinds of thoughts. With this regard, freedom to express thoughts and to spread them has crucial importance for the existence of democracy[545].

Another important issue regarding freedom of expression is that the aim of freedom of expression is not guaranteeing the expression of issues accepted, welcomed or deemed as unimportant by the majority of society but, on the contrary, it is safeguarding expression of thoughts that is unpleased, irritating and unusual. It is also needed to observe this principle in Labour Law, if an employee uses his/her right to freedom of expression[546].

It is not always possible to draw a clear line between positive and negative obligations regarding freedom of expression and to separate them from each other. Negative obligations regulated for state needs avoiding from arbitrary interference in every circumstance. On the other hand, positive obligations oblige to safeguard this right and even though it is in relations

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543 9th Civil Chamber of Turksih Court of Appeals' judgment dated 29/05/2019 numbered 2019/538 E. and 2019/12543 K. (Legalbank.com).

544 Süzek and Başterzi, p. 616.

545 The Turkish Constitutional Court's judgment: Bekir Coşkun [GK], B. No: 2014/12151, 4/6/2015, §§ 33-35; Mehmet Ali Aydın [GK], B. No: 2013/9343, 4/6/2015, §§ 42, 43.

546 Gaye Burcu, Yıldız. "İşçinin Sosyal Medya Paylaşımları Nedeniyle İş Sözleşmesinin Feshi Konusunda İki Farklı Yargıtay Kararının Değerlendirilmesi". *Sicil İş Hukuku Dergisi*, I: 39, (2018): p. 109.

among individuals, to take reasonable specific measures in order to provide a guarantee of respect to freedom of expression[547]. The Turkish Constitutional Court also accepted in its many judgments for this reason that freedom of expression should have been interpreted as it may have let exaggeration and even provocation in some degree[548].

The Turkish Constitutional Court, by indicating that even though employee's employment contract had been terminated because of a share containing some explanations as follows; *" in these days, pressure on the employee of sub-employer increased, some people assuming that they are manager themselves undertake to mess with employees of sub-employer by leaving all their work. You, human trashes, offscourings of managers, never forget that, we as employees of sub-employer are muslims that believe islam and have faith in God, and our God says to us "THERE IS NO MOVING CREATURE ON EARTH BUT ITS SUSTENANCE DEPENDENT ON ALLAH" (Surah Hud, verse 6). I hope my God make you be guided in a short period and MAKES YOU UNDERSTAND THAT EMPLOYEES OF SUB-EMPLOYER ARE ALSO HUMAN BEING, AMEN"*, accepted that accepting the fact that applicant's aim had been humiliating managers could only be possible by evaluating applicant's words meaning beyond the meaning that applicant had desired to say, acceptance of first instance courts' excessive interpretation made without taking employee's identity as representative of union into consideration and by accepting that applicant had targeted managers of the employer with indirect links even though it was not directly indicated may have made social communications impossible, thus, the employee had expressed his/her criticism by alleging that pressures directed to employees of sub-employer may have been made only by people who had not qualifications of humanity and management skills with word that s/he had used, first instance courts did not show objectively and persuasively that employee's behavior and words in question had needed to apply an intervention as termination that had been immensely serious and may have been deemed as last resort and reasoning of court's judgment declaring that termination of employee's employment contract had depended on valid reason may not have been deemed as sufficient and relevant for

[547] For similar evaluations: Turksih Constitutional Court's judgment: Adnan Oktar (3), B. No: 2013/1123, 2/10/2013, § 32; Ömür Kara ve Onursal Özbek, B. No: 2013/4825, 24/3/2016, § 46.

[548] Turksih Constitutional Court's judgment: Ali Suat Ertosun, B. No: 2013/1047, 15/4/2015, § 66; Zübeyde Füsun Üstel ve diğerleri, § 102.

intervening to employee's freedom of expression, declared in one of judgments that there was a breach of freedom of expression guaranteed by Article 26 of the Turkish Constitution[549].

In order to improve working conditions and workplace, an employee has the right to criticize and explain negativities that s/he figured out[550]. As this right may be performed by the employee in person, this may be used by representatives of unions in workplaces with union organizations. The fact that employee's choose to which manner s/he will prefer shall depend on his/her free intention. In addition to this, the employee has the duty of fidelity to the employer which is essential for the employment contract. According to this, on the one hand, the employee is obliged to avoid any kind of behavior that may harm the employer during employment relation; on the other hand, the employer is obliged to protect the employee from any kind of harm and danger[551]. During the continuation of the employment contract, employee's duty to keep secret is included in employee's duty of fidelity[552].

Above all, employee's duty of fidelity has a mutual relation with employer's duty to observe. Providing the main working conditions and maintaining of them during employment relation are employer's duty. With this regard, an employer is obliged to provide working conditions to the employee that do not threaten the physical and mental health of the employee, that are in conformity with human dignity, that are eliminated from discrimination and also, this employer has to pay rights arising from employment relation in time and wholly. Employer's extended duty to observe needs these. When an employer acts against this duty and an employer does not perform his/her duties properly or never, the expression of employee's criticisms regarding these issues shall be against the employer as a need of its nature. Yet, the employee does not act against his/her duty of fidelity in this circumstance and s/he just criticizes the employer who does not perform his/her obligations arising from his/her duty to observe. The only limit in this circumstance is not to use words that may be deemed as offence against employer's personality by excessing limits of freedom of expression, while using the right to freedom of expression. Unless this limit is exceeded, only expressing

549 The Turkish Constitutional Court's judgment: Kadri Eroğul, B. No: 2019/976, 11/5/2022, RG: 16/08/2022, No: 31925.

550 Çalışkan Yıldırım and Uğur, p. 1186.

551 Yıldız, Sosyal Medya, p. 109-110.

552 Süzek and Başterzi, p. 364; Hande Heper. "Düşünceyi Açıklama Hakkının Çalışma Yaşamındaki Görünümü: İşçinin İfade Özgürlüğü". *Çalışma ve Toplum*, V: 3, I: 74: p. 1905.

criticism which is against the employer or conditions of the workplace should not be deemed as a valid reason[553].

Whistleblowing right provided to an employee may be deemed as employee's explanations regarding illegality learnt by the employee in the workplace, behaviors and practices being against legal regulations or breaching them in order to inform other employees or society. However, in order that the employee may use this right, s/he has to have a reasonable belief regarding illegal or unethical practices of the employer. If the employee makes reasonably an inference with his/her searchs and any other reasonable individual may make this inference in this circumstance, employee's belief should be deemed as reasonable[554]. Therefore, his/her explanations regarding the illegal or unethical practice of the employer shall be deemed as being in the scope of freedom of expression and this should not be deemed as a termination reason.

In the Turkish Court of Appeals' judgment regarding employee's freedom of expression, the employer working as a sales expert in the workplace, another employee whose employment contract was terminated and other employees in the same position requested with collective signature and sent e-mail because of mobbing, changing of working conditions and wage policy negatively. At the same time, they set up a group in an application named as Whatsapp. There were interpretations and messages here regarding the negativity of working conditions, managers' habits and behaviors. It was understood that those interpretations and messages had been sent out of working periods generally due to reports in the file. Those messages of the employee whose employment contract was terminated and other friends in Whatsapp group had been sent to the employer by another employee who was a party of this Whatsapp group, following that by taking defences of these employees, even though the employer terminated employment contract of the employee, who initiated the relevant reemployment case, and other employees, the employee having sent these messages to the employer received only warning penalty. Communications made in a group chat were private, as it was generally examined, it was determined that negativity of working conditions, unequal actions of employers and managers, behaviors such as mobbing were expressed. In addition this, the employer received information that had to be kept private with an illegal

553 Yıldız, Sosyal Medya, p. 110; Çalışkan Yıldırım and Uğur, p. 1186; Heper, p. 1907.

554 Heper, p. 1914 ff.; according to the same opinion, emloyee's explanation regarding employer's illegal and unethical practices depends on a legitimate reason without doubt and, if the explanation is deemed as true, it does not matter that the employee makes this explanation with which manner.

manner[555], by giving a warning penalty to the employee having sent these information and having made the same communication because of his/her behaviors, the employer protected the employee having given information. Sending of e-mails by employees to employers was qualified as a democratic request regarding employment rights and the Turkish Court of Appeals, by taking into consideration that it was not accurate to evaluate such employees' peaceful behaviors as a valid reason, decided that the defendant employer having burden of proof did not prove that employment contract had been terminated with justified or valid reason and because of that, termination of the employment contract was invalid[556]. Indeed, according to one opinion in the doctrine that we also support, criticizing shares, which may not be reached generally and whose content does not constitute a crime, may not be demonstrated as valid reason[557]. Besides, even though it was not mentioned in the judgment, according to one opinion in the doctrine, the fact that the employer protected one of employees but dismissed other employees is against the principle of equal treatment[558].

The Turkish Court of Appeals evaluated in one of its judgments[559] as follows;

> *"According to documents and information in the file, it was understood that the employee being the claimant had sent an e-mail containing improper explanations and issued against the to managers computer during the working period, following that, in order to prevent the employer from reading that, by going to relevant manager's table, s/he deleted that e-mail that s/he had sent without taking employer's consent, even though employee's that behavior was not as serious as to give rise to the termination of the employment contract with justified reason, since it should have been accepted as behavior affecting workflow, conditions of termination with valid reason occurred"*

and sending of an improper message and deleting it from employer's computer without receiving employer's consent were accepted as valid reason.

b. Employee's Endangering of the Security of the Workplace and/ or Causing Damage to Equipment Belonging to the Employer

In accordance with Article 25/II of LC, provided that an employee endangers the security of the work with his/her own intention or negligence; s/he causes damage to

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555 For the evaluation in the doctrine indicating that proofs collected with an illegal manner may not be taken into account while examining the case and the judge should examine *ex officio* whether proofs are collected with an illegal manner or not: Ugan Çatalkaya, İletişim, p. 536-537.

556 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 01/06/2017 numbered 2016/14205 E. and 2017/9526 K. (legalbank.com).

557 Çalışkan Yıldırım and Uğur, p. 1185.

558 Yıldız, Sosyal Medya, p. 111.

559 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 10/02/2005 numbered 2005/424 E. and 2005/3763 K. (legalbank.com).

equipment that belongs to the workplace or, even though they do not belong to the workplace, machines, equipment or other things that are under his/her authorization more seriously than s/he may not pay with the amount of employee's wage which is for his/her working period as 30 days; employee's employment contract may be terminated with justified reason. Furthermore, regarding the specialty of circumstance, if an employee causes damage to the employer less seriously than it may not be paid with employee's wage which is his/her working period as 30 days with his/her intention or negligence, the employer may use his/her right to terminate the employment contract with valid reason.

Indeed, the Turkish Court of Appeals indicated in one of its judgments that employer's right to use justified termination was regulated under the sub-paragraph (ı) of paragraph II of Article 25 of LC, on the condition that an employee caused damage to equipment belonging to the employer or machines, equipment or other things that were under his/her authorization more seriously that it may not have been paid with the amount of employee's wage which was for his/her working period as 30 days; provided that it was understood that the employee was faultless, there was not possible for the employer to terminate employment contract either with justified or valid reason; on the other hand, provided that employee's fault was determined with a percentage or rate, it should have been determined whether the amount of damage excessed the amount of wage which was for employee's working period as 30 days. Following the amount of damage was calculated in accordance with this percentage or rate, if there was no damage less serious than the amount of wage which was employee's working period as 30 days, it may not have been accepted that there was a right to terminate employment contract with justified reason. Yet, it was also evaluated in this judgment that provided that negativity on working conditions occurred in the workplace because of damage less serious than the amount of employee's wage which was for employee's working period as 30 days and maintenance of employment contract may not have been waited from an employer, it should have been accepted that termination depended on a valid reason[560].

On the other hand, not only causing damage to the employer but also endangering the employer is shown as an example of a valid reason arising from employee's behavior in the reasoning of LC. According to one opinion in the doctrine, even though the employee compensates for the damage caused by him/her or the employee is forgiven by the employer, the employee may have anxiety about the fact that the same or more serious damage may be

[560] 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 15/02/2010 numbered 2009/16140 E. and 2010/3388 K. (legalbank.com).

caused by the employee again. In this circumstance, an employer may terminate employee's employment contract with a valid reason[561]. However, according to another opinion that we also support, although employee's behavior has a feature that may betray employer's trust, provided that an employer shows that s/he does not care it at all with his/her behaviors, for example, if an employer promotes the employee or increases employee's wage, after this, this employer may not terminate employee's employment contract by demonstrating the same reason[562]. In addition to this, on the one hand, the employee may not be deemed as being responsible for damages that are not caused by herself/himself; on the other hand, provided that damages caused because of employee's slighter fault are repeated frequently, by taking circumstances into consideration, right to terminate with valid reason may be used by employer[563].

c. Employee's Request to Borrow Money from his/her Colleagues

Request to borrow money from colleagues in a manner that may cause nonconformity in the workplace is determined as a valid reason in order to terminate an employment contract in the reasoning of LC. Furthermore, for the existence of this valid reason, not the fact that an employee borrows money from his/her colleagues but the fact that an employee requests to borrow money from his/her colleagues is needed. In addition to this, this request should be made in a manner that may cause nonconformity in the workplace so that this valid reason occurs. Especially, the fact that an employee makes a habit of requesting to borrow money from his/her colleagues and the fact that s/he may not pay back his/her debts will affect the workplace negatively. The fact that one of employees working for the employer complains about this issue shall show that this issue causes nonconformity in the workplace[564].

d. Employee's Frequently Being Late to Work

The fact that an employee is late frequently is another valid reason for termination. It should be indicated that the risk to be late to work belongs to the employee[565]. In order that this may be deemed as a valid reason, it shall be needed that the employee makes a habit of

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561 Centel, p. 87; Tankut Centel. "Feshin Geçerli Nedene Dayandırılması, İspat Yükümlülüğü ve Sonuçları". *Mercek*, I: 30, (April 2003): p. 12.

562 Süzek and Başterzi, p. 614; Baycık, p. 67.

563 Süzek and Başterzi, p. 621-622.

564 Centel, p. 87.

565 Çelik and others, p. 545; Caniklioğlu, p. 102; Kılıçoğlu and Şenocak, p. 433-434.

being late and this issue causes nonconformity in the workplace. On the other hand, being late for a short time inconstantly shall not give rise to a valid reason for termination[566].

In order to detect whether the employee is late to work or not, firstly, the employee has to know the starting and finishing hours of his/her working period. As starting and finishing hours to work may be determined with employment contact, they may also be determined by publishing in the workplace or with workplace practice. On the contrary, provided that there is application of flexible hours for work in the workplace, whether the employee is late to work or not shall be detected according to concrete practice[567].

An employer may not terminate employment contract of an employee who is late slightly. Indeed, an employer is obliged to endure slight defects arising from an employee. Besides, it shall be against the principle of proportionality to make being late slightly be subject to a serious measure as termination[568]. The Turkish Court of Appeals decided in the concrete case that the employment contract of the employee having been late for 1 to 5 minutes may not have been terminated with justified reason[569]. Although it is not understood from the script of judgment whether actions as being late for 1 to 5 minutes were repeated frequently for a short period of time, it seems that the Turkish Court of Appeals accepting that actions of being late with short ranges as valid reason emphasizes that action being late for 1 to 5 minutes which does not happen frequently may not be deemed either as valid reason for termination[570]. On the other hand, provided that this circumstance happens frequently and, considering the qualification of work performed by the employee, it causes nonconformity in the workplace and it is detected that the employee does not pay attention warning indicating that s/he has to fix her/his behavior, this circumstance may also be deemed as a valid reason[571].

In this regard, the Turkish Court of Appeals decided that on the condition that the employee was late to work for 25 times and 11 defences of the employee were received by the employer, it should have been evaluated that there may have been termination with valid

566 Centel, p. 91.
567 Caniklioğlu, p. 102-103.
568 Emre Ertan. "İşçinin İşe Geç Gelmesinin Hukuki Sonuçları". *Sicil İş Hukuku Dergisi,* I: 35, (2016), p. 111.
569 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 10/03/2015 numbered 2013/15395 E. and 2015/9861K. (legalbank.com).
570 Ertan, p. 107.
571 Caniklioğlu, p. 103.

reason[572]. Besides, for termination arising from being late frequently, there has to be negative foreseen regarding the fact that the employee will continue to be late to work in the future too[573]. In other words, it is needed that the employee makes a habit of being late to work[574]. In spite of warning having been issued before, the fact that the employee continued to be late to work is an important signal of the occurrence of this foreseen[575]. Due to the fact that this circumstance may be deemed as a valid reason arising from employee's behavior, warning the employee is a need of the principle of last resort before termination in order that termination may be deemed as valid, the employee being late to work frequently has to be warned before terminating employment contract with written warning without hesitation. In the warning script to be sent to the employee, in which days the employee was late to work and when his/her working period started in those days should be indicated. Furthermore, a written warning should include a caution about the fact that the employee should not continue to be late to work as well as a termination threat based on a probability of repetition of this behavior. According to this, general and intangible written warning that does not include data regarding the fact in which days the employee was late and when his/her working period started in those days shall not be sufficient[576].

In accordance with Article 25/II (g) of LC, without taking permission or depending on the justified reason, the fact that an employee does not continue to work for 2 working days consecutively or for any working days following leave for two times within 1 month or three working days within 1 month shall be evaluated as a justified reason for termination of the employment contract. Besides, employee's absence which is not as long as durations indicated in Article 25/II (g) of LC but is repeated occasionally may be evaluated as valid reason according to the Turkish Court of Appeals. According to the Turkish Court of Appeals, in the concrete case that the employee had five children and the fact that s/he did not come to work for three working days because these children needed care because of their ages but the employee may not have found a care assistant, even though employee's absence from work because of necessity to take care of his/her children by his/her own gives rise to a justified reason, since the employer was not informed about this excuse in a reasonable period of time, by taking into consideration that this behavior caused serious problems for management of

572 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 03/04/2006 numbered 2006/4727 E. and 2006/8246 K. (legalbank.com).
573 Çelik and others, p. 546; Caniklioğlu, p. 104.
574 Centel, p. 92.
575 Çelik and others, p. 546; Caniklioğlu, p. 104.
576 Ertan, p. 109.

work and maintenance of employment contract may not be waited from an employer, it should be evaluated that termination of employment contract depends on a valid reason[577].

According to another judgment of the Turkish Court of Appeals, in the concrete case that there is an absence of the employee from work for three different days within the same month but on the other hand, one of these absences of the employee depends on a report, even though employee's absence made for two days without permission and justified excuse may not be deemed as justified reason for termination in accordance with Article 25/II (g) of LC, this behavior damaging to process of work constitutes a valid reason for termination[578].

e. Employee's Rejection of Overtime Work

As it is regulated under Article 41 of LC, it is possible to apply for overtime work with reason such as general benefits of the country, needs of work or increase of producing. Overtime work is working more than 45 hours in one week within the scope of conditions regulated by LC. However, provided that process of equalization applies in the workplace in accordance with Article 63 of LC, employee's normal working duration may be separated among days of the week that an employee works differently on the condition that employee's working duration does not pass 11 hours for per week. In this scenario, during a period of 2 months, employee's normal weekly working duration may not exceed his/her normal weekly working duration.

In accordance with the explicit explanation of LC, the wage to be paid for each working hour for overtime work shall be paid by increasing the wage for working hours with a %50 raise. On the other hand, provided that weekly working duration is specified as less than 45 hours by parties, extra works that are more than weekly working duration specified within the scope of the abovementioned procedure and that are performed up to 45 hours per week shall be named as working with an extra hour. Wage to be paid for each working hour for working with extra hour shall be paid by increasing the wage for each working hour with a %25 raise. Additionally, in accordance with this same provision of LC, provided that an employee wants, s/he may benefit from free time as one hour and thirty seconds for each overtime work hour and one hour and fifteen seconds for each work with an extra hour instead of a raised wage.

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577 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 15/09/2014 numbered 2014/17958 E. and 2014/23812 K. (legalbank.com).

578 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 05/12/2005 numbered 2005/35871 E. and 2005/38686 K. (legalbank.com).

Furthermore, two different overtime works as overtime work arising from force majeure and overtime work at the time of the state of emergency are regulated under LC. According to Article 42 of LC, at the time of the malfunction, at the time that it is understood there is a threat of malfunction, when there is a crucial work to be performed immediately on machinery, tools or equipment or force majeure; it is possible to make whole or a part of employees work with overtime work, with the condition that compulsory overtime work shall not exceed necessary duration in order to ensure for normal working process of workplace. In this case, it is mandatory for employers to provide appropriate free times for employees to rest. In accordance with Article 43 of LC, during the period of mobilization and with the condition of not exceeding this period of time, provided that overtime work seems necessary in workplaces producing products to be used in defence of the country, it is possible for President of Türkiye to increase the daily working duration up to the maximum capacity of employees in accordance with the variety of needs and seriousness of needs. The total duration of overtime works may not exceed 270 hours per year and it is mandatory to receive employee's consent to be worked with overtime work.

In addition to this, instead of situations specified in Article 42 and Article 43 of LC, it is not possible to make employees working in underground mining works work for overtime work. Provided that employees working underground mining works are worked in accordance with Article 42 and Article 43 of LC, for every hour exceeding weekly 37,5 hours, the wage to be paid to them for each hour as overtime work shall be as two times of their hourly wage at least.

As a rule, provided that an employee accepted to perform overtime work before, s/he has to perform his/her obligation in this regard. Also, as abovementioned, performing overtime work may be mandatory for employees working in some circumstances, regardless of whether they accept overtime work or not. When an employer suggests applying for overtime work, whether employee's refusal to do overtime work shall be deemed as being in the scope of insufficient work or not may change in accordance with the reason for the refusal. In fact, provided that the employee reports that his/her health is not available for overtime work with a doctor report and s/he does not want to do overtime work, although s/he accepted to do overtime work before, this circumstance may not be deemed as a valid reason for termination[579]. On the other hand, without showing any reasonable reason, if the employee

[579] Centel, p. 89; Cevdet İlhan Günay. "Fazla Saatlerle Çalışmanın Hukuki Sonuçları". *Sicil İş Hukuku Dergisi*, I: 6, (June 2007): p. 14.

does not perform overtime work that s/he accepted to perform before, it may be mentioned that termination with valid reason arising from employee's behavior may be issued.

Indeed, the Turkish Court of Appeals also indicated in one of its judgments that in order to apply for overtine work in the workplace, there had to be employee's written consent to overtime work. In the concrete case, by emphasizing that it was understood from the document signed by the employee himself/herself that the employee had given consent to the application of overtime work with the written form, the fact that the employee did not accept the application of overtime work in the workplace was evaluated as a valid reason for termination[580].

f. Employee's Improper and Insufficient Performance of His/her Duties in spite of Warnings

The fact that an employee performs his/her duties improperly and insufficiently in spite of a warning is another valid reason specified in the reasoning of LC. Even though in accordance with Article 25/II (h) of LC, the fact that an employee insists on not to perform his/her duties even though these duties were reminded to him/her is specified as a reason for immediate termination with justified reason, provided that the employee performs his/her duties improperly and insufficiently, this circumstance shall cause valid reason for termination. Besides, improper and insufficient performance of employee's duties should be reminded to the employee before termination. In other words, before termination with a valid reason, a warning has to be issued to the employee[581].

g. Employee's Relationship with Others in a Manner That May Negatively Affect Workflow and Working Conditions

Employee's relationship with others in a manner that may negatively affect workflow and working conditions may be shown as another valid reason. Although, it is not clear who will be understood from the term as *"others"* specified in this reason, it should be accepted that other employees working in the same workplace and client are in the scope of this term. Important issues for this reason are that an employee has a relationship with others and this relationship affects workflow or working conditions. As a principle, relations that an employee will have in the scope of sexual orientation or private life may not be deemed as valid reason. This issue may be deemed as a valid reason only if it causes nonconformity in

580 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 13/05/2014 numbered 2014/3840 E. and 2014/15607 K. (legalbank.com).

581 Centel, p. 89.

the workplace[582]. Indeed, even though an employer may give instruction concerning the work, employer's right to give instruction does not cover employee's lifestyle and his/her private life out of the work[583].

It is clear that an employee has to act respectfully against clients and people that have business relation with the employer, while performing his/her duties[584]. As it is indicated by the Turkish Court of Appeals too, employee's unrespectful behavior may cause termination with valid reason. In the concrete case, the employment contract of the employee working in bank's call center is terminated in accordance with Article 25/II (e) of LC by declaring that while s/he was having call with a client, s/he said words that were not in conformity with moral rules and client made a complaint about that issue. Phone records based on employee's termination were brought to the relevant file. When records were examined, it was understood that the employee had warned the client following that the client had yelled at him/her and had used some sentences like *"you talk like a stupid",* the client wanted to receive an authorized person, the while employee was making the client wait in order to make him/her receive to an authorized person, the employee talked to a third person about his/her complaints, after that, while dialing to the client again, s/he used an expression like "*son of a b**ch*" and that expression was heard by the client, following that sentence having been heard by the client, the employee primarily rejected that s/he had used that expression, after the client's insist, the employee said, *"okay sorry, I apologize, I did not mean to you because I'm nervous, it meant to another one of my friends, I'm sorry, I did not use this expression for you"*. It was indicated by the Turkish Court of Appeals for this case that employee's behavior would cause nonconformity in the workplace and it would affect working conditions negatively, therefore, termination made by the employer depended on a valid reason[585].

h. The Employee's Sleeping during Working Hours

The employee's sleeping during working hours causes a consequence such that the duty to perform work is not performed properly and therefore, this shall be against the employment contract. Indeed, during the working period, an employee is obliged to perform his/her duty to perform work, otherwise, the behavior of the employee acting against this duty shall be deemed as a valid reason for termination of the employment contract. Hence, work

582 Centel, p. 90; Ugan Çatalkaya and Heper, p. 166.
583 Çalışkan Yıldırım and Uğur, p. 1198.
584 Caniklioğlu, p. 121.
585 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 02/10/2014 numbered 2014/11615 E. and 2014/29091 K. (legalbank.com).

performed by the employee also should be taken into consideration. Indeed, when features of work performed by the employee were considered, if the employee's sleeping in the workplace causes a dangerous situation in the workplace or there is a probability to cause this; it is not waited from the employer to endure such behaviors[586].

It is understood in a case regarding this concrete dispute that the employee worked as a stocker in the packing part of the workplace, that day, the employee had a duty to carry equipment to the area where other colleagues were working. Yet, the employee had not brought equipment to the area that other colleagues had been working in, around 11 a.m. in the morning. Following this, other working colleagues had seen the employee while s/he had been sleeping beyond a machine that had not worked by leaning on a bench, employee's defence was wanted by the employer and s/he defended as *"I had slept because I could not have been slept at night".* The Turkish Court of Appeals evaluated that, when taking features of work performed by the employee into consideration, even though there was not a circumstance endangering working security, that circumstance caused to disruption of workflow and that was a behavior affecting employment relation negatively for the employer and as a consequence, decided that even though there was not a justified reason for termination, there was a valid reason for termination[587].

i. Prolonged Phone Calls of the Employee During Working Hours

On the condition that an employee has a prolonged phone call in a manner that stops the workflow, termination with a valid reason may be considered. As a rule, the employee should be free to have calls both with clients and with his/her relatives such as his/her partner, children and other relatives. On the other hand, on the condition that the employee has prolonged phone calls in a manner that stops the work, from that moment, since workflow shall be disrupted, this issue may be deemed as valid reason. It is not important for termination that the employee uses his/her private phone or work phone during these prolonged calls. Besides, only having one prolonged call shall not give right to terminate the employment contract. This circumstance may be considered as a valid reason only if having more than one long call in a manner that may affect workflow occurs[588].

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586 Caniklioğlu, p. 120.

587 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 06/03/2017 numbered 2016/6401 E. and 2017/3237 K. (Yargıtay Karar Arama).

588 Centel, p. 91.

j. Actions of the Employee Leading to Non-Conformity within the Workplace

When an employee does not get along by having disputes with or having unsolvable problems with other employees working for an employer, including his/her supervisor, in the workplace in a manner affecting working conditions, it may be considered that there is a valid reason for an employer to terminate the employment contract. Yet, the fact that employees have disputes among themselves or the fact that the employee has a dispute with his/her supervisor is normal for work life. In order that this kind of circumstances may cause the termination of employment contract, there have to be serious disputes[589].

The Turkish Court of Appeals accepted that the fact that the employee working as a regional manager in the workplace caused inconformity in the workplace because s/he gossiped by conveying all the things that had happened in the workplace to partners of employees, the fact that the employee used workplace's opportunities by sending messages from a work phone, while doing mentioned behaviors and the fact that s/he used slang words to employees should have been evaluated as a valid reason[590].

In another judgment, the Turkish Court of Appeals decided that even though the fact that the employee had backed with a tanker truck filled fully with fuel oil in the road did not cause any damage, it was certain that traffic rules were breached because the vehicle that had been driven was a heavy vehicle and had carried inflammable and dangerous material but when features of the case, such as the fact that this matter was happened for the first time and backed distance was short, were taken into account, employer's termination did not depend on justified reason but it depended on a valid reason[591].

It is possible that not observing Covid-19 measures during the pandemic may give rise to termination of employment contract. With this regard, the fact that an employee does not observe Covid-19 measures may be shown as a valid reason while terminating an employment contract. Besides, according to one opinion in the doctrine, not observing measures taken regarding hygiene in order to prevent the virus may spread and other employees get infected, as example behaviors such as not wearing a mask in spite of warnings, not observing social

589 Centel, p. 93.

590 7th Civil Chamber of the Turkish Court of Appeals' judgment dated 25/02/2016 numbered 2015/38348 E. and 2016/4300 K. (Yargıtay Karar Arama).

591 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 13/05/2019 numbered 2019/77 E. and 2019/10756 K. (legalbank.com).

distance should be deemed as valid reason, because these behaviors endanger working health and security. On the other hand, according to the same opinion, not taking PCR test shall be deemed as valid reason only if there is a circumstance causing risk, this test should not be deemed as an obligation[592]. Indeed, Adana Regional Court of Appeals decided, in a concrete case that the employee came to the workplace when s/he was infected with Covid-19 and jeopardized other employees' health in the workplace, that the termination of the employment contract issued by the employer depended on justified reason because the employee jeopardized other employees' healths by coming to the workplace even though s/he knew that s/he was infected with Covid-19[593]. However, in accordance with Provisional Article 10 having been added to LC on 16/04/2020 with the Code on Amending the Code on Decreasing of Effects of New Covid-19 Pandemic on Economical and Social Life and Some Other Codes numbered 7244, it was accepted that employers may not have terminated employment contracts of employees within 3 months from the time of enforcement of that provision, except terminating employment contract by depending on Article 25/II of LC, expiring of duration of employment contracts with definite duration, the closing of workplace because of any reason and finalization of its activity, finalization of construction works and of relation of receiving service concluded in accordance with relevant code. On the other hand, the authority to prolong this period of time with 3 months periods at most for each time until 30/06/2021 belonged to the President of the Turkish Republic. That period of time was prolonged for several times by the President of the Turkish Republic and the application of this provision was finalized on 01/07/2021. Even though during this period of time it was not possible to terminate employees' employment contracts by depending on a valid reason because of the fact that employees did not comply with precautions taken for Covid-19 or any other valid reason, it was possible for an employer to terminate employment contract with immediate effect in accordance with Article 25/II of LC[594]. However, as a consequence of the finalization of the effectiveness of this provisional article of LC on 01/07/2021, from 01/07/2021 till today, there is no prohibition anymore.

592 Çelik and others, p. 557.

593 11th Civil Chamber of Adana Regional Court of Appeals' judgment dated 26/05/2022 numbered 2021/2620 E. and 2022/982 K. (legalbank.com).

594 Sabahattin Yürekli. "Çalışma Hayatında Koronavirüs (Covid-19) Salgınının Etkileri". *İstanbul Ticaret Üniversitesi Sosyal Bilimler Dergisi Covid-19 Hukuk Özel Sayısı*, I: 38, Summer 2020/2 (Covid-19 Special Annex): p. 40-41.

k. Seizure of Employee's Assets

The fact that an employee has excessive debts may give rise to only one seize on his/her assets since all these debts belong to one creditor as one debt, it may also belong to more than one creditor as more than one debt and it may give rise to execution procedure issued against the employee for seizing employee's assets[595]. In accordance with Article 35 of LC, employee's wage may not be seized totally. At most, only one-fourth of employee's wage may be seized at the same time. The only expection of this rule is determined for alimony payments and payment to be held by the judge regarding family members that the employee has to take care of. Therefore, there is no restriction regarding the percentage of employee's wage for employee's debts regarding his/her obligation to pay alimony and payment to be held by the judge regarding family members that the employee has to take care of and employee's wage may be seized totally for this kind of debts[596].

As a rule, the fact that an employee has debts more than that s/he may pay for does not mean that the employee breaches his/her duty of care[597]. Even though the fact that only employee's wage is seized may not give rise to the termination of the employment contract, on the condition that employee's wage is seized frequently, this circumstance may give rise to nonconformity in the workplace. Indeed, the separation of the seized part from employee's wage, payment of this amount to the banking account of executive offices and following of these procedures will cause employer's employees working in human resources, law department and accounting department to be occupied and lose time unnecessarily[598]. Whether seizes applied to employee's wage may be deemed as a valid reason or not depends on the merging of features such as frequency of seizes, negative effects of them on working condition and construction and size of enterprise and continuation of application of seize in spite of warning made to the employee regarding seize[599].

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595 Mahmut Kabakçı and Ulaş Baysal. "İşçilerin İş Sözleşmeleri Haklarında Çok Sayıda İcra Takibi Bulunması Nedeniyle Feshedilebilir Mi? –Bir Kamu İktisadi Teşebbüsünün Konuyla İlgili Genelgesi Üzerine Değerlendirme-". *Prof. Dr. Fevzi Şahlanan'a Armağan*, İstanbul Üniversitesi Hukuk Fakültesi Mecmuası, V: I, Legal, (2016): p. 470.

596 Süzek and Başterzi, p. 406; Çelik and others, p. 351; Mollamahmutoğlu and others, p. 690.

597 Kabakçı and Baysal, p. 473.

598 Centel, p. 99.

599 Centel, p. 100; for an evaluation declaring that when it is taken into consideration that the wage is employee's only source for his/her well-being, in a society where the wages are low but the debts are so much, giving rise for the employee to encounter with unemployment while s/he is dealing with his/her seizes may not be deemed as being in conformity either with needs of society or with fundamental principles of Labour Law: Engin, Sona Erme, p. 158; For another evaluation indicating that making circumstance of employee who has economic difficulties more difficult by dismissing him/her may not be

Additionally, provided that an employee works in a position needing a specific trust as a result of his/her qualification, it is possible that the fact that the employee has excessive debts gives rise that the employee loses his/her necessary qualifications needed for his/her work. If an employee works in a position that a specific trust is needed for, losing trustworthiness shall be important for the employer. It may be considered that an employee who may not pay his/her debts and come across with executive procedures issued against him/her loses his/her trustworthiness needed for this kind of work[600]. Because of this, supposing that the employee works in a work needing a specific trustworthiness, having excessive debts shall cause a lose of trustworthiness needed for work and it shall be possible to terminate employee's employment contract with a reason arising from employee's incapability[601].

Also, the Turkish Court of Appeals indicates that there shall be a valid termination reason and it is not waited from the employer to continue the employment relation if seizures of an employee's assets occupy the legal and accounting departments so much[602].

l. Different Examples for Termination Depending on Employee's Behaviors

In addition to examples indicated in the reasoning of LC; circumstances such as using internet for personal reasons; using equipment and tolls such as scanner, fax machine or printer for personal reasons in workplace; looking at personal and private documents of the employer or of other employees and using their computers without taking permission; irritating other work friends mentally and emotionally (mobbing); not giving resting report to the employer in time; being occupied with something which is not regarding work during working period; disrupting work by making other employees occupy without any reason; not complying smoking prohibition in workplace[603]; doing additional personal works in workplace during working period by using employer's opportunities without taking permission from employer; not giving personal information and records to the employer in time; not observing rules regarding working health and security even though it does not

deemed as being either justified or fair: Alp, Sona Erme, p. 201-202; Erhan Birben. "İşçinin Özel Yaşamı Nedeniyle İş Sözleşmesinin Feshi". *İş Hukukunda Genç Yaklaşımlar II*, Istanbul: Onikilevha, (October 2016): p. 159.

600 Baysal, p. 144-145.

601 Kabakçı/ Baysal, p. 477-478.

602 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 24/09/2012 numbered 2012/11441 E. and 2012/19502 K. (Legalbank.com).

603 Dusseldorf Regional Labour Court's judgment dated 17/06/1997 numbered DB 1998, 376 (transferred from; Kılıçoğlu, 18. Madde, p. 481).

endanger working security; reading book, news or magazine which is not directly concerning the work that should be performed by the employee during working period[604]; making phone calls in workplace frequently[605]; making a habit of short time leaving[606]; having serious polemic in church community in a manner that may damage to authority of community[607]; controlling a secret list in computer despite the lack of authority[608]; making a xenophobic speech against a Turkish person[609]; taking working equipment with him/her in order to use for private work[610] may be given as examples.

In another judgment of the Turkish Court of Appeals, it was decided that the fact that the medical instructor had driven a vehicle provided by the employer when s/he had been under the effect of alcohol and since his/her driving licence had been captured for 6 months; the fact that s/he did not perform his/her duty to instruct caused to disruption of work and that circumstance should have been deemed as a valid reason[611].

In addition to this, the Turkish Court of Appeals examined effects of capturing of employee's driving licence because of driving a vehicle while being drunk for termination of employment contract in one of its judgments. In a concrete case, driving licence of the employee having driven a vehicle belonging to the workplace while being drunk out of working period was captured and employee's employment contract was terminated because of this reason. Yet, there was a regulation in workplace directive such that a warning shall be issued for the employee that drove a vehicle while being drunk for the first time. On the other hand, the Turkish Court of Appeals decided that it was always possible to conclude regulation on behalf of the employee with workplace directive but driving vehicle while being during was a crime, employee's benefit would be evaluated as being subsidiarily against public order and public health, it was not possible to abolish regulations regarding crimes regulated by

604 Fevzi Demi. "Geçerli Sebeple fesih Kavramı ve Uygulama". *Legal İş Hukuku ve Sosyal Güvenlik Hukuku Dergisi,* I: 10, (2006): p. 477-483; Mollamahmutoğlu and others, p. 1043-1044.

605 Judgment of Niedersachsen dated 13/01/1998 numbered BB 1998, 1112 (transferred from; Kılıçoğlu, 18. Madde, p. 480).

606 Federal Labour Court's judgment numbered AP Nr. 51 regarding article 123 of German Civil Code (transferred from; Kılıçoğlu, 18. Madde, p. 480).

607 German Constitutional Court' judgment dated 09/02/1990 numbered NSW 1990, 2053 (transferred from; Kılıçoğlu, 18. Madde, p. 481).

608 Köln Regional Labour Court's judgment dated 20/09/1982 numbered DB 1990, 635 (transferred from; Kılıçoğlu, 18. Madde, p. 481).

609 Rheinland- Pfalaz Regional Labour Court' judgment dated 10/06/1997 numbered BB 1998, 163 (transferred from; Kılıçoğlu, 18. Madde, p. 481).

610 Neumünster Labour Court's judgment dated 02/04/1981 numbered BB 198, 974 (transferred from; Kılıçoğlu, 18. Madde, p. 482).

611 7th Civil Chamber of the Turkish Court of Appeals' judgment dated 11/12/2013 numbered 2013/25992 E. and 2013/21827 K. (Yargıtay Karar Arama).

codes with workplace directives, for those reasons, that regulation was invalid and employment contract was terminated by the employer with valid reason and since work as medical instructing performed by the employee may not have been performed with his/her own opportunities (having private driver or taxi for 6 months) without providing vehicle and also showing same performance specified in directive may not have been possible; it should have been accepted that termination depended on a valid reason[612].

The fact that an employee goes on holiday by taking a resting report from a private hospital without permission[613] and the fact that an employee leaves work 3 hours before finishing his/her regular working period since s/he was subject to supervised release and the fact that s/he will leave work early for 2 years[614] are evaluated as valid reasons for termination arising from employee's behaviors by considering that these circumstances may cause disruption of workflow by the Turkish Court of Appeals in its different judgments.

In the concrete case where the employee acts against regulations of the collective labour contract and workplace directives regarding going hospital and taking a medical report, the employee wants the workplace doctor to issue a medical visit form without getting examination, the employee takes a report by going to hospital without never being examined by workplace doctor and taking medical visit form and the employee says sentences as follows; *"they put you in here as a doctor"* to workplace doctor who does not give visit form; the Turkish Court of Appeals decided that employee's behaviors may have been deemed as valid reason even though they were not as serious as to give rise to termination depending on justified reason[615],

Since employment relation is a relation depending on trust relation, some actions disrupting this trust are qualified as being able to give rise to immediate termination with justified reason in accordance with Article 25/II (e) of LC. With this regard, on the condition that an employee shows behaviors that are not in conformity with liability and dignity such as abuse of employee's trust, revealing employer's vocational secrets or stealing something; employment contract may be terminated by the employer with justified reason. On the other

612 7th Civil Chamber of the Turkish Court of Appeals' judgment dated 11/06/2014 numbered 2014/7929 E. and 2014/13044 K. (Legalbank.com).

613 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 30/04/2015 numbered 2015/5656 E. and 2015/15836 K. (Yargıtay Karar Arama).

614 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 27/09/2018 numbered 2018/7654 E. and 2018/16859 K. (legalbank.com).

615 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 13/12/2012 numbered 2012/25600 E. and 2012/28214 K. (legalbank.com).

hand, even though it is not as serious as abuse of employer's trust, behavior damaging to this trust and preventing the continuation of relation gives rise to the termination of the employment contract with valid reason[616]. In fact, the Turkish Court of Appeals did not evaluate that the fact that the employee had supported a boycott that had been started on social media for products produced by the employer by sharing on his/her personal account gave reason for immediate termination with a justified reason but it decided that there was an issue damaging to the relation between the employer and the employee so that there would be a valid reason for termination of the employment contract[617].

In another case, the employee had taken a report with his/her working colleagues working in the same department for dates from 26/06/2014 to 29/06/2014, and following that, s/he had started to work on 30/06/2014 with the same working colleagues but they left the workplace collectively and took report again for dates from 30/06/2014 to 06/07/2014. During the resting period, when they came to the workplace on 02/07/2014 for taking Ramadan package, it was observed that they were healthy. It was evaluated in this case by the Turkish Court of Appeals that although it was not proved that reports were fake, when employee's defences and behaviors were taken into consideration, relation between parties was damaged, the fact that employees had taken reports consecutively and collectively gave rise to inconformity in the workplace, it was not waited from the employer to continue to work with the employee, for those reasons, termination of employment contract depended on a valid reason[618].

The Turkish Court of Appeals did not evaluate the termination of employment contract of the employee who took a medical report following that requested vacation had not been given because of workload but as it was understood from information shared on her/his social media account that s/he was Güzelçamlı/ Izmir during his/her period of the report as a termination with valid reason[619]. Indeed, it is not obliged for the employee to be at her/his home during the period of report, the employee may spend this period of time at the place where s/he thinks that s/he will be cared for better with his/her family or friends. Just because of this reason, it shall not be deemed that the employment relation is damaged. On the other

616 Çelik and others, p. 549; Caniklioğlu, p. 111.

617 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 17/09/2015 numbered 2015/19276 E. and 2015/26071 K. (Yargıtay Karar Arama).

618 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 17/09/2015 numbered 2015/18609 E. and 2015/26067 K. (Yargıtay Karar Arama).

619 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 16/06/2016 numbered 2015/12273 E. and 2016/18238 K. (legalbank.com).

hand, when it is understood that the employee goes on holiday in order to make sportive activities that do not comply with his/her illness during a resting period or it may be detected without doubts that s/he spends holiday in a manner that does not comply with his/her illness, this circumstance should be evaluated as being against liability and dignity and it should be accepted that there is a justified reason for termination[620]. Also, the Turkish Court of Appeals declared in one of its judgments that the fact that the employee went to Giresun during the period of resting report and sent photos having been taken at the beach while s/he was wearing holiday clothes were a clear proof regarding the fact that resting report was not real, the fact that the employee informing that s/he had report went on holiday in contrast to report was against liability and dignity and it was sufficient for justified termination[621].

An employer may give some instructions in order to provide organization in the workplace. On the condition that an employee does not comply with these instructions, if a disruption of workflow occurs, termination of employment contract made by the employer with valid reason may be considered. The Turkish Court of Appeals decided in one of its judgments that termination made because the employee did not accept to shave depended on a valid reason. As an example in this concrete dispute, a warning was issued to the employee since he did not participate in a meeting organized by the employer, a reprimand was issued to the employee because he did not shave and did not carry his identification card, in another date, wage deduction was applied to the employee because he did not shave and came to work with regular clothes, in another date, a reprimand was issued since he did not shave and came to work with regular clothes and at the end employee's employment contract is terminated with justified reason. Following these, by evaluating that, not only principal performance obligations but also additional performance obligations should have been taken into account in order to detect whether the employment contract was breached or not, the Turkish Court of Appeals decided that behavior of the employee meeting with clients frequently due to the work performed by the employee was not as serious as to give rise to termination with a justified reason but it should the have been deemed as a valid reason[622]. If the fact that the employee is seen clearly and well-cared by clients or others being with business relation with an employer is important for an employer to protect his/her corporate image, it is possible to make an evaluation such as the Turkish Court of Appeals' evaluation. On the other hand, for

620 Çelik and others, p. 550-551.

621 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 06/07/2017 numbered 2016/17532 E. and 2017/12196 K. (lexpera.com).

622 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 29/06/2009 numbered 2008/38431 E. and 2009/18306 K. (NJIS).

work which does not need that the employee has a meeting with clients face to face, if the beard is not in conformity with hygiene and care, this circumstance may not be deemed as a valid reason[623]. Indeed, it is not possible for the employer to make regulations prohibiting growing beard for employees in the workplace. Restricting this right by depending on the right to manage may be possible only if the employer makes this restriction depend on a legal base or another superior private or public benefit. If it does not affect producing or workflow negatively, it does not create any damage to employment security and health or does not make any negative consequence for workflow; the employer may not prohibit that the employee grows a beard[624].

In the concrete case that the employee takes leave from the general manager and does not inform the deputy general manager about the fact that s/he goes on holiday, even though the employee was informed before by the deputy general manager with messages and e-mails regarding the fact that s/he has to be informed about all leaves by the employee before going on holiday; the Turkish Court of Appeals decided that only this employee's behavior may not have given rise to justified or valid reason[625].

In another concrete case that the employee had not worn a hijab when she had started to work and she had been wearing a t-shirt that the brand of company was on, but after that, due to her religious belief, she started to wear a hijab and did not wear a t-shirt from that time, the employer issued minutes in order to warn the employee for not wearing her t-shirt but the employee rejected to wear a t-shirt and there was not employer's complains about the fact that the employee was wearing long-sleeved t-shirt due to employee's regional belief; the Turkish Court of Appeals evaluated that the point of complains were that relevant employee did not wear the t-shirt although other employees working in the workplace were wearing t-shirt that brand of company was on. It decided when all other employees were wearing mentioned business clothes, the fact that the employee did not wear this may have caused for clients to hesitate whether that person was an employee or client, the fact that the employee acted against that rule may have caused to conflict between relevant employee and other employees while others were complying with that rule, this circumstance would give rise to disruption of working peace and therefore, it was clear that employee's behavior caused to disruption in the

623 Çelik and others, p. 552.

624 Hazal Tolu Yılmaz. "İşçinin Sakalını Kesmeyi Reddetmesi Nedeniyle İş Sözleşmesinin Feshi". *İnönü Üniversitesi Hukuk Fakültesi Dergisi*, Research Article, (2021): p. 735.

625 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 13/01/2016 numbered 2015/25023 E. and 2016/589 K. (Yargıtay Karar Arama).

workplace and the employee did not comply with wearing rules, even though the employer terminated employment contract with justified reason, as a result of the fact that the employee did not wear mentioned working clothes may not have been deemed as her principal performance obligation, termination was not as serious as for justified reason but that termination depended on valid reason[626].

In the concrete case where the employee works as a responsible at restaurant, the Turkish Court of Appeals indicated that the employee was responsible for process and order without any need for written notice due to his/her work, when one of employer's clients was poisoned, the fact that the employee had not controlled in order to prevent service of products whose expire date had been passed was a behavior disrupting relation between the employee and the employer and it affected workflow negatively and for those reasons, termination made by the employer depended on a valid reason[627].

In the Code on Regulations of Relations Between Workers Working in Press Profession and Employers numbered 5953, a specific termination reason is determined. In accordance with Article 11 of the Code numbered 5953, for termination arising from employee's behavior, as a consequence of serious negligence or malice on issues regarding the performance of journalism, the fact that an employee acts against honour and reputation of the media organ is deemed as one of serious circumstances giving opportunity for an employer to terminate the employment contract without waiting notice period. It is not necessary that behavior is not a consequence of work created by journalist. However, even though journalist's behavior is not concerning with his/her work, if it causes nonconformity in the workplace, even though it does not depend on justified reason, it should be accepted that there is a valid reason[628].

The fact that an employee uses internet frequently during the working period shall be deemed as a valid reason for the termination of the employment contract. Yet, for this, an employer has to determine restrictions on internet usage, has to inform the employee that internet usage during working hours is forbidden. Also, if it is detected that the employee behaves against these rules, the employer has to warn the employee as need of the principle of last resort. When the employee continues to make same behaviors in spite of warnings and

626 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 02/02/2017 numbered 2016/5475 E. and 2017/2968 K. (legalbank.com).

627 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 28/11/2018 numbered 2018/2782 E. and 2018/21816 K. (legalbank.com).

628 Kar, p. 271.

information made by managers, by assuming that this behavior will be able to continue in the future, it should be accepted from this point that there is a valid reason for termination of employee's employment contract[629]. In addition to this, even though it is forbidden but the fact that the employee downloads software that may damage to employee's computer system, searches on criminal sites or downloads criminal software may give rise to termination with justified reason[630].

It should be mentioned lastly that, as indicated in the reasoning of Article 18 of LC, reasons arising from employee's behavior and incapability may be deemed as valid reason only if they are causing nonconformity in the workplace[631]and also, an employer should prove that employee's behavior or incapability causes nonconformity in the workplace[632]. Employee's behaviors or conducts that are not accepted socially and ethically may not be deemed as a valid reason unless they affect the workplace. Provided that employee's behaviors that are socially negative and conducts that are not accepted socially and ethically do not affect working relation and workflow negatively in the workplace, they may not be deemed as a valid reason[633]. However, if the feature of crime that the employee commits outside of workplace concerns employment relation, even indirectly, as a result of good faith, it is not waited from an employer to continue to maintain the employment contract, an employer may terminate employment contract[634].

B. Valid Reasons Arising from Needs of Enterprise, Workplace or Work

In an environment where competition increases every day, new competitors exist in both domestic and abroad, the fact that companies process in a delicate balance and the fact that companies preserve their competitiveness, and while doing that, the fact that they protect their employees from these negative situations are immensely hard. These companies' orders change so much that it is not possible for companies to predict and to program the future. Even though there may be a need for excessive work for a restricted period of time, after a

629 Çelik and others, p. 554.

630 Çelik and others, p. 554; Caniklioğlu, p. 120.

631 Mollamahmutoğlu and others, p. 1044; Ertürk, p. 316.

632 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 18/01/2018 numbered 2016/34201 E. and 2018/609 K. (kazanci.com).

633 Süzek and Başterzi, p. 624; Başbuğ and Yücel Bodur, p. 192; Günay, p.134; Çelik and others, p. 529; Öner Eyrenci. "İşçiye Bağlı Nedenlerle Feshin Geçerliliğinde Ölçülülük Denetimi". *Prof. Dr. Turhan Esener II. İş Hukuku Uluslararası Kongresi*, Ankara: Seçkin, (October2017): p. 348; Kar, İspat Yükü, p. 1045; Şakar, p. 128; Birben, Özel Yaşam, p. 139.

634 Öner Eyrenci. "Feshin Geçerliliğinin Denetiminde Ölçülülük İlkesi". *İş Güvencesi ve İşe İade Davaları*, Seminer, 29 May 2010, Kadir Has Üniversitesi Hukuk Fakültesi and İstanbul Barosu, Istanbul, (2010): p. 40.

short period, it may be needed to dismiss some employees. In other words, companies may need flexible regulations as a need in their fields of activities because the occurrence of rises and falls is always possible[635].

An employer has the right to make regulations regarding the production and organization of the workplace. Changes regarding organization such as rationalization measures; stopping producing or making changes of producing; decreasing expenses; applying new working, producing and manufacturing methods or changing them; applying new marketing system; converting part time work into full time work; deciding whether works will be performed in the department of workplace that employees work part time or in the department of workplace that employees work full time; accepting shift method; decreasing of working period; increasing of workload as a consequence of reorganization, unproductive work of workplace or decrease of income; merging working areas or departments; transferring some part of work to abroad; transferring some specific works to other companies (outsourcing) or sub-employers; decreasing production capacity of workplace; closing workplace or enterprise; closing a department or service of workplace; increasing income; applying new working methods and decreasing working power for an indefinite period of time may be given as examples of operational decisions qualified as internal reasons[636].

As a difference from termination depending on employee's behavior and termination depending on employee's incapability, termination reason arises from employer's field with reasons arising from needs of enterprise, workplace or work[637]. These reasons cumulated under the term as economic reasons *(motif economique)* in French Law do not arise from employee's personality. Yet, they are reasons which are regarding enterprise, workplace or work and which eliminate the opportunity to employ employees in the workplace or change employment relations; such as finalization of workplace activities, economic difficulties, renovation and the need to protect economic competitiveness[638]. In order that the termination of an employment contract with reasons arising from economic reasons may be deemed as valid, these difficulties have to be real and they have to compel an employer to terminate an

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635 Serkan Odaman. "Fesihten Sonra İşyerinin Kapatılmasının Feshin Sonuçlarına Etkisi". *Sicil İş Hukuku Dergisi*, I: 8, (December 2007): p. 76.

636 Tulukçu, p. 209.

637 Erhan Birben. "İşletme Gerekleri Nedeniyle İşten Çıkarılacak İşçilerin Belirlenmesinde İşverenin Seçim Serbestisi Ve Sınırları". *Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi*, VIII, 2, (2006), p. 7.

638 Mollamahmutoğlu and others, p. 1048.

employment contract[639]. As it is understood from this point, termination arising from needs of enterprise, workplace or work always based on an employer's decision[640]. While termination with reasons arising from the internal of workplace depends on employer's decision directly, for reasons arising from externals of workplace, an operational decision made by the employer is a reaction to reason arising from the external of workplace[641].

Operational decisions are separated into two categories. These are constructive employer decisions and dependent employer decisions. Because of economic crises, employer's decisions issued for dismissing employees as a consequence of excessive employment that arises from taking some precautions before being affected economic crises, in this regard; closing some departments, canceling some positions, closing and merging some branches should be deemed as constructive employer decisions. Constructive employer decision takes its legal basis from the employment contract and employer's freedom of enterprise. The issue blocking the obligation to perform work shall not be examined for this kind of employer decision, in contrast to dependent employer decision. It is important to make it clear whether excessive employment occurred with employer's decision, whether the employer applied this rule consistently, whether the employer acted arbitrarily for termination of the employment contract, and as a consequence of employer's decision, whether termination of the employment contract was inevitable or not[642].

In a country having a free market economy, an employer has right to adjust the number of employees working in the workplace when it is impossible to maintain employees' employments because of some economic reasons. Therefore, termination made by the employer with these reasons shall be deemed as termination depending on needs of enterprise, workplace or work[643]. With another explanation, termination of employment contract because of needs of enterprise, workplace or work shall be deemed as valid only if employer's operational decisions remove the possibility for an employee to work objectively[644]. The fact that there is an existence of excessive employment in the workplace does not have the same meaning as losing money. Indeed, even though the workplace is losing money or there is an

639 Kar, p. 307.

640 Devrim Ulucan. "İş Güvencesinin Kapsamı ve Temel Kavramlar". *İş Güvencesi Temel Kavramlar ve Uygulamadan Öneriler Semineri*, İstanbul Barosu- Galatasaray Üniversitesi, Istanbul, (2003): p. 39; Ertürk, p. 318; Kar, p. 299.

641 Bozkurt Gümrükçüoğlu, p. 342.

642 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 05/04/2010 numbered 2009/41846 E. and 2010/9393 K. (legalbank.com).

643 Şahlanan, Şirket Birleşmesi, p. 16.

644 Alp, Emeklilik, legalbank.com.

adverse balance, provided that it continues to produce the same amount, it shall not be deemed that there is excessive employment and an employer will not be able to terminate the employment contract with valid reasons arising from needs of enterprise, workplace or work[645].

The fact that employee's opportunity to work in the workplace is eliminated does not mean only closing of the workplace or the excessiveness of employment. Provided that an employer does not benefit from working power depending on this workplace and from the performance of work in accordance with employer's productivity purpose, it shall be deemed that employee's opportunity to be employed in this workplace disappears. The important issue is disappearance of working opportunity determined with employment contract and provided that needs of the workplace regarding working power changes, this condition shall be deemed to be occurred. Considering that employee's duty to work is determined by the employment contract, employee's opportunity to be employed in the workplace shall continue as long as need of performance of duty to work specified by the employment contract continues. Indeed, disappearance of the opportunity to work in the workplace has the same meaning with the disappearance of employee's opportunity to work in conformity with provisions of employment contract[646].

The Turkish Court of Appeals evaluates that it should be sought whether there is excessive employment really or not by comparing circumstances of normative positions in which employees are with the number of employees[647].

Operational decisions taken by an employer for performance and reasons preventing performance during employment relation shall be deemed as dependent employer decisions. As reasons preventing performance and acceptance of performance may be force majeure, they may be unpredicted circumstances too. In accordance with the scope of Obligations Law, reasons causing the impossibility of performance and finalizing debt are reasons arising from needs of enterprise, workplace or work. Because of these terms, the fact that an employee may decide to terminate employees' employment contracts is dependent employer decision[648]. For dependent employer decisions, decreasing in workload that leads to a block in should be examined and it should be clarified whether or not excessive employment occurred following

645 Uysal İbat, p. 21.
646 Alp, Emeklilik, legalbank.com.
647 Kılıçoğlu, 18. Madde, p. 485.
648 32nd Civil Chamber of Istanbul Regional Court of Appeals' judgment dated 05/07/2018 numbered 2017/2674 E. and 2018/823 K.; Kar, p. 302.

the operational decision, whether the employer acted arbitrarily for termination, and as a consequence of the operational decision, whether the termination of the employment contract is inevitable [649].

Even though employee's freedom to take operational decision is guaranteed by the Turkish Constitution in Turkish Law, the authority to examine whether termination is made arbitrarily or not belongs to the judge[650]. The right to determine the aim of operational precaution belongs to the employer but provided that the employer does not show any aim for operational precaution, this precaution shall come across with the suspicion of arbitrariness. An employer terminating an employment contract with an operational decision during employment relation should not act arbitrarily in accordance with this rule and should have good faith while taking this operational decision. Examination of employer's operational decision regarding termination is an examination of arbitrariness[651].

The Turkish Court of Appeals also, by giving place to expressions as follows;

> *" In Article 18 of Labour Code numbered 4857, it is regulated that employment contract may be terminated by the employer by depending on a valid reason arising from needs of enterprise, workplace or work. Because of excessive employment having arisen from objective reasons affecting enterprise or workplace, provided that the possibility for an employee to work in the workplace was ended, it may be mentioned that there is a valid reason for termination. The employer may take operational decisions that s/he is free to determine their content. Yet, as a consequence of operational decision, termination considered as a measure should be mandatory. In other words, employee's arbitrary decisions regarding termination are subject to judicial examination"*

indicated that examination of the arbitrariness of these employer's decisions were subject to judicial examination[652]. It means that an employer may take operational decision whose aim and content may be determined by the employer freely but termination should be mandatory as a consequence of the operational decision and employer's arbitrary decisions will be

649 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 23/03/2009 numbered 2008/17009 E. and 2009/7711 K. (legalbank.com).

650 Ulucan, Temel Kavramlar, p. 38; Odaman, İşyerinin Kapatılması, p. 76; A. Can Tuncay. "Telekomünikasyon Alanında İşletme Gerekleriyle İşe Son Verme; Yargıtay 9. Hukuk Dairesinin E. 2005/21085, K. 2005/24114 Numaralı ve 07/07/2005 Tarihli Kararı Üzerine Düşünceler". *Legal İş Hukuku ve Sosyal Güvenlik Hukuku Dergisi,* I: 10, p. 567; 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 07/07/2005 2005/21085 E. and 2005/24114 K. (kazanci.com).

651 Kar, Yargıtay Uygulamaları, p. 473.

652 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 12/02/2007 numbered 2006/32387 E. and 2007/3098 K. (legalbank.com).

subject to judicial examination[653]. Indeed, the limit of employee's freedom to take operational decision is provisions of employment security specified in LC, in other words, it is the obligation to demonstrate a valid reason for termination[654].

Due to the fact that holdings and group companies are ventures, they may take operational decisions too. As holding's operational decision may be regarding one of companies being within the body of it, it may be concerning only one workplace. Even though their legal personalities are separated, since enterprises' managers have to comply with these decisions, managers of enterprises and workplaces may be obliged to liquidate an enterprise or workplace or a specific work in accordance with these decisions and with this regard, they may be obliged to dismiss employees. It should be more proper to name this decision as *"decision regarding enterprise or workplace"* instead of *"operational decision"*, if this decision is for the organization of enterprise or workplace and it is possible to issue termination with valid reason by depending on this decision[655].

When operational decision is considered, it is not possible to examine whether the decision is in conformity with the aim or whether it is beneficial or not. In other words, operational decision may not be subject to review of expediency[656]. Indeed, the right to determine needs of enterprise and work belongs to the employer[657]. On the other hand, the fact that an employer may take operational decisions freely and the fact that as a rule, these decisions may be excluded from judicial examination, without any doubt, depend on the occurrence of these decisions by complying with limits identified by legal system[658]. With another explanation, even if operational decision may not be examined regarding expediency or beneficialness by the judge, due to the fact that an employer is limited on behalf of the employee by employment security system while taking operational decision for terminating

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653 Gülsevil Alpagut. "İş Sözleşmesinin Feshinde Sosyal Seçim Yükümlülüğü Mevcut Mudur?". *Sicil İş Hukuku Dergisi*, I: 4, (December 2006), p. 96.

654 Tulukçu, p. 212-213.

655 Devrim Ulucan. "Feshin Geçerlilik Denetiminde Ekonomik ve Teknolojik Nedenler". *İş Güvencesi ve İşe İade Davaları*, Seminer, 29 May 2010, Kadir Has Üniversitesi Hukuk Fakültesi and İstanbul Barosu, Istanbul, (2010): p. 11.

656 Kılıçoğlu, p. 1216; Kılıçoğlu, Geçerli Sebep, p. 52; Kar, Yargıtay Uygulamaları, p. 469; Güzel, Yetki, p. 363; Kadriye Bakırcı. "Asıl İşveren Alt İşveren İlişkisinin İşyeri Bölümünün Devriyle Bağlantısı Asıl İşveren Alt İşveren İlişkisi Kurulurken İş Sözleşmelerinin Feshi". *Sicil İş Hukuku Dergisi*, I: 18, (June 2010): p. 124; Secarettin Göktaş. "İşyeri Kapanmasının İş Güvencesine Etkisi", *Sicil İş Hukuku Dergisi*, I: 16, (December 2009): p. 70.

657 Şahlanan, p. 59; Alp, Emeklilik, legalbank.com.

658 Kar, p. 299; Yılmaz, Dava, p. 72-73.

an employment contract, termination made by the employer by depending on operational decision shall be subject to judicial examination in certain respects[659].

According to German Law, operational decisions are independent. Labour courts only may examine whether decision is clearly irrelevant, unnecessary or arbitrary. Neither labour courts nor other government authorities may execute a review of expediency regarding operational decisions for protection against termination[660]. With another explanation, labour courts are obliged to respect employer's freedom to take operational decision and it is only given authority for labour courts to examine good faith regarding whether operational decision is concerned with circumstance, whether there is discretion and whether this is arbitrary or not[661].

An employer has to use his/her freedom to take operation decision in conformity with good faith. An employer desiring to finalize employment relation should demonstrate a valid reason arising from needs of enterprise, workplace or work and termination should be depended on this reason. Termination of the employment contract may arise from employer's operational decision or it may be the consequence of employer's operational decision but reason and subject of employer's operational decision may not only be to terminate the employment relation[662].

There has to be a casual relation between termination and reason arising from needs of enterprise, workplace or work[663]. At the time that the employer decides to terminate employment contract, s/he should have a prediction regarding the fact that it is not possible to maintain employment relation in the near future and with present circumstances. It is not important for the validity of termination whether or not this prediction is wrong[664]. The fact that circumstance causing the employer to consider himself/herself to be obliged to decrease the number of the employee working in the workplace depends on a wrong decision having been taken by himself/herself before shall not make termination of employment contract invalid in accordance with Article 18 of LC. The fact that operational decision causing

659 Çelik and others, p. 564; Bozkurt Gümrükçüoğlu, p. 312; Kılıçoğlu, Geçerli Sebep, p. 52.
660 Krebber, p. 512.
661 Krichel, p. 178.
662 Alp, Emeklilik, legalbank.com.
663 Odaman, İşyerinin Kapatılması, p. 76.
664 Bozkurt Gümrükçüoğlu, p. 307

termination of employment contract is not subject to judicial examination is also effective for operational decisions having been issued wrongfully before[665].

An employer terminating an employment contract during employment relation, in accordance with Article 2 of the TCC, should not act arbitrarily while using his/her right being in the scope of his/her management authority, operational decision should be issued in accordance with good faith and this right should not be abused. In addition to this, if there is an allegation regarding the fact that the employer acted arbitrarily, the burden of proof belongs to the employee[666].

When it is alleged that termination is issued with reasons arising from needs of enterprise, workplace or work, initially, employer's operational decision regarding this issue should be sought, the situation blocking performance of work in dependent employer decision should be sought and it should be made clear whether operational decision caused to excessive employment, whether this decision was applied consistently and, as a consequence of operational decision, whether the termination was inevitable or not[667]. With another explanation, even though an employer is free to take decisions such as applying automatization in the workplace, closing some departments or transferring some parts of work to sub-employer or downsizing; whether the employer is sincere for this issue, whether reasons of termination are real and whether termination is issued as a last resort or not shall be examined by judge[668]. Besides, when the employer takes decision for termination, s/he is obliged to prove that this caused excessive employment in the workplace, that this decision is applied consistently and that termination is inevitable[669]. With this regard, the Turkish Court of Appeals seeks that the employer should act in conformity with good faith while using his/her right to take operational decision[670] and accepts that the principle of last resort which is not regulated in LC should be observed[671]. In accordance with the clear provision specified in Article 20/2 of LC, when the employer takes a decision for termination, s/he has to prove

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665 Tulukçu, p. 207.

666 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 13/05/2019 numbered 2019/916 E. and 2019/10722 K. (legalbank.com).

667 Süzek and Başterzi, p. 628-629; Demir, Arabuluculuk, p. 114; Kar, p. 208-209; Bozkurt Gümrükçüoğlu, p. 315-316; 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 08/06/2009 numbered 2008/32592 E. and 2009/15936 K. (lexpera.com).

668 Centel, p. 108-109.

669 Kılıçoğlu, p. 1218.

670 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 22/10/2010 numbered 2009/31834 E. and 2010/30149 K. (legalbank.com).

671 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 02/11/2009 numbered 2009/1917 E. and 2009/29704 K. (legalbank.com).

that this decision causes excessive employment, that this applies consistently and that termination is inevitable[672]. Provided that decision regarding termination is illogical but it is applied consistently, termination shall be deemed as valid[673].

In order to detect whether operation decision applied consistently or not, the Turkish Court of Appeals accepts that receiving employment documents including information regarding 3 months period before and 3 months period after the termination of the defendant employee's employment contract[674].

Reasons arising from the need of enterprise, workplace or work shall be deemed as valid reasons only if they have features affecting employee's work directly or indirectly and eliminating the need to employ the employee[675]. In this circumstance, reason arising from needs of enterprise, workplace or work may be deemed as valid reason for termination as long as they make termination of employment contract inevitable. Besides, negative prediction regarding enterprise, workplace or work that have not happened yet, such that economic crisis may occur at any time or that there may be problems in obtaining raw materials because of measures taken by the government, circumstances which are not certain to exist may not be shown as valid reasons for termination[676].

On the condition that excessive employment occurs, termination of employment contract with valid reason arising from needs of work shall be considered. On the other hand, in order that termination of an employment contract with reasons arising from needs of work may be deemed as valid, it is obliged for an employer to prepare a working analysis and to determine working definitions previously[677].

As indicated in the reasoning of LC, reasons arising from needs of enterprise, workplace or work are separated into two groups as internal reasons and external reasons. External reasons are to become impossible to continue to maintain work in the workplace with reasons such as decrease of producing and selling opportunities, decrease of order and demand, losing foreign market, problems regarding energy, economic crisis affecting the

672 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 18/09/2018 numbered 2018/9730 E. and 2018/19040 K. (legalbank.com).

673 Kar, Yargıtay Uygulamaları, p. 471.

674 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 16/10/2017 numbered 2017/40633 E. and 2017/21880 K. (kazanci.com); 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 08/06/2017 numbered 2017/502 E. and 2017/13708 K. (kazanci.com).

675 Nuri Çelik. *İş Güvencesi*, (Istanbul, 2003): p. 31; Süzek and Başterzi, p. 628.

676 Mollamahmutoğlu and others, p. 1051.

677 Kar, p. 299.

country, general marketing stagnation and problem regarding raw material. On the other hand, internal reasons may be reasons such as applying a new working strategy, downsizing, applying new technology, cancelling some departments in the workplace, cancelling some working types. Indeed, internal and external reasons may just constitute a purpose for termination and therefore, it would be wrong to make a certain division. In the end, every internal decision taken by the employer shall be bounded with external reasons with a view due to the fact that the enterprise works by focusing market[678].

Some of termination reasons arising from needs of enterprise, workplace or work shall be explained in this section of our study in detail.

1. Economic Crisis

In order that an economic crisis may be demonstrated as a termination reason, it has to affect the workplace[679]. Otherwise, only the existence of general economic crisis may not be shown as a valid reason for termination. For this reason, economic indicators which are regarding the working sector that the workplace works in will be important in order to make the valid reason explicit. One of these indicators is how did Gross Domestic Product change over time according to economic activity branch in the relevant sector. According to this, provided that the contribution of the sector in which termination is made to GDP decreased compared with other sectors recently, it should be accepted that there is a sectoral negativity. The second indicator is Industrial Production Index giving information about economic activities on a sectoral basis. It is possible to detect whether the relevant sector is in difficult circumstance or not by evaluating the progress of the sub-index of the sector in which termination is made. Another indicator is *"distribution of employees in accordance with economic activity scopes"* indicating whether there is a serious change in the number of employees recently in the sector in which termination is made. Provided that decreasing of the number of employees or less increasing of it occurs when compared with other working sectors in the relevant sector, the existence of sectoral negativity may be considered[680].

While some regions' contribution to economic growth increases due to growing faster when compared with other regions in time, some regions' contribution to GDP may be less in time. Because of this, as important as the working sector in which termination is made,

678 Ulucan, Teknolojik Nedenler, p. 12.
679 Bozkurt Gümrükçüoğlu, p. 308.
680 Ertürk, p. 321; Kar, p. 308

geographical region is also important. By using Comparing Regional Publications published by the Turkish Statistic Institution, it is possible to make more proper decision by examining economic growth and working conditions of the region that company in which the termination is made is operated in. At the same time, due to every regions' contribution to GPD, regional growth and economic activity may be understood with reports prepared by TUSI[681].

External reasons that may occur instead of force majeure such as economic crisis or market shrinkage are reasons mostly blocking performance or making performance impossible. Yet, in the event of these reasons, by taking risk caused by these reasons and to be caused by them into consideration, an employer as an entrepreneur may consider that these reasons will block maintenance of employees' employment contracts and may terminate these employees' employment contracts[682]. An economic crisis is not solely sufficient for termination and it is necessary that sectoral circumstance affects the workplace directly. Changes on the economic circumstance of a company occurred because of an economic crisis may be understood by examining balance sheets. Financial statements for the end of the period (such as balance sheets, profit and loss account statements) are prepared in most of companies. By comparing these financial statements with each other, it may be detected how serious company is affected by the economic crisis. Accounting data belonging to the pre-crisis period and accounting data belonging to the post-crisis period should be compared with each other and how serious changes are and whether reasons for changes arise from the economic crisis or not should be determined[683].

2. Transfer of Work to Sub-employer or Transfer of Employment Contract

As a consequence of transfer of workplace wholly or partially, an employer changes and some problems regarding protecting employee's rights arising from the employment contract may be releaved[684]. In order to mention about transfer of workplace, the work performed in workplace should be transferred to and should be continued by another employer without making any essential change[685]. With this regard, transfer made without transferring physical place shall not affect the current employment relations and employees'

681 Ertürk, p. 321-322; Kar, p. 308.
682 Ulucan, Ekonomik ve Teknolojik Nedenler, p. 16.
683 Ertürk, p. 322.
684 Manav, İşyeri Devri, p. 1343.
685 Manav, İşyeri Devri, p. 1346.

employment contracts shall continue with the transferor employer[686]. While a person who is transferee and who buys the workplace as a whole with employees shall be deemed as an employer, the person transferring the workplace shall lose his/her title as employer for the workplace transferred by him/her[687].

In order to assume that employment relation that already occurred in the workplace is transferred to a new employer, it is needed that the technical aim of the workplace remains the same during the new employer's management and its existence should continue. Yet, provided that transferee employer continues its activity with a completely different aim, it shall not be deemed that there is a transfer of workplace whose aim is to base on the continuance of employment relation[688].

The transfer of workplace may not be deemed as a valid reason for termination[689]. On the one hand, for an employee being in the scope of employment security, if the employment contract is terminated just because of transfer of workplace, reemployment of an employee shall be considered; on the other hand, for employees who are not in the scope of employment security, termination made by the employer just because of this reason shall give rise to consequences of termination with bad faith. Whereas, it is possible to terminate an employment contract with financial and technological reasons or with reasons caused by reorganization[690]. Provided that conditions for valid termination occur, even though there is a timewise link between termination notice and transfer of workplace, termination shall give rise to consequences of a valid termination[691]. With another explanation, the existence of another valid reason instead of or with transfer of workplace is necessary and sufficient for the validity of the termination[692]. However, although only transfer of workplace shall not be deemed as a valid or justified reason for termination of employment contract in accordance with Article 6 of LC, when it is considered that, whether s/he is in the scope of employment security or not, an employee may use his/her right to terminate the employment contract with duration arising for LC without demonstrating any valid reason, it is possible for an employee

686 Manav, İşyeri Devri, p. 1346; Tankut Centel. "İşyerinin Bir Bölümünün Devrinde Fiziki Mekan". *Sicil İş Hukuku Dergisi*, I: 9, (March 2008): p. 8.

687 Akı, İşyeri Devri, p. 6.

688 Manav, İşyeri Devri, p. 1349.

689 Subaşı, p. 609; N. Binnur Tulukçu. "Şirket Birleşmelerinde İşletme Gerekleri İle İş Sözleşmesinin Feshi". *Sicil İş Hukuku Dergisi,* I: 18, (June 2010): p. 129-142, p. 134; Süzek, İşyerinin Devri, p. 320-322.

690 Ulucan İşyeri Devri, p. 38.

691 Manav, İşyeri Devri, p. 1359.

692 Alpagut, İşyeri Devri, p. 133; Süzek, İşyerinin Devri, p. 321.

to terminate the employment contract with duration in the event of transfer of the workplace[693].

With this regard, it is possible that an employer chooses to terminate employment contract with a valid reason such as a decrease of selling rates or problems regarding raw materials before transferring workplace. Termination made by the employer who terminates employee's employment contract because of these reasons and who transfers his/her workplace, even if termination and transfer happens at the same time, shall be deemed as valid. Indeed, termination of the employment contract is not made because of transfer of workplace in this scenario[694].

In order to deem that there is a transfer of workplace, transferred place should be qualified as a workplace in conformity with provisions of LC. Therefore, provided that an employer sells his/her workplace after for a while that s/he collectively dismissed all employees having worked for him/her in accordance with Article 29 of LC, this circumstance may not be deemed as transfer of workplace and it shall be understood that empty building belonging to the employer is sold to another real or legal person after finalization of activity and of producing and closing of the workplace. In this circumstance, the person buying this building may not be accepted as an employer[695].

Provided that workplace's activity is finalized only for easing the transfer of workplace or fulfilling transferee's introductions, in this circumstance, it shall be deemed that there is a termination of employment contract made because of transfer of workplace. The fact that transferee starts up for the same or similar activity right after the finalization of the workplace's activity and the fact that transferee continues to his/her business relations with same clients shall be deemed as transfer of workplace[696]. As long as the duration between the finalization of workplace's activity and reactivation is, it should be deemed that there is a finalization intention of the employer as serious as this[697]. If an employer transfers all assets to a new employer following the finalization of workplace's activity and the new employer starts to work in his/her own workplace with these assets, detecting whether the relation between these two employers depends on transfer of workplace or not shall be important for

693 Süzek, İşyerinin Devri, p. 322.
694 Manav, İşyeri Devri, p. 1359; Osman Güven Çankaya and Şahin Çil. *İş Hukukunda Üçlü İlişkiler*, 2nd Edition (Ankara: Yetkin, 2009): p. 399.
695 Akı, İşyeri Devri, p. 6.
696 Manav, İşyeri Devri, p. 1361; Alpagut, İşyeri Devri, p. 164.
697 Alpagut, İşyeri Devri, p. 164.

protecting employees in accordance with provisions of employment security. Indeed, if it is accepted that workplace's activity is finalized, as finalization of workplace's activity constitutes a valid reason for the termination of the employment contract, it shall be deemed that termination is valid and depends on good faith. For this reason, it should be detected whether the condition of finalization of workplace's activity or transfer of workplace occurs or not and whether parties abuse against the law or conclude a collusive transaction or not in accordance with the concrete case[698].

The transfer of work to sub-employer is different from transfer of workplace. Indeed, while in the existence of transfer of workplace, employer's activity for this workplace and work is totally finalized, in the existence of transfer of work to sub-employer, employer's activity for this workplace or work performed in his/her workplace is not finalized but the employer decides that this work shall not be performed by his/her own employees. Indeed, in sub-employment relation, primary employer's work is performed by sub-employer's employee in primary employer's enterprise or workplace with some specific conditions. Transferring of work to a sub-employer is an operational decision made by the employer. Provided that excessive employment occurs and the opportunity to employ employees in the workplace disappears as a consequence of the application of sub-employment relation in the workplace, a valid reason for termination may be considered[699]. With another explanation, if existence of collusion is not proven with sufficient proofs, transferring of a department of the workplace to sub-employer shall constitute a valid reason arising from needs of enterprise, workplace or work as a reorganization measure[700].

It is also possible to transfer employee's employment contract to another employer with employer's initiatives in conformity with needs of the workplace. Transfer of contract shall be concluded by an agreement concluded among three parties with its *sui generis* feature. This agreement may be concluded by joint participation of transferor, transferee and employee or employee's consent for contract concluded between transferor and transferee. Employee's consent to transfer of contract is mandatory and constituent element. It is not possible to transfer an employment contract without obtaining employee's consent. Provided that an employee does not accept the transfer of employment contract, this circumstance may not constitute a justified or valid reason for an employer to terminate the employment

698 Manav, İşyeri Devri, p. 1361-1362.

699 Bakırcı, İşyeri Bölümünün Devri, p. 124-125.

700 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 14/10/2004 numbered 2004/22472 E. and 2004/23187 K. (legalbank.com); Tulukçu, p. 233-234; Şahlanan, Şirket Birleşmesi, p. 19.

contract. Following the transfer, legal relation, in other words, employment relation, between the employee and transferor shall finalize. Yet, employment contract shall continue with transferee without any disruption. Neither termination of the employment contract nor concluding a new contract may be considered. With this manner, an employer shall not be responsible for the consequences of termination, an employee may protect his/her rights arising from his/her seniority and the new employer may have experienced employee for his/her work. With transfer of the employment contract, all rights and obligations depending on the previous employment contract will be transferred to transferee without any change[701].

It was evaluated with an opinion in the doctrine that as an employee may have given consent to the transfer of employment contract explicitly, s/he may also have given consent implicitly. Indeed, since there was not any formal requirement for the transfer of employment contract, the fact that the employee worked *de facto* in the new workplace should have been evaluated as implicit consent to the transfer of employment contract. Yet, it should not have been accepted in every case that declaration of implicit consent giving rise to serious consequence such as a change of the employer occured. It was possible that the employee did not complain because of assuming that the transfer of employment contract was temporary and s/he would go back to his/her own work again. Indeed, it was possible that an employer may have made the employee think in this way intentionally. Also, it was even possible that the employee was not aware of the transfer of his/her employment contract to another employer[702]. For those reasons, by taking the concrete case's circumstances into consideration, it should have been expected from the employer to explain reasons why s/he took employee's implicit consent even though s/he may have taken employee's explicit consent[703]. On the other hand, today in accordance with the explicit regulations of Article 429 of TCO, an employer may only transfer employee's employment contract by receiving employee's written consent. Therefore, following this regulation, it is not possible for an employer to transfer employment contract to another employer with employee's implicit consent.

Since the relation between the employee and transferor shall be finalized with the transfer of the employment contract, transferor shall not be responsible for debts and credits that will occur after the transfer of the employment contract. For debts and credits that will

701 Mustafa Alp. "İş Sözleşmesinin Devrinde Bazı Sorunlar". *Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi*, V: 9, Special Issue, (2007): p. 190.

702 Alp, Sözleşmenin Devri, p. 197-198.

703 Alp, Sözleşmenin Devri, p. 197-198.

occur from the time of the transfer of employment contract, the transferee shall be the only person who is responsible.

3. Closing of the Workplace or Department in the Workplace

In the scope of freedom of enterprise, an employer may have right to close his/her workplace on the condition that there is an economic reason or rational working condition. If otherwise is accepted, there won't be any right to manage an enterprise or to manage the workplace of the employer taking risk. The authority to stop the process of work with economic reasons belongs to the employer. Also, not only an enterprise or workplace being in bad conditions but also an enterprise or workplace having profit may be closed by the employer if s/he does not want to take risk and s/he thinks it is necessary, as a consequence of freedom of enterprise. Unless there is a collusion, in other words, an employer starts to manage the same workplace and employ new employees for this same workplace, or unless there is a proof showing that the employer has a bad faith, this circumstance may be deemed as a valid reason for termination[704].

On the other hand, not only closing the workplace wholly but also closing only some departments of the workplace may be deemed as a valid reason for termination. Provided that excessive employment occurs in the event of closing some departments of the workplace and it is not possible to employ these employees for another department of the workplace or with another manner, termination of employment contracts of these employees should also be evaluated as depending on a valid reason[705].

In its judgment, the Turkish Court of Appeals accepted that in the event of the closing of present department because of the merging of companies, if other conditions also existed, an employer may have terminated the employment contract with valid reason[706]. As it is indicated in the same judgment, it is clear that there is going to be an excessive employment on the condition that companies merge and they lose their legal personalities. Yet, it should be examined whether an employee may be employed for another company instead of a merged

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704 Subaşı, İşyerinin Kapatılması, p. 53.

705 Ekmekçi and others, p. 145; 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 30/05/2018 numbered 2018/26565 E. and 2018/12115 K. (legalbank.com); 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 30/06/2008 numbered 2008/1816 E. and 2008/17979 K. (legalbank.com).

706 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 02/11/2009 numbered 2009/1917 E. and 2009/29704 K. (legalbank.com).

company or not[707]. In order to evaluate that employee's employment opportunity disappears, it is needed that the mentioned employee may not be employed for another department of company[708].

4. Privatization

Since it includes structural changes and economic reason, privatization shall be deemed as a valid reason arising from needs of enterprise, workplace or work too[709]. Privatization means the transfer of properties and management belonging to public institutions to the private sector. Termination made as a consequence of privatization shall be subject to legal examination of employment security. It means that an employee whose employment contract is terminated as a consequence of privatization may initiate a reemployment case. Privatization may solely not be deemed as valid reason in all by itself[710]. Privatization may be deemed as a valid reason only if excessive employment which is the main condition sought for termination arising from needs of enterprise, workplace or work exists and it shall be valid in accordance with the rate of detected excessive employment. In such circumstance, by observing the principle of last resort (*ultima ratio*), which is considered for terminations arising from needs of enterprise, workplace or work, abilities to avoid from termination should be reviewed. Otherwise, on the condition that there is no inspection showing the existence of excessive employment or even though it is, the number of employees more than causing excessive employment is dismissed, or even though there is no problem with these issues, the principle of last resort is not observed while dismissing employees; it may not be considered that there is a valid reason anymore[711].

5. Division of Company

In accordance with the clear explanation of Article 178 of TTC, for partial and whole division, unless the employee objects, the employment contract concluded with employees shall be transferred with all debts and credits having occurred from the beginning of the employment contract till the time of transfer. On the other hand, supposing that the employee

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707 For evaluation in detail made regarding mentioned judgment of the Turkish Court of Appeals: Tulukçu, Şirket Birleşmesi, p. 132-142.

708 Şahlanan, Şirket Birleşmesi, p. 18.

709 Ekmekçi and others, p. 149; 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 10/01/2005 numbered 2004/26556 E. and 2005/117 K. (legalbank.com).

710 Subaşı, p. 612; Şeref Güler. "Türk İş Hukukunda Geçerli Nedenle Fesih Ve Sonuçları." (Master Thesis, Marmara Üniversitesi, 2008), p. 73.

711 6th Civil Chamber of Ankara Regional Court of Appeals' judgment dated 02/07/2019 numbered 2019/2411 E. and 2019/1624 K. (legalbank.com).

objects, the employment contract shall be deemed as being finalized following the notice period. The employee and transferee shall be responsible for performing his/her obligations arising from the employment contract until the finalization of the employment contract. The transferee and the previous employer shall be responsible jointly for employee's credits having been due before the division and to be due during the period passing until the normal finalization date of the employment contract or until the time that the employment contract is finalized because of employee's objection. TTC is a new code when compared with LC. Also, since Article 178 of TTC regulates consequences of transfer of employment relation only for merge, the division and the change of the type of company, this provision is more special when compared with Article 6 of LC covering all transfer of workplaces and consequences arising from this. Therefore, provided that Article 178 of TTC and Article 6 of LC conflict with each other, Article 178 of TTC should apply[712].

If the employee objects to the division of the company, it may not be deemed that there is a termination issued by the employer since there is not an employer's intention to terminate the employment contract[713]. As a result of this, even though the employee desires to be reemployed or s/he claims that the principle of last resort is not observed by the employer before finalization of his/her employment contract, it is not possible for him/her to initiate a reemployment case because of the absence of condition regarding existence of employer's termination in order that the employee may be deemed as being in the scope of employment security. As a consequence of this, even if the division of the company may be deemed as a valid reason for finalization of an employment contract, it shall not be possible to examine whether the finalization of employee's employment contract is issued in accordance with general principles specified for employment security or not. It is obvious that this legal gap regarding the division of the company is not in conformity with an employment security system whose main purpose is protecting employees from employer's arbitrary actions and this gap should be fulfilled with a new regulation.

6. Other Valid Reasons arising from Needs of Enterprise, Workplace or Work

One of the significant circumstances of the current global economy is to want to downsize the workplace or being obliged to apply this in order to improve workplace's compatibility. This circumstance is indicated as downsizing of the workplace in the reasoning

712 Süzek, İşyerinin Devri, p. 326-328.
713 Süzek, İşyerinin Devri, p. 329.

of LC and this may also cause a valid reason for termination. Yet, not every downsizing demand should be deemed as valid reason arising from needs of the workplace for termination. In order to mention about termination with a valid reason arising from the downsizing of the workplace, there should be an existence of a circumstance causing need of downsizing and compelling to act in accordance with this action to protect workplace's compatibility[714]. In addition to this, it is needed that there is no opportunity for the employer to employ the employee whose employment conract will be terminated for work performed by the employee or any other work performed in the workplace belongs to him/her anymore.

According to the Turkish Court of Appeals, following the transfer of the bank to the Saving Deposit Insurance Fund and appointment of a board of directors with the decision of SDIF, since the board of directors decides on the reorganization of the bank, termination issued for manager of branch of the bank depends on a valid reason[715].

9th Civil Chamber of the Turkish Court of Appeals unified judgments because of conflicts among judgments of different Regional Courts of Appeals and, in the concrete case that employees already work for same service in employer's workplace, it is evaluated that employer's termination of employment contract of workplace doctor, nurse, paramedics with the reason that the employer will take service from common health and security department is not possible and a right to choose is not provided by the Code numbered 6331 for the employer regarding whether to continue employment relation with workplace doctor and paramedics in workplace or to take service from common health and security department. On the contrary, it is deemed as being possible to take service from common health and security department on the condition that there is not a workplace doctor occupational safety specialist and paramaedic in the workplace[716]. Employer's right to take operational decision is restricted by the Code numbered 6331. Therefore, it is decided that termination of the employment contract of workplace doctor, nurse and other paramedics having worked in workplace with the reason of taking service from common health and security service may not be deemed as a valid reason[717].

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714 Centel, p. 111.

715 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 08/10/2018 numbered 2018/7711 E. and 2018/17623 K. (legalbank.com).

716 For the supporting evaluation in the doctrine: Ebru Karabacak. "İş Sağlığı ve Güvenliği Hizmetlerinin Dışarıdan Temini". *İstanul Üniversitesi Hukuk Fakültesi Mecmuası*, LXXIV, V: 1, p. 506.

717 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 17/01/2022 numbered 2021/12111 E. and 2022/503 K. (legalbank.com).

While, in one of judgments of the Turkish Court of Appeals, the fact that the present employee's employment contract had been terminated by the employer in order to employ other employees that s/he would have paid less money because payment of wages paid during months when the school had been closed for the holiday had been too much for him/her was evaluated as a invalid reason[718]. On the other hand, in another judgment of the Turkish Court of Appeals, applying unpaid leave procedure for employees is accepted as termination because financial problems and expenses for employees exceeded 30% of the budget was deemed as valid reason[719].

In accordance with Article 30 of LC, on the one hand, employers are obliged to employ disabled employees as 3% of the total number of employees in private workplaces in which fifty or more employees work; on the other hand, employers are obliged to employ disable employees as %4 of the total number of employees in public workplaces and former convict or people who are blessed in a way that they may be deemed as being disable because of and effects of terrorist incident listed in Article 21 of the Anti-Terror Code numbered 3713 and dated 12/04/1991 while performing his/her service in the scope of Military Service Code numbered 111 and dated 21/06/1927 or Reserve Officer and Reserve Armed Forces Officer Code numbered 1076 and dated 16/06/1927 as %2 of the total number of employees in public workplaces in which fifty or more employees work, in accordance with their physical, mental and vocational circumstances. It is controversial in the doctrine whether this obligation shall be disappeared or whether an employer may terminate employment contracts of disabled employees, former convicts and victims of terrorism or not, when the number of employees working in the workplace decreases below fifty. According to an opinion that we support too, even though they are employed due to their special circumstances, dismissing of them shall be subject to valid reasons to which other employees are subject and decrease of the number of total employees working in disabled employees', former convicts' and victims' of terrorism employer's workplace may not be deemed as a valid reason for termination of their employment contracts[720]. Indeed, special circumstances of this kind of employee are unique for their employment and subjecting them to same procedures with other employees regarding

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718 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 11/12/2003 numbered 2003/19269 E. and 2003/20526 K. (legalbank.com).

719 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 29/12/2003 numbered 2003/22915 E. and 2003/22947 K. (legalbank.com).

720 Subaşı, p. 613.

valid reasons after being employed shall be in accordance with the principle of Labour Law[721].

In another judgment of the Turkish Court of Appeals, by indicating that a decrease in producing, price and marketing because of negative effects of bird flu in the workplace operated for poultry raising is deemed as a reasonable reason affecting the workplace negatively, termination of the employment contract having been issued with this reason is deemed as valid[722].

In addition to these, the thought regarding increasing quality, productivity and compatibility in the workplace may impact the employer to take different decisions. For this purpose, an employer may decrease production, may change product or producing manner, may focus on producing of some products or services by decreasing workplace's production variety, may change workflow. Provided that there is no possibility for employee to work and there are more employees than needed because of these precautions taken by the employer, an employer may terminate employees' employment contracts with duration as a last resort[723].

C. Circumstances that do not Constitute Valid Reason

Followings are listed by paragraph 3 of Article 18 of LC in accordance with Article 5 of the Convention numbered 158 as circumstances that do not constitute valid reasons for termination. These are;

i. Union membership or participation in union activities out of working hours or, with the consent of the employer, within working hours.
ii. Being a union representative
iii. Issuing a complaint or participating in proceedings against an employer to competent administrative or judicial authorities in order to follow their rights and to fulfill their obligations arising from contract and codes
iv. Race, color, sex, marital status, family responsibilities, pregnancy, birth, religion, political opinion, national etc.
v. Absence from work during period of time that is in Article 74 and that is forbidden for female workers to be worked

721 Güler, p. 75.
722 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 16/04/2007 numbered 2007/7965 E. and 2007/10625 K. (legalbank.com).
723 Süzek and Başterzi, p. 630.

vi. Temporary absence from work during the waiting period specified in subclause (b) of sub-paragraph (I) of Article 25 of LC because of illness and accident

Even though it is indicated with different aspect in the doctrine[724] that these circumstances that may not be deemed as a valid reason and are specified in LC are listed one by one and as a consequence of this, these circumstances may not be extended with employment contracts to be concluded between the employer and the employee; according to an opinion that we support too, they are listed especially, as these circumstances are fundamental rights and freedoms protected by Labour Law especially, and they may not be deemed *numerous clauses*[725].

II. OBLIGATION TO ISSUE A WARNING BEFORE TERMINATION

ILO Recommendation named Termination of Employment Recommendation and numbered 166 is a recommendation decision that has a subsidiary feature for Convention numbered 158 and is accepted by ILO on 22 June 1998[726]. According to Article 7 of Termination of Employment Recommendation numbered 166, *"the employment of a worker should not be terminated for misconduct of a kind that under national law or practice would justify termination only if repeated on one or more occasions, unless the employer has given the worker appropriate written warning"*. Besides, according to Article 8 of Termination of Employment Recommendation numbered 166, "*the employment of a worker should not be terminated for unsatisfactory performance, unless the employer has given the worker appropriate instructions and written warning and the worker continues to perform his duties unsatisfactorily after a reasonable period of time for improvement has elapsed"*[727].

According to the prevailing perspective in the doctrine, as it is indicated in the Termination of Employment Recommendation numbered 166, for termination arising from employee's behavior, the fact that the employee was warned with a written warning and despite this, s/he repeated on this behavior; for termination arising from employee's incapability, the fact that the employee was warned with written warning and a reasonable

724 Centel, p. 60.

725 Süzek and Başterzi, p. 624; Sümer, p. 106; Demir, Arabuluculuk, p. 35; Başbuğ and Yücel Bodur, p. 192; Günay, p. 132; Bakırcı, p. 116.

726 Tulukçu, p. 64.

727 ILO, Reccommendation 166 sur le licenciement, https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID,P12100_LANG_CODE:312504,fr

period of time was provided for the employee but at the end of this period of time that employee did not give satisfactory improvement should be deemed as valid reason regarding employer's usage of his/her right to terminate employment contract with duration with good faith[728]. On the other hand, this condition shall be effective when giving another chance may be more proper with considering that this behavior and this kind of behaviors will not be repeated in the future in spite of intentional behavior. With this regard, in order that valid reason may occur, incapability not arising from physical incapability but arising from vocational incapability and intentional behaviors not affecting trust relation seriously that constitutes the base of employment relation may be evaluated as concrete circumstances that the employee should be warned and a reasonable period of time should be provided[729].

In fact, in the event of termination with a valid reason arising from employee's behaviors, because of behavior depending on employee's intention and will, a warning is an opportunity provided in order that the employee may act in conformity with the employment contract[730]. As a general description, a warning is to inform the employee regarding the fact that the employer does not accept employee's behavior which is against the employment contract, if it is repeated, there will be legal consequences of his/her behaviors regarding content and existence of the employment contract[731]. Warning has functions of informing, caution and reporting and the function of warning gives an opportunity for the employee to evaluate his/her circumstance and act in conformity with obligations arising from employment contract, instead of being punished[732]. Warning issued in order that an employee may fix or improve his/her behaviors should not be evaluated as a formal need. Indeed, the fact that the employee is warned means giving an opportunity for him/her to fix or to improve his/her behaviors. With this regard, unless another new breach of employment contract arising from employee's behaviors occurs after warning, termination to be made only by depending on the reason indicated in the warning shall not be deemed as valid anymore[733]. By issuing warning,

728 Mollamahmutoğlu and others, p. 1046; Çelik and others, p. 531-532; Süzek and Başterzi, p. 639; Centel, p. 84 and 101.

729 Mollamahmutoğlu and others, p. 1046-1047.

730 Kılıçoğlu and Şenocak p. 31; Centel, p. 101.

731 Muhittin Astarlı. "İş Sözleşmesinin İşçinin Davranışları Nedeniyle Geçerli Feshinde İhtar". *Legal İş Hukuku ve Sosyal Güvenlik Hukuku Dergisi*, 2009/23: p. 965-966.

732 Çelik and others, p. 532; Caniklioğlu, p. 73.

733 Centel, p. 102; Kılıçoğlu, p. 1222.

it should be accepted that an employer waived implicitly from his/her right to terminate the employment contract because of behavior that was mentioned on the warning[734].

The need for a warning may also be possible for the part of termination arising from employee's behavior regarding trust in order to rebuild employer's trust. If it does not seem possible, an employer may terminate an employment contract with valid reason without issuing warning. Without doubt, the criteria for this condition are not employer's subjective evaluation, it should be detected with objective criteria to be determined for every specific case[735].

Warning shall only be evaluated as mandatory in case of breach of employment contract that the employee may fix or change. Because of this, in the event of the existence of termination reasons arising from enterprise, workplace or work and arising from employee's incapability that the employee may not change or fix, the warning may not be deemed as being mandatory. Indeed, in this kind of circumstance, there will not be any positive effect of warning on concrete termination reason, and this reason may not be eliminated with any effort of the employer even with any warning to be issued[736]. Besides, provided that the employee declares explicitly that s/he will continue to act against the employment contract, there will not be any need for a warning anymore. In fact, the caution function of warning shall not be effective in this circumstance[737].

As it is mentioned above, there is no need to issue a warning for employee's incapability arising from his/her nature[738]. This issue is also regulated same in German Law and, by taking into consideration that the employee may change his/her behaviors if s/he wants, in the event of termination arising from employee's behaviors, it is indicated that there is an obligation to issue a warning before termination. On the other hand, since this may not be considered for termination arising from personal reasons, warning obligation is not regulated[739]. Indeed, if this incapability may be fixed, a warning should be issued for the employee and on the condition that the employee does not fix this incapability within the

734 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 22/04/2019 numbered 2018/10548 E. and 2019/9475 K. (legalbank.com); Kar, p. 155; Kılıçoğlu, p. 122.

735 Astarlı, İhtar, p. 977.

736 Çelik and others, p. 532-533; Süzek; 608; Astarlı, İhtar, p. 973; Kabakçı, p. 270; Demir, İş Hukuku Uygulaması, p. 317.

737 Astarlı, İhtar, p. 977; Ugan Çatalkaya, p. 491.

738 Kılıçoğlu, 18. Madde, p. 489.

739 Krebber, p. 517; Kirchner and others, p. 143.

period of time provided to him/her, his/her employment contract may be terminated with valid reason[740].

There is not any statutory basis of a warning accepted as a pre-requirement for termination of an employment contract with valid reason in the Turkish legal system. The main basis of warning is the principle of last resort regulated under termination law and dominating provisions of employment security and the principle of proportionality. Indeed, according to the principle of proportionality, provided that it is possible to reach the consequence with another measure which is less serious than termination instead of termination which is a last measure for employee's breach of employment contract, termination shall not be valid. Indeed, the first purpose of employment security is to provide continuance of employment relation by restricting employee's right to terminate the employment contract. With this regard, a warning shall be deemed as a pre-requirement for termination with valid reason[741]. According to this, regardless of being in which scope, regarding employee's behaviors which may be controlled by an employee and which are against the employment contract, in accordance with the seriousness of the breach of contract, provided that it is predicted that the employee will not show such behaviors and avoid acting in this manner in the future, as a need of the principle of proportionality, an employer has to warn the employee before terminating the employment contract[742].

In order to understand warning as a term, it is necessary to explain its relation with other similar terms. With this regard, it should be useful to determine the difference between warning and caution. The main difference between warning and caution is that although warning is an instrument of the law of the protection against termination, caution is a measure applied in the scope of authorization to issue disciplinary punishment. The aim of the warning is to warn the employee seriously regarding the fact that employee's behavior is against the employment contract, if it is repeated, there will be consequences in the scope of Labour Law and the employment contract will be terminated. In accordance with a perspective in the doctrine, a warning taking its source from employment contract and employer's right to manage and being as a measure regarding issuing disciplinary punishment may only constitute informing function of warning and it does not have warning and reporting functions of warning which constitute main characteristic of warning. Indeed, in a simple caution, it is

740 Astarlı, İhtar, p. 976.
741 Astarlı, İhtar, p. 970-971.
742 Astarlı, İhtar, p. 977.

only informed to the employee, who does not act in conformity with employer's orders and instructions, that employee's behaviors are against provisions of the employment contract. Provided that this caution also contains a threat regarding the fact that employee's employment contract will be terminated if these behaviors are repeated, it shall be qualified as a valid warning being a pre-requirement for termination arising from employee's behavior[743].

Furthermore, there should be a clause regarding the fact that the employment contract will be terminated if this behavior is repeated in a written warning[744]. Indeed, in order that employee's behaviors may be deemed as a valid reason for termination of the employment contract, these behaviors should be repeated at least one more time after a warning regarding these behaviors was issued[745]. It should be clearly indicated in writing warning, which shall be issued for employee's behaviors that s/he should improve himself/herself, that his/her employment contract shall be terminated if s/he does not accept the education process offered so that s/he may eliminate his/her insufficiency of adaption and capability or s/he does not eliminate his/her incapability or s/he reject job offer for another work[746]. In order the caution function of warning occurs, it is not necessary to inform whether the employment contract may be terminated with ordinary or extraordinary reasons, if it is repeated; the issue which is necessary and sufficient is to inform the employee regarding the fact that the employee will face to consequences of Labour Law and content and existence of employment contract is in danger, if this behavior is repeated[747]. Besides this issue is evaluated by the Turkish Court of Appeals in one of its judgments by indicating as follows; *"warning should warn the employee seriously, It should be requested from him/her not to repeat the behavior explained explicitly, in the event of its repeat, there should be a threat regarding the fact that some consequences in the scope of existence and content of employment relation shall occur"*[748].

Warning is not an exclamation of intention, it is an action like a legal transaction. Indeed, the warning is not for concluding a legal consequence but it is for showing illegality of his/her behaviors to the counter-party of the employment contract[749]. There is not a formal requirement regulated by LC for warning. As a consequence of this, unless otherwise is

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743 Astarlı, İhtar, p. 966.
744 Kar, p. 151; Demir, Geçerli Sebep, p. 485-486.
745 Çelik and others, p. 532.
746 Demir, Geçerli Sebep, p. 485.
747 Astarlı, İhtar, p. 981.
748 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 17/03/2008 numbered 2007/27583 E. and 2008/5294 K. (legalbank.com).
749 Astarlı, İhtar, p. 968.

agreed with an individual employment contract or collective labour contract, a warning may be issued in written or verbal form[750]. Whereas, due to the fact that it will be easier for an employer who has the burden of proof to prove that a warning is issued in the case to be initiated, it shall be more proper to issue a warning in written form[751]. Besides, when the warning is issued in written form, this written warning has to be kept in personal registration files due to the fact that they are important for employees. While issuing a warning, it is not important whether there is a title as *"warning"* on the top of the warning, if it is understood that this script is a warning by interpreting the content of it, it should be accepted that there is a warning[752].

Furthermore, according to another opinion in the doctrine, a termination having been deemed as invalid before, in some circumstances, may be deemed as a warning for termination to be made. For this circumstance, initially, there should be the same or similar behaviors. Secondly, termination having been made before should be deemed as invalid because of reasons that are not regarding the fact that employee's behavior are against the employment contract, for example; violation of formality or not to issue a warning. In other words, there should not be any hesitation between parties of the employment contract regarding the fact that employee's behaviors are not in conformity with the employment contract or this inconformity should be determined by the court. In the event of the existence of these conditions, after termination was deemed as invalid, provided that the same or similar behavior is repeated, an employer may terminate the employment contract with valid reason without issuing another warning[753].

With this regard, the breach of employment contract arising from employee's behavior should be explained as clear and understandable as possible in warning. Therefore, general warning explanations as follows; *"because of your behavior known by you"* or *"your behavior which is against contract"* may not be deemed as valid[754].

According to an opinion that we support too, for the validity of the warning, the fact that the warning is reached to the employee is not sufficient and therefore, the employee has to be informed about the content of the warning. Indeed, in order that a warning performs its functions, especially its caution function, the employee has to be informed regarding which

750 Astarlı, İhtar, p. 979.
751 Süzek; 608; Kar, p. 155.
752 Astarlı, İhtar, p. 982-983.
753 Astarlı, İhtar, p. 988.
754 Astarlı, İhtar, p. 981.

his/her behavior is found as being against the employment contract by the employer and with this regard, which his/her behavior should be fixed or changed by him/herself and otherwise, what are its legal consequences[755].

Not only managers authorized to dismiss but also all supervisors that have right to give instruction and work regarding the place, time and concept of works obliged by employment contract may issue warnings. Warning may be issued by any supervisor who has authority to give instructions regarding the work[756].

There is not any specific period of time in order to issue a warning. In addition to this, an employer will determine when a warning shall be issued but evaluating every specific case in accordance with its own conditions shall be more proper in order not to act so fast. Warning should be issued in a reasonable time before a long period of time passed[757]. According to an opinion in the doctrine[758], this reasonable period of time should be evaluated in accordance with the period of time determined as 6 working days in Article 26 of LC.

Only issuing a warning is not sufficient for termination. Whether the employee changes his/her behaviors after warning or not should be detected and besides, consequences of this should be waited. Therefore, a reasonable period of time should be provided to the employee for this process[759].

In conclusion, the scope of warning does not cover employees working during the probation period even though they are in the scope of provisions of employment security. Employment relation shall have an unstable feature during the probation period. Indeed, concluding the probation period in an employment contract means that both parties of the employment contract reserve their rights to terminate the employment contract. In accordance with Article 15 of LC, each party of the employment contract may terminate the employment contract without complying with the notice period and without paying any compensation. This termination opportunity which is unusual for general rules regarding termination excludes issuing a warning as a result of its feature[760].

755 Astarlı, İhtar, p. 979.
756 Kar, p. 151.
757 Çelik and others, p. 532; Astarlı, İhtar, p. 984.
758 Kar, p. 153.
759 Tulukçu, p. 185.
760 Astarlı, İhtar, p. 975.

III. OBLIGATION TO PROVIDE WRITTEN NOTICE FOR TERMINATION OF EMPLOYMENT CONTRACTS

In accordance with Article 19 of LC, an employer has to issue a termination notice in written form. For termination of employment contract of employees who are not in the scope of employment security, it shall be accepted that written termination notice is not for the condition for validity but it is the condition for proof, in spite of Article 109 of LC specifying that termination notice should be issued in written form by taking employee's signature. Indeed, the Civil General Assembly on the Unification of Judgments of the Turkish Court of Appeals[761], with explanations as *"in fact, accepting that the form specified with the mentioned article is a condition for proof should be more proper in accordance with needs of work, conflicts of benefits and at the and principles of law",* indicated explicitly that this form was a condition for proof.

On the other hand, it is not possible to reach the same consequence for employees being in the scope of employment security[762]. Termination to be issued against employees being in the scope of employment security should be prepared in written form and this condition is a condition for validity of termination notice. Therefore, even though other conditions are fulfilled by the employer while terminating employees' employment contracts, just not to observe written form condition shall give rise to the invalidity of termination[763]. As it is explicitly indicated in the script of LC that there is a written form requirement for termination of employment contracts of employees being in the scope of employment security, it should be accepted that a written form for termination is a requirement that has to be issued not only for termination with valid reasons but also for termination with justified reasons, if employees are in the scope of employment security[764]. According to the opposite opinion, this is not a condition for validity but it is a condition for proof. Condition for validity shall cause invalidity of termination just because of not observing written form requirement even though there is a valid reason shown by the employer and it is clear that the employee is informed about this valid reason and also that this kind of serious consequence may not be deemed as being proper[765]. However, it is not important whether employees are in

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761 Civil General Assembly on the Unification of Judgments of the Turkish Court of Appeals' judgment dated 18/02/1959 numbered 1958/28 E. and 1959/17 K. (legalbank.com).

762 Mollamahmutoğlu and others, p. 1070.

763 Ekmekçi and Yiğit, p. 665; Çelik and others, p. 571; Süzek and Başterzi, p. 641; Doğan Yenisey, Sona Erme, p. 402.

764 Ulucan, p. 73-74; Mollamahmutoğlu and others, p. 1071; Sümer, p. 107; Çelik and others, p. 483.

765 Ekonomi, p. 13.

the scope of employment security or not, provided that the employment contract is terminated by the employee, the written form requirement for issuing termination notice shall not be deemed as a condition for validity.

Yet, there is not a mandatory procedural requirement in some countries. As an example, in accordance with Swiss Codes, any procedural requirement for termination of the employment contract is not regulated and only the fact that an employer may issue a termination notice in written form while terminating an employment contract is regulated as an advice. On the other hand, if parties decided that there will be a formal requirement (such as written form and via registered e-mail address) for termination while concluding the employment contract to be performed between them, parties have to terminate the employment contract by observing this formal requirement[766]. With another explanation, in accordance with Swiss Law, unless otherwise is regulated with an employment contract or collective labour contract, observing written form is not obliged for parties of employment contract to terminate employment relation. Employment contract may be terminated with oral form or by declaring intention implicitly. Yet, provided that the other party of the employment contract wants, a termination notice has to be issued in written form[767].

On the other hand, even though Protection Against Unfair Dismissal Act indicates that terminations to be made by the employer have to be in written form, in accordance with German Law Regulations, fax and e-mail are not sufficient for providing written form requirement[768]. The burden of proof for proving that termination notice is served to the employee is on the employer[769].

In the doctrine, it is accepted that termination notices issued as messages by phone or e-mail are not in conformity with written form requirement because termination notice should be served to other party of employment contract and periods of prescriptions depending on termination start to process from the time that termination notice is served[770]. In accordance with the opposite opinion that we also support, provided that an employee informs an employer about his/her own e-mail address or phone number shown in the employment contract and accepts that notice may be sent to this number or e-mail address, it should be

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766 Michelè Stutz. "Switzerland". in *Labour Law A Pratical Global Guide*, editor: Agusti Jausas, London: Global Law and Business, (2011): p. 596.

767 Portmann, p. 641.

768 Vossen and Willemsen, p. 259.

769 Kirchner and others, p. 137.

770 Centel, p. 122; Kılıçoğlu and Şenocak, p. 45-46.; Mollamahmutoğlu and others, p. 1071.

accepted that notices issued in this manner are valid. The phone number or e-mail to which the termination notice will be sent should belong to the employee and provided that the phone number or e-mail address to which the termination notice will be sent does not belong to the employee himself/herself, termination shall be deemed as invalid[771]. As it is indicated in the reasoning of the Notification Code numbered 7201, e-notice is not such a mandatory notice as a rule, only if it is accepted by the employee explicitly or implicitly, e-notice may be issued to the employee but unless there is an explicit or implicit acceptance of the employee, provided that e-notice is used to the employee, it shall be deemed that written form requirement regulated by Article 19 of LC is not observed in this circumstance[772]. However, according to the Turkish Court of Appeals[773], a quitclaim may not be qualified as a termination notice.

This issue is different from country to country regarding Comparative Law too. As an example, in accordance with Belgian Codes, the termination procedure of an employment contract shall be different whether it is issued by the employer or the employee and on the one hand, when the employment contract is terminated by the employer, termination notice shall be sent to the employee via the registered e-mail address or by employer's representative; on the other hand, provided that termination of the employment contract is issued by the employee, termination notice shall be sent to the employer via a registered e-mail address, by an authorized representative or by hand[774].

In accordance with Article 29 of LC, with explanations as follows; *"when an employer wants to dismiss employees collectively because of reasons such as economic, technological and structural needs of enterprise, workplace or work, s/he is obliged to inform workplace union's representative, relevant regional institution and Turkish Labour Institution about this before at least 30 days with written form",* collective dismissing is regulated in Turkish Labour Law. On the other hand, there is a conflict between evaluations of Civil Chambers of the Turkish Court of Appeals examining Labour Law regarding the fact that the termination procedure for employment contracts of employees, who are in the scope of employment security and are dismissed collectively, shall apply in which manner. In accordance with the opinion of 7th[775] and 9th[776] Civil Chambers of the Turkish Court of

771 Ertürk, E-posta veya Kısa Mesaj, p. 36 ff.; Ertürk, p.326-327.

772 Ertürk, E-posta veya Kısa Mesaj, p. 38.

773 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 08/02/2018 numbered 2017/28048 E. and 2018/2020 K. (legalbank.com).

774 François and Colenberghe, p. 52.

775 7th Civil Chamber of the Turkish Court of Appeals' judgment dated 24/12/2015 numbered 2015/3968 E. and 2015/26619 K. (Yargıtay Karar Arama).

Appeals, even for collective dismissing, termination notices should be issued in written form and separately for each employee and, instead of circumstances arising from justified reasons, the fact that termination notice is not issued in written form shall cause invalidity of termination all by itself. This evaluation has been supported in the doctrine by declaring that publishing in the workplace may not be deemed as a termination notice, it is obliged to issue termination notices for each employee separately and even though it is collective dismissal, this obligation shall not disappear[777]. In our opinion too, this evaluation may be more appropriate for the purpose of employment security. On the other hand, in accordance with the evaluation of 22nd Civil Chamber of the Turkish Court of Appeals, collective dismissing is subject to different obligations rather than individual termination. As a difference from Article 19 of LC, in the script of Article 29 of LC, there is no regulation obliging an employer to issue separate termination notices for each employee in collective dismissing, yet, it is accepted that the effectiveness of dismissing shall commence after 30 days from the time that the employer informs regional intuition about this. Therefore, the Special Civil Chamber decided that there was no need to issue a termination notice to relevant employee for collective dismissing and it was not possible to apply Article 19 of LC regulating obligation to issue a termination notice for terminations depending on valid reasons to collective dismissing[778].

According to the Turkish Court of Appeals, on the condition that it is understood that sub-employment relation depends on collusion, termination made by sub-employer shall not be legally effective[779]. In this circumstance, the existence of valid termination shall not be considered. Besides, when it is detected that sub-employment relation depends on collusion, unless there is a service issued by principal employer, the Turkish Court of Appeals decides that the period of prescription specified for initiating the reemployment procedure as 1 month shall not commence. On the other hand, by an evaluation in the doctrine, this decision is criticized with reasons that the decision has conflicts in itself because it is accepted in this

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776 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 27/09/2016 numbered 2015/34344 E. and 2016/16731 K. (legalbank.com).

777 Ekmekçi and Yiğit, p. 665; Mollamahmutoğlu and others, p. 1159-1160; Çelik and others, p. 694; Süzek and Başterzi, p. 644; Kar, p. 344.

778 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 20/06/2017 numbered 2017/32696 E. and 2017/14866 K. (legalbank.com).

779 9th Civil Chamber of Turksih Court of Appeals' judgment dated 08/07/2004 numbered 2004/17098 E. and 2004/17431K. (kazanci.com).

judgment that notice made by sub-employer is qualified as termination intention and reemployment case continues but period of time as 1 month does not commence[780].

IV. OBLIGATION TO DEMONSTRATE TERMINATION REASON EXPLICITLY AND CERTAINLY

As a need of LC's explicit provision, an employer is obliged to show the termination reason explicitly and certainly. However, it is not needed to be explained all of the details and processes of the issue causing the termination of the employment contract in the termination notice. The important issue is to be able to understand that employee's employment contract is terminated with which reason explicitly from the termination notice[781]. An employer terminating an employment contract shall be binding with this termination reason having been shown while terminating the employment contract and s/he may not change this termination reason or may not show any other termination reason anymore during the reemployment procedure[782]. As an employer may not change the termination reason that s/he shown before, provided that an employer has more than one reason for terminating the employment contract but s/he showed only one of them, an employer may not depend on other reasons anymore[783]. Besides, an employer who did not show any termination reason may not show a termination reason, even though it is real and acceptable[784]. This issue constitutes a guarantee on behalf of the employee[785].

Additionally, even though an employer has a termination reason for every issue giving rise to termination depending on a valid reason, after s/he uses one of them as a termination reason, as employment relation shall be finalized after the expiry of the notice period, it is not possible to demonstrate other termination reasons following the expiry of the notice period. It is also the same for terminating an employment contract having been terminated with valid reason before with justified after the expiry of the notice period. Indeed, it is not possible to

780 Şahlanan, p. 65.

781 Ekmekçi and Yiğit, p. 666.

782 Çelik and others,p. 484; Süzek; p. 609; Yusuf Yiğit. "4857 sayılı İş Kanunu Kapsamında İş Sözleşmesini Fesih Hakkını Kullanma Süresi". *Selçuk Üniversitesi Hukuk Fakültesi Dergisi*, V: 27, I: 3, (2019): p. 754; Engin, Sona Erme, p. 144; 9th Civil Chamber of Turksih Court of Appeals' judgment dated 11/10/2004 numbered 2004/10587 E. and 2004/22804 K. (legalbank.com).

783 Mollamahmutoğlu and others p. 1072; Odaman, İşyerinin Kapatılması, p. 77.

784 Mehmet Uçum. "Karar İncelemesi: İşverenin Dayandığı Fesih Nedeninin Hukuki Niteliğinin Belirlenmesi ve Sözleşmenin Feshinde Usul Hükümlerinin Uygulanması*". A. Can Tuncay'a Armağan*, Istanbul, (2005): p. 390.

785 Demir, Arabuluculuk, p. 132.

terminate an employment contract having been finalized before[786]. On the other hand, according to one opinion in the doctrine, when an employer learns the existence of another termination reason within the termination notice period or another termination reason occurs after the termination notice was issued, the termination reason may be changed and extended[787]. In accordance with our opinion, provided that the employer terminated employment relation having been concluded between him/her and the employee, it shall not be possible anymore to change the termination reason indicated in the termination notice after this termination notice was served to the employee. If an employer learns a new termination reason or a new termination reason occurs after previous termination notice was served to the employee, this employer may only issue a new termination notice within the notice period in order to demonstrate this reason for termination before relevant labour court. As will be explained below, provided that the second termination reason is a one of the justified reasons indicated in Article 25 of LC and provided that the reemployment case is initiated by the employee for both terminations issued by the employer, labour court examining the reemployment case regarding termination issued with duration should consider reemployment case initiated against termination depending on justified reason as a preliminary issue[788].

In addition to this, when Article 21 of LC is taken into consideration, since termination shall be deemed as invalid just because of the fact that termination reason is not shown in the termination notice, it should be accepted that showing the termination reason explicitly and certainly is a condition for validity. In this circumstance, even though an employer observes written form and proves the existence of valid reason, termination made by the employer who does not show termination reason explicitly and certainly shall be deemed as invalid[789]. Because of this, an expression as *"upon necessity"* in termination

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786 Baycık, Fesih Sebebi, p. 115.

787 Ekmekçi and Yiğit, p. 666.

788 For the opposite opinion in the doctrine indicating that, as a consequence of some behaviors performed by the employee or the employer while the reemployment case continues, if it is not waited duly from the counter-party of the employment contract to continue employment relation, this relation should be finalized and if the fault belongs to the employee, the employer should not be responsible for the reemployment compensation; on the other hand, if the fault belongs to the employer, the employee should have right to receive compensation without needing to apply to the employer: Çağlar Çopuroğlu. "Geçersiz Fesihlerde Tarafların Fesihten Sonra Öğrendikleri Veya İşe İade Sürecindeki Kusurlu Davranışlarının Davaya Etkisi". *İş Hukukunda Genç Yaklaşımlar II*, Istanbul: Onikilevha, (October 2016): p. 178 ff.

789 Çelik, Güvence, p. 37-38; Mollamahmutoğlu and others p. 1072; Uçum, Usul, p. 389; Şahlanan, p. 60; Tulukçu, p. 272; Caniklioğlu, Sona Erme, p. 284.

notices shall not be evaluated as a termination reason shown explicitly[790]. Also, unspecific expressions as *"because of your behaviors"* or *"because of circumstances that enterprise is getting through"* are far from being sufficently explicit[791]. Besides, indicating only the script of relevant article of LC in the written termination notice does not mean either that the termination reason is shown explicitly and certainly[792].

According to the Turkish Court of Appeals, it is not obliged for an employer to always terminate an employment contract explicitly. If behaviors of parties to each other and termination of the employment contract may be understood from circumstance, this issue should also be deemed as termination of the employment contract. With another explanation, it is not obliged to place the term as "*termination"* in termination[793]. Provided that an implicit explanation indicating termination intention and the fact that the employee does not continue to work are together exist, this should be evaluated as termination of the employment contract. It is sufficient for an employer to use explanations showing his/her intention and desire to terminate the employment contract[794]. However, in addition to the termination intention, the time of terminating the employment contract should be explicit as it is needed and it may not be explained in a manner that may cause misunderstanding in termination notice[795]. This circumstance is called as *"termination depending on action"* by the Turkish Court of Appeals. Sometimes termination may arise because of employee's negative action. The fact that the employee is avoided from entering the workplace and the fact that employee's automatic entrance card is taken back may be deemed as examples of this circumstance. As another example, the fact that even though the employee does not accept it, the employer gives unpaid leave to the employee unilaterally may be deemed as termination made by the employer[796]. In fact, provided that the employee does not accept unpaid leave, the employer may not change working conditions unilaterally[797]. In addition to this, provided that the employee and the employer agreed on the application of unpaid leave but the

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790 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 16/05/2013 numbered 2012/35850 E. and 2013/14879 K. (legalbank.com); Centel, p.124.

791 Mollamahmutoğlu and others p. 1072.

792 Kar, p. 144.

793 9th Civil Chamber of Turksih Court of Appeals' judgment dated 10/06/2010 numbered 2008/35729 E. and 2010/17372 K. (legalbank.com).

794 Centel, p. 124; Kılıçoğlu/ Şenocak, p. 52; H. Sena Akkışla. "Feshin Geçersizliği Davasında Ön Koşul Olarak Arabuluculuk Kurumu". *Türkiye Adalet Akademisi Dergisi*, Year: 15, I: 57, (January 2024): p. 429.

795 Yılmaz, Dava, p. 62; Kılıçoğlu, p. 1224.

796 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 12/03/2009 numbered 2007/41150 E. and 2009/6661 K. (legalbank.com).

797 Taşkent, Askı, 27; Sarper Süzek. "İş Akdinin Askıya Alınması ve Ücretsiz İzinler". *Dokuz Eylül Ünivsersitesi Hukuk Fakültesi Dergisi,* V: 9, Special Issue, (2007): p. 131.

employer does not reemploy the employee following the expiration of the suspension duration, it should be deemed that employee's employment contract is terminated by the employer[798].

In a judgment of the Turkish Court of Appeals, it is indicated that regarding seasonal work, the fact that the employee is not called at the time of starting of the season, it shall be deemed as termination made by the employer[799] and the period of time to initiate a reemployment case commences from the time of performance of termination depending on the action[800]. This date may be proven with any kind of oral and written proofs[801]. Regarding termination depending on the action, since there is no termination performed in accordance with conditions specified in LC, termination made against the employee being in the scope of employment security shall be deemed as invalid.

When a reemployment case is initiated, it may not be considered that an employer may demonstrate termination reason in the reply petition[802]. Indeed, termination notice made by the employer who had not demonstrated any termination reason in the termination notice but indicated a termination reason in the reply petition is rejected by the Turkish Court of Appeals with the reason that the termination notice was made by not observing formal requirements indicated in LC[803].

The important issue for termination notice made by the employer is that concrete issues may be evaluated as being in the scope of one of three groups specified in Article 18 of LC and it would be appropriate to say that it is not bounded with the legal qualification made by the employer. In fact, the important thing is not that reason is in the scope of which group of these groups but it is whether the reason may be qualified as valid by being in the scope of these three groups[804].

Even though there is an opinion in the doctrine as the condition regarding the fact that termination reason has to be determined certainly and explicitly should be applied to

798 Süzek, Askı, p. 130.

799 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 18/04/2006 numbered 2006/4823 E. and 2006/10605 K. (NJIS).

800 Durmuş Özcan. "İşe İade Davalarında İhtiyari Tedbir Yoluyla veya Duruşma Açılmada İşe İadeye Karar Verilip Verilmeyeceği Meselesi". *Sicil İş Hukuku Dergisi*, I: 29, (March 2013): p. 98; Kar, Yargıtay Uygulamaları, p. 450.

801 Günay, p. 136.

802 Centel, p. 123.

803 9th Civil Chamber of Turksih Court of Appeals' judgment dated 03/02/2005 numbered 2005/1084 E. and 2005/3101 K. (kazanci.com).

804 Centel, p. 125.

immediate termination with justified reason[805], the Turkish Court of Appeals does not seek a condition obliging that termination notice should be issued in written and termination reason should be demonstrated explicitly and certainly for immediate termination with justified reason[806].

In the event of an allegation regarding the fact that formal requirements are not observed, this allegation should be examined meticulously in the scope of good faith (Article 2 of TCC). Especially, despite existence of credible minutes issued for employee's behaviors and incapability and known by the employee too, employee's allegations regarding the fact that formal requirements were not followed when the employee continued his/her behaviors in spite of warning and his/her defence regarding these behaviors shall be deemed as being against good faith[807].

Lastly, it should be explained that even though there is not a written form requirement for terminations of employment contracts of employees who are not in the scope of employment security, it is possible for parties of the collective labour contract to determine with a provision to be regulated in the contract that terminations of employment contracts of employees who are not in the scope of employment security shall be made with written form and that termination reason should be determined certainly and explicitly[808].

V. OBLIGATION TO TAKE EMPLOYEE'S DEFENCE BEFORE TERMINATION OF EMPLOYMENT CONTRACT

In accordance with explicit regulation of LC, without taking employee's defence about an allegation regarding him/her, employee's employment contract with indefinite duration shall not be terminated with reasons arising from employee's incapability and behavior[809]. Yet, as it may be understood from the explicit explanation of LC, for termination with reasons arising from needs of enterprise, workplace or work, there is no obligation to take employee's

805 Mollamahmutoğlu and others, p. 1072.

806 Ekmekçi and others, p. 150; M. Refik Korkusuz and Ömer Uğur. "Individual Labour Law ", in *Turkish Private Law*, editors: M. Refik Korkusuz and Ferna İpekel Kayalı, 2nd Edition (Ankara: Seçkin Yayınları, 2020), p. 125; 9th Civil Chamber of Turksih Court of Appeals' judgment dated 24/04/2006 numbered 2006/5461 E. and 2006/11253 K. (legalbank.com).

807 M. Polat Soyer. "Feshe Karşı Korunmanın Genel Çerçevesi ve Yargıtay Kararları Işığında Uygulama Sorunları". *İş Güvencesi Kurumu ve İşe İade Davaları*, Legal İş Hukuku ve Sosyal Güvenlik Hukuku 2005 Yılı Toplantısı Legal, (2005): p. 57.

808 Canbolat, Toplu İş Sözleşmesi, p. 153.

809 Çelik and others,p. 573; Sümer, p. 107; Noyan Turunç and Melda Sur. *Turkish Labour Law*, (Izmir: Turunç, May 2010), p. 85; Güzel, Sona Erme, p. 255; Caniklioğlu, Sona Erme, p. 287.

defence because reasons causing termination are not related to the employee[810]. Furthermore, employer's right to terminate the employment contract complying with the sub-paragraph (II) of Article 25 of LC is reserved. Therefore, provided that an employer issues an immediate termination with justified reason depending on Article 25/ II of LC, it is not obliged for an employer to receive employee's defence before terminating an employment contract[811]. Even though paragraph 2 of Article 19 is criticized in the doctrine with reasons that not to take employee's defence for serious faults is against justice and equality, while taking employee's defence for slight faults[812], the Turkish Court of Appeals evaluated with its decision on the unification of judgments that the employer was not obliged to take employee's defence before termination when employment contract was terminated with justified reason by the employer[813]. However, even though taking employee's defence on termination with a justified reason for circumstances regulated by the sub-paragraph (II) of Article 25 of LC is reserved, it shall be obliged for an employer to take employee's defence before termination even though s/he decided to terminate employee's employment contract with a valid reason, instead of a justified reason for the same reason[814].

As it is understood from the explicit explanation of LC, it is obliged to take employee's defence before termination. The fact that employee's defence is taken after termination shall not be deemed as being in conformity with the procedure[815]. Indeed, the Turkish Court of Appeals also indicates this and in the event of taking employee's defence with a termination notice, during the notice period or after termination, it was decided that termination would have been deemed as invalid[816]. In addition to this, employer's obligation to take defence is obliged just before termination of the employment contract and there is no obligation to take defence while issuing a warning. Therefore, not taking employee's defence while issuing a warning regarding his/her behaviors to the employee shall not cause invalidity of warning. Even though defence has not been received yet, an employer may issue a warning

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810 Ulucan, Ekonomik ve Teknolojik Nedenler, p. 8; Demircioğlu, p. 49; Yiğit, p. 1152; Bozkurt Gümrükçüoğlu, p. 302.

811 Kar, p. 159; for the evaluation indicating that an employer is not obliged to take employee's defence for terminations issued with reasons specified in Article 25/ I, II, III and IV of LC: Ekmekçi and Yiğit, p. 655.

812 Çelik and others,p. 574; Süzek and Başterzi, p. 642; Mollamahmutoğlu and others,p. 1075.

813 General Assembly on the Unification of Judgments of the Turkish Court of Appeals' judgment dated 19/10/2018 numbered 2017/9 E. and 2018/10 K. (legalbank.com).

814 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 05/02/2007 numbered 2006/31969 E. and 2007/2253 K. (legalbank.com).

815 Mollamahmutoğlu and others, p. 1074; Süzek; 611; Kar, p. 156.

816 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 24/05/2010 numbered 2009/20438 E. and 2010/14394 K. (legalbank.com).

against employee[817]. In its other judgment, the Turkish Court of Appeals indicated that employee's defence must have taken before the termination of the employment contract, the employee must have been invited so that s/he may have given his/her defence, termination reasons arising from his/her behaviors must have been shown explicitly and certainly in the invitation, it must have been reminded to the employee that s/he should have been in place, day and at the time that had been indicated reasonable time ago, otherwise, it was possible for the employee to give a written defence, provided that the employee would not be in place, day and at time that had been indicated reasonable time ago and would not give a written defence, it would be evaluated that the employee waived to give defence. According to the Turkish Court of Appeals, these are also conditions for the validity of the termination[818].

An employer must clearly and explicitly specify the subject on which the employee's defence is requested and the employee is expected to provide their defence accordingly[819].

Defence is a right for an employee, not an obligation for him/her. Due to this, even though the employer is obliged to request from the employee to give his/her defence, the employee is not obliged to defend himself/herself. While taking defence, the employer is also obliged to provide the appropriate environment for the employee. If it is necessary, the employer has to provide materials such as a computer, printer, paper or pencil and if the employee does not know how to read and to write, the employer has to provide a printer and has to take defence in front of witnesses by getting it written and taking witnesses' signatures[820].

According to one opinion in the doctrine that we also support, when it became completely impossible for an employee to perform his/her duties for work undertaken with an employment contract and therefore, if there is an objective incapability of the employee, it is not obliged for an employer to take employee's defence before termination but if incapability is subjective, employee's defence has to be taken[821].

On the other hand, if a defence is taken from the employee, subjects for which employee's defence is taken should be the same with subjects indicated in the termination

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817 7th Civil Chamber of the Turkish Court of Appeals' judgment dated 15/11/2016 numbered 2016/15414 E. and 2016/19496 K. sayılı Kararı (Yargıtay Karar Arama); Kar, p. 155.

818 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 05/11/2015 numbered 2015/22372 E. and 2015/31331 K. (Yargıtay Karar Arama).

819 Canbolat, p. 92.

820 Canbolat, p. 90.

821 Mustafa Kılıçoğlu and Kemal Şenocak. *İş Kanunu Şerhi.* V: 1, (Istanbul Legal, January 2008), p. 1284.

notice. With another explanation, it is not possible to issue a termination regarding the subject for which employee's defence is not taken[822].

As it is explicitly explained above, the employer has to inform the employee whose employment contract will be terminated by the employer about termination reasons and has to provide a reasonable period of time in order that the employee may give his/her defence regarding these subjects. With this regard, in addition to that reasonable period of time shall be determined in accordance with conditions of every specific case, it is clear that at least it should be *"between a couple days and one month".* Indeed, it may not be deemed proper to request from the employer who may not maintain employment relation anymore to wait for a long period of time in order to take employee's defence[823]. Provided that the employee does not give his/her defence during this reasonable period of time, it should be accepted that the employee waives from his/her right to give defence[824].

In addition to all, from one of 9th Civil Chamber of the Turkish Court of Appeals' judgments, it is understood that the termination reason is that the employee used slang words against one of employees working for the employer. In accordance with the judgment, that reason was a justified reason for the employer in accordance with article 25/II (d) of LC and it was understood that the employer had terminated employee's employment contract because of that reason but termination had been made in accordance with Article 17 and 18 of LC by depending on good faith in order that his/her employee who had worked in the workplace for 30 years may have been taken the severance payment and the payment in lieu of notice, even though employee's behavior gave an opportunity for the employer to terminate employment contract with justified reason. The Turkish Court of Appeals decided in this judgment that there was not any need to take employee's defence in that circumstance, the fact that the employer had not used his/her right to terminate the employment contract with justified reason with good faith may not have been evaluated as against him/her, otherwise, employer's behavior depending on good faith would be punished and because of all those reasons, termination should have been deemed as depending on a valid reason and the case should

822 Ekmekçi and Yiğit, p. 655.
823 Centel, p. 128.
824 Sümer, p. 107.

have been rejected[825]. Even though this decision is open to criticism, due to the fact that it secures justice, it is evaluated as proper in the doctrine[826].

Provided that the employment contract is terminated with an allegation of the existence of justified reason, when it is decided by the court that termination of the employment contract does not depend on justified reason but it is more proper to evaluate that this termination depends on a valid reason, just the fact that employee's defence was not taken shall not affect the validity of termination in this scenario[827]. Hence, according to the Turkish Court of Appeals, provided that the employment contract is terminated by the employer with justified reason following the period of prescriptions specified in Article 26 of LC in order to terminate the employment contract immediately expired, this termination made by the employer may be deemed as termination with valid reason and this termination shall not be deemed as invalid just because of the absence of employee's defence[828].

VI. TIMEFRAME FOR EXERCISING THE RIGHT TO TERMINATE AN EMPLOYMENT CONTRACT FOR VALID REASONS

It is regulated in Article 26 of LC that the right to terminate an employment contract with immediate effect regulated for an employer and an employee by showing circumstances that are not in conformity with morality and good faith may not be used after six working days starting from the time that one of two parties learns that other party showed or shows such behaviors or, in any circumstances, after 1 year starting from the time of occurrence of an action. Yet, provided that an employee gains monetary advantages from this action, the period as 1 year shall not apply. On the other hand, there is no regulation indicating that termination with valid reason may be made in which period of time in LC. However, although

825 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 24/05/2018 numbered 2017/25553 E. and 2018/11649 K. (legalbank.com).

826 Çelik and others, p. 574.

827 Ekmekçi and Yiğit, p. 655; In the Turkish Court of Appeals' judgment, this issue is evaluated as follows *"Even though Regional Court of Appeals decided on invalidity of termination with the ground that claimant's defence had not been taken in accordance with Article 19 of Labour Code numbered 4857 before termination, in accordance with our Chamber's practice, provided that termination reason is not deemed as a justified reason but it is deemed as a valid reason for circumstances that an employer applies termination with justified reason, just not taking employee's defence may not cause to eliminate the validity of termination"*. For more information: 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 03/05/2018 numbered 2017/24792 E. and 2018/9808 K. (legalbank.com).

828 9th Civil Chamber of Turkish Court of Appeals' judgment dated 19/06/2006 numbered 2006/13620 E. and 2006/17779 K. (NJIS).

there is no regulation about this issue, it may not be evaluated that termination depending on valid reason may be made at any time[829].

An employer has to use his/her right to terminate an employment contract with valid reason in a reasonable period of time[830]. The first issue that should be understood from the reasonable period of time is, in our opinion, the period of time that concrete subject causing termination of the employment contract may be deemed as a valid reason to terminate the employment contract. With another explanation, it is the period of time that concrete subject, which termination with duration depends on, makes termination necessary both subjectively and objectively[831]. According to an opinion in the doctrine, for termination made because of financial needs, the right to terminate employment contract may be used as long as effects of financial reasons continue. On the other hand, for termination made because of reorganization, it shall be clear whether excessive employment occurs or not as a consequence of changing of organization and termination depending on this reason should be made as soon as possible. For termination arising from employee's incapability and behaviors, right to terminate the employment contract should be used in reasonable time from the time that it is understood that incapability is certain or that there is a serious behavior causing termination[832].

In addition to this, the Turkish Court of Appeals declared that the relative period of prescription as six working days and the imperative period of prescription indicated in Article 26 of LC would apply to termination with justified reasons without notice specified in Article 25 of LC, there was not any provision indicating that that provision would apply to terminations depending on valid reasons specified in Article 18 ff. of LC. As a consequence of that reason, the period of prescription regulated by Article 26 should have only been sought for terminations depending on Article 24/II and Article 25/II of LC. Yet, it was not possible that the period of prescription regulated by Article 26 may have applied to terminations depending on valid reasons. However, it was inevitable to consider that termination with valid reason would not be subject to a time limit due to the fact that it was a formative right. That period should have been considered as reasonable period of time and an employer must have used his/her right to terminate the employment contract within the reasonable period of time

829 Secarettin Göktaş. "İş Sözleşmesinin İşverence Feshi ve İş Güvencesi". *Ankara Barosu Dergisi*, Year: 66, I: 1, (2008): p. 34; Manav, p. 155; Centel, p. 129; Yiğit, Fesih Hakkı, p. 757.

830 Çelik and others, p. 570; Ekmekçi and others, p. 151; Demir, Geçerli Sebep, p. 473; Yiğit, Fesih Hakkı, p. 759.

831 Baycık, p. 67.

832 Ekmekçi and Yiğit, p. 667.

from the time that s/he learned valid reason causing termination. Termination to be made after a reasonable period of time would be deemed as invalid[833].

In its another judgment, after it was indicated that the right to terminate must have been used in period of time which was in conformity with objective equity, it may not have been used as a pressure manner after a long period of time having expired, the Turkish Court of Appeals decided that the employer having terminated employment contract after a long period of time (after 4 months) from the time that valid reason causing termination of employment contract had occurred did not observe the principle of good faith and for that reason termination of the employment contract was invalid[834]. In the same way, the Turkish Court of Appeals evaluated that the right to terminate an employment contract was not used in a reasonable period of time since there were 4 months from the time that the report had been issued to the time that the employment contract had been terminated and there were approximately 2 months from the time that employee's defence had been taken to the time that employment contract had been terminated[835].

The Turkish Court of Appeals accepted in one of its judgments that even though 2 years passed from the time that the employee working as a janitor in a public hospital had taken entertaining videos in the intensive care unit, by indicating that the period of prescription indicated in Article 26 of LC would not be applied for terminations with a valid reason, an employer used his/her right to terminate the employment contract with valid reason within a reasonable period of time and termination was made within its time[836]. In addition to this, especially for terminations with valid reasons arising from employee's behavior or incapability, provided that employee's behavior giving rise to termination still continues to cause negative effects on the workplace at the time of usage of right to terminate employment contract and it affects employment relation, with another explanation, if employee's behavior or another valid reason has not lost its effects yet; it should be accepted that reasonable period of time for termination has not expired yet[837].

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833 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 12/09/2005 numbered 2005/24429 E. and 2005/29361 K. (legalbank.com).

834 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 02/10/2006 numbered 2006/17797 E. and 2006/25426 K. (NJIS).

835 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 06/03/2014 numbered 2013/13126 E. and 2014/7371 K. (legalbank.com).

836 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 09/10/2018 numbered 2018/261 E. and 2018/17869 K. (Yargıtay Karar Arama).

837 Kar, p. 148-149.

In another judgment[838], the Turkish Court of Appeals gave place to the explanations as follows; *"the employment contract of claimant working as a painter in defendant's workplace was terminated with the reason that s/he took reports frequently and it affected workflow negatively. In accordance with the content of the file, since it is understood that the claimant worked for approximately 4 years and 8 months in employer's workplace, according to the statistics having been submitted by the defendant, the employee took a resting report on August 2015 lastly, employee's employment contract was terminated on 12/01/2016, as the termination was not made in a reasonable time by taking the date of last report into account, it is not proven that termination depends on a valid reason; even though it should have been decided on the invalidity of termination and reemployment of the employee, it is incorrect to decide on dismissal of the case with written reasoning"*.

As the right to terminate an employment contract is a disruptive formal right, the disappearance of the ability to use this right means that the right to use this right is finalized. For formal rights, the disappearance of the ability to use these rights means the finalization of these rights[839]. Besides, provided that an employer creates a credible belief for the employee to believe that the employment contract shall not be terminated by the employer in spite of the existence of a valid reason, for example, if the employer promotes the employee or gives a new duty to him/her, it should be accepted that right to terminate employment contract is made ineffective. In fact, in this circumstance, an employer creates a credible belief for the employee to believe that the employment contract shall not be terminated with his/her contradictory actions with his/her termination intention. This belief should be legally protected as a consequence of article 2 of TCC and, as a more concrete explanation, prohibition to act contradictorily[840].

Furthermore, according to the Turkish Court of Appeals, termination which is made after the expiration of the period of prescription as six working days regulated in Article 26 of LC should not be evaluated as invalid. Indeed, the employer may use his/her right to terminate the employment contract with a justified reason as right to terminate the employment contract with a valid reason within a reasonable period of time by depending on the concrete subject

838 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 22/01/2018 numbered 2016/35051 E. and 2018/768 K. (legalbank.com).

839 Baycık, p. 70; Çopuroğlu, p. 177.

840 Baycık, p. 67; Süzek and Başterzi, p. 614.

that may be evaluated as a justified reason[841]. With another explanation, it is not possible that, for terminations with justified reasons, only the expiration of the period of prescription as six working days shall cause invalidity of termination, even though the period of prescription is expired, provided that the existence of valid reason shown by the employer is certain, termination made by the employer should be deemed as termination with valid reason[842]. Indeed, after the expiration of the period of prescription, the concrete subject shown as a reason of termination loses its qualification as a justified reason subjectively. Yet, provided that termination depending on valid reason is made within a reasonable period of time, it should be accepted that the same reason gives rise to termination with valid reason and therefore, whether termination is legal or not should be evaluated in the scope of termination depending on valid reason[843].

It is not important how an employer legally qualifies the reason demonstrated as termination reason by himself/ herself. As legal qualification made by the employer shall not be binding for the employer during the legal procedure, the judge is not either bound with employer's legal qualification. In other words, termination made by the employer shall not be deemed as invalid simply because an employer may not correctly qualify legal reasons for termination. Even though there is a termination made in accordance with Article 25 of LC, the judge will examine termination reasons regarding valid reasons regulated by Article 18 of LC too[844].

VII. PRINCIPLES TO BE TAKEN INTO CONSIDERATION WHILE TERMINATING EMPLOYMENT CONTRACT

While terminating the employment contract of employees being in the scope of employment security, some principles should be taken into account by an employer. If these principles are not taken into consideration by an employer, during a potential judicial examination, it may be decided that termination is invalid.

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841 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 22/01/2018 numbered 2016/35051 E. and 2018/786 K. (kazanci.com); 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 27/09/2017 numbered 2016/22383 E. and 2017/14275 K. (kazanci.com); 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 12/09/2005 numbered 2005/24429 E. and 2005/29361 K. (legalbank.com); 7th Civil Chamber of the Turkish Court of Appeals' deicisionda dated 25/01/2016 numbered 2015/34836 E. and 2016/716 K. (Yargıtay Karar Arama).

842 Uçum, Usul, p. 394.

843 Baycık, p. 66.

844 Uçum, Usul, p. 391- 392.

A. The Principle of Last Resort (Ultima Ratio)

The existence of a valid reason arising from employee's behaviors, incapability or needs of enterprise, workplace or work is the legal base of the employment security system for termination of the employment contract. Yet, in order that an employer may terminate an employment contract legally, it is not sufficient that the abovementioned conditions exist. Measures which are less serious than termination and may prevent termination should be sought in every specific case and provided that these measures are not sufficient, termination should be issued as a last resort[845].

In accordance with this principle, only if other measures are used before termination which is the last measure but they do not achieve the purpose, termination may be issued. In this regard, termination made without consuming measures that may be taken shall not be explained with needs of enterprise or workplace. Employer's arbitrary decision regarding termination is subject to judicial examination because termination, which is evaluated as a last measure, should become mandatory. On the other hand, if it is possible to reach to purpose wanted to achieve with another manner, it may not be deemed that there is a valid basis for termination[846].

Ultima Ratio is a principle whose legal base depends on the principle of binding with contract and the principle of performance of employment contract by complying with good faith. This principle declares that an employer has to use all measures deemed in conformity with good faith before termination in order to protect contractual relation[847]. It became an extremely functional principle regarding judicial examination about whether termination is valid or not in the scope of employment security[848]. However, there is also a criticism in the doctrine arguing that the principle of last resort can serve merely as a tool to invalidate terminations. This evaluation emphasizes that it significantly intervenes with employer's freedom to make decisions and assert that the authority to determine which measures should be taken should rest solely with the employer[849].

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845 Çelik and others, p. 530; Süzek; 602; Şahlanan, Gazeteci, p. 573.

846 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 03/04/2006 numbered 2006/4878 E. and 2006/8253 K. (legalbank.com); For the opinion in the doctrine emphasizing that the principle of last resort is in conformity with the necessity which is one of three sub-principles of the principle of proportunality: Ugan Çatalkaya, 474.

847 Köme Akpulat, Ultimo Ratio, p. 46.

848 Güzel, Son Çare, p. 63.

849 Ekmekçi and Yiğit, p. 659 ff.

The limit of the principle of last resort is determined by the purpose of operational decision. The fact that an employer did not take measures that are not appropriate as termination so as to reach the purpose shall not be deemed as against the principle of last resort[850].

This principle is not explicitly regulated under the Turkish Legal System. In accordance with Article 1 of the TCC, the judge may take the reasoning of LC into consideration[851]. Indeed, in the reasoning of LC, it is explained as follows; "*while choosing this manner, the thing waited from the employer is thinking termination as a last resort. As a consequence of this, it should be examined constantly whether it is possible to avoid termination or not, while making evaluation in conformity with the term as a valid reason".*

In one of the judgments of 9th Civil Chamber of the Turkish Court of Appeals, by placing explanations as follows;

> *"When a valid reason giving rise to change employment contract is detected, in the second part, it should be examined whether changing of employment contract that was offered de facto is in conformity with LC and collective labour contract, whether it is in accordance with the principle of proportionality and whether it is waited from the employee to accept this offer justifiably or not; in other words, s/he has to accept the offer having been made before or not. It means, in the second part of the examination regarding changing termination, it is considered that there is an examination of changing offer. With this regard, indeed, proportionality is examined. The examination should be made in accordance with concrete case's circumstances. In accordance with this, only if changing termination is needed in order to change working conditions as a slight and convenient manner and is in conformity with proportionality for the followed purpose, it may be deemed as being in conformity with ultima ratio. There should not be any other measure that does not need changing of working conditions or needs to offer slighter working conditions and may make it possible to reach the same purpose regarding the organization or the scope of technic or economic. In addition to this, the employer, if it is possible, has to offer less radical offer in order to change the employment contract. If the offer for changing breaches the principle of equal treatment regarding Labour Law, since the employee is not obliged to obey this offer, changing termination shall be deemed as invalid."*

explained the importance of the principle of last resort[852]. In other words, the Turkish Court of Appeals decided that termination should have been evaluated as a last resort for terminations arising from needs of enterprise, workplace or work. For this reason, it is needed that an

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850 Şahlanan, Şirket Birleşmesi, p. 17.

851 Güzel, Son Çare, p. 71-72.

852 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 13/03/2023 numbered 2023/3247 E. and 2023/3581 K. (legalbank.com).

employer has to find alternative manners such as decreasing in working hours, finalizing overtime work or increasing productivity for the management of workplace in difficult times arising from financial reasons[853]. In accordance with the practice of the Turkish Court of Appeals, regarding termination decisions taken by the employer because of needs of enterprise, workplace or work; an employer has to prove that it caused excessive employment in the workplace, termination is inevitable and termination is issued in accordance with needs of the principle of last resort[854]. With this regard, it should be considered that there is a difference between valid termination and termination depending on valid reason. In fact, LC seeks other conditions in addition to existence of a valid reason for valid termination and the principle of *ultima ratio* is one of them.

In accordance with the reasoning of LC, it is indicated that termination has to be considered as a last resort for termination arising from needs of enterprise, workplace or work. Therefore, according to one opinion in the doctrine, it is not possible to consider the principle of last resort for terminations arising from employee's behavior or incapability[855]. Also, according to the Turkish Court of Appeals, it is not possible to consider the principle of last resort for the employee causing negativity in the workplace with his/her behavior and incapability and making it impossible to maintain employment relation[856]. According to the opposite opinion in the doctrine, even though it is indicated that terminations arising from needs of enterprise, workplace or work should be evaluated in conformity with the principle of last resort, on the condition that an employee may also be employed for another work for terminations depending on employee's behavior and incapability, termination may not be chosen[857]. Yet, provided that employee's faulty behavior is as serious as to cause to disrupt of trust relation, it is not possible to wait from the employer to use termination as a last resort[858].

Also, in one of judgments of the Turkish Court of Appeals dated 2007, it is indicated that this principle should be taken into consideration for terminations arising from employee's incapability. In the mentioned case, it is understood that the psych-technic department constructed in workplace has an authorization document prepared by Province Health

853 Turunç and Sur, p. 88.

854 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 01/10/2015 numbered 2015/19201 E. and 2015/26987 K. (Yargıtay Karar Arama).

855 Ekmekçi and Yiğit, p. 663.

856 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 06/07/2017 numbered 2016/29524 E. and 2017/12122 K. (legalbank.com).

857 Süzek and Başterzi, p. 635; Savaş Taşkent. "Geçerli Sebep Bağlamında Belirli İlkeler". *Sicil İş Hukuku Dergisi*, I: 21, (March 2011): p. 16; Güzel, Son Çare, p. 83.

858 Mollamahmutoğlu and others, p. 1054-1055.

Institution, the employee working as a driver of mass transportation is passed a general survey test and from some results, it is understood that the claimant is incapable for visual continuity, discernment, visual perception/ memory, test regarding predicting fast and distance and visual perception test which is regarding traffic. In reports having been issued by expert phycologist and expert doctor psychiatry, it is made certain that the employee does not have competences and abilities required for driving a vehicle and that there is a risk to employ the employee with regards to the phyco-technic evaluation. Also, it is certain that the employee had accident for 11 times in the last 5 years with the scope of the file. It is evaluated in the judgment that the employee works as a driver of mass transportation, because of results having existed during general survey tests and the frequency of having accidents, it is not appropriate to employ the employee as a driver in the workplace. Whereas, the employer is a public institution with many employees. Because of this, deciding without evaluating whether it is possible to employ the employee in another department or not in accordance with employee's educational situation is evaluated as being incorrect in this judgment. Therefore, it is indicated that it should be sought whether termination is a last resort or not, whether there is another work that the employee may perform at the time of termination or not, whether it is possible for the employee to be employed in different department of workplace or not, if it is needed, with an evidentiary investigation to be made by the relevant court in the workplace, and it should be decided on this case after consequences of these searches[859].

Although it is indicated in the reasoning of LC that the principle of last resort shall only be taken into consideration while examining whether or not termination reasons needs of enterprise, workplace and work is valid, according to our opinion, this principle should also be accepted for terminations arising from employee's behaviors and incapability[860]. As indicated above, the Turkish Court of Appeals evaluated in one of its previous judgments that the principle of last resort should have been taken into account in order to detect whether there was any working position for the employee to continue to be employed in the workplace or not while examining whether termination reason arising from employee's incapability would be deemed as valid or not. As it is indicated in this judgment, it is possible that there is another available working position for the employee to be employed in the workplace. Even though it is not possible for an employer to employ this employee in his/her working position that the employee has been working in and employment relation regarding employee's

859 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 12/06/2007 numbered 2007/8740 E. and 2007/18743 K. (legalbank.com).

860 Mollamahmutoğlu and others, p. 1054; Süzek, p. 604; Köme Akpulat, Ultimo Ratio, p. 49.

working position is not endurable for an employer to continue, it should be considered that the employee may be employed for another working position which is suitable for employee's capacity and which is beneficial for the employer. Indeed, this evaluation shall not be deemed as being only on behalf of the employee, it shall also be beneficial for the employer. On the one hand, while protecting the employee who does not have any fault for being incapable for the work that s/he performs; on the other hand, an employer may provide sufficient employment for a working position which is suitable for the employee. Additionally, if it is possible for an employer to continue to employ his/her employee in a workplace with another work even though the employee gives rise to any termination reason arising from his/her behavior, it should be also examined whether the employer complies with the principle of last resort or not as a need of employment security's main purpose to protect the employee against the employer. Yet, if employee's behavior is so serious that an employer may not continue to employ this employee for any position in the workplace or that it is not possible for employer to continue employment relation by issuing disciplinary punishment, valid termination shall be deemed as being performed dully. Also, according to one another opinion in the doctrine, employer's obligation should be effective for both terminations depending on employee's incapability or behavior only restricted with employee's performance or with employee's difficulty to adapt to work and terminations depending on needs of enterprise, workplace or work[861].

Discretion to decide whether it is possible to reach the purpose, desired by an employer, with another manner instead of termination belongs to the judge. As a rule, whether the decision made by the employer is convenient for the purpose and beneficiary or not is not in the scope of the examination of competence of court[862]. Because of this, it is not possible to think that the principle of last resort brings unlimited obligations for an employer to choose less serious measure[863]. The limit of the principle of last resort for termination shall be determined by freedom of decision taken by observing benefits of the workplace and by observing the limit that an employer rightfully needed to use. It may not be waited from an employer to create a new working position for the employee or to change his/her operational decision[864]. It is only possible to wait from employer to take measures which are as convenient as termination in order to reach this purpose by ignoring operational purposes. On

861 Çelik, p. 247.
862 Güzel, Son Çare, p. 74.
863 Yiğit, p. 1156; Köme Akpulat, Ultimo Ratio, p. 47.
864 Bozkurt Gümrükçüoğlu, p. 320.

the other hand, it may not be expected from an employer to act in a manner that eliminates his/her freedom to take operational decision, incurs additional expenses or causes damage to the workplace[865].

The principle of last resort is also accepted in Germany and even though it is in another place, on the condition that there is another appropriate position that the employee may be reasonably employed for, if an employer does not take it into consideration, termination made by the employer shall not be deemed as valid[866].

Provided that an employer has more than one workplace, it should be sought whether the employee may work in another workplace belonging to the employer as a need of the principle of last resort[867] and it is not important whether this workplace that the employee will be able to be employed for is in the same enterprise, whether it is in the scope of same working sector or whether it is in the same province or not. The important thing is that the workplace belongs to the same employer[868] and it is really possible that the employee may be employed for another workplace belonging to the same employer with a different manner[869]. Whether a working position is available or not shall be evaluated in accordance with the time of termination[870]. According to one opinion in the doctrine, on the condition that one workplace being in the scope of holding or a group of companies is closed, if it is possible to employ employees in other workplace/workplaces, termination of employee's employment contract with reasons arising from closing of the workplace shall be against the principle of last resort[871]. On the contrary, in one of the Turkish Court of Appeals' judgments, it is indicated that enterprises depending on holdings and main enterprise have their own legal personalities. However, as a rule, it is not obliged to examine whether there is an available working position in dependent enterprise, it should be examined as an exception whether there is an available working position for the employee as a consequence of management method, organic relation among them and transfer of employees[872]. Indeed, according to

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865 Eyrenci and others, (2020), p. 207; Subaşı, İşyerinin Kapatılması, p. 51; Tuncay, p. 567; Köme Akpulat, Ultimo Ratio, p. 47

866 Vossen and Willemsen, p. 260; Kirchner and others, p. 139-143.

867 Köme Akpulat, Ultimo Ratio, p. 53.

868 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 21/12/2017 numbered 2016/31919 E. and 2017/22072 K. (Yargıtay Karar Arama).

869 Kar, p. 211; Kar, Yargıtay Uygulamaları, p. 478.

870 Centel, p. 114; Eyrenci, p. 49.

871 Ali Cengiz Köseoğlu. *İşyerinin Kapanmasının İş Sözleşmelerine Etkisi*. (Istanbul: Beta, 2004), p. 37; Mollamahmutoğlu and others, p. 1053; Tulukçu, p. 224-225.

872 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 02/11/2009 numbered 2009/1917 E. and 2009/29704 K. (legalbank.com).

opinion that we also support, in the scope of the principle of last resort, it is not waited from an employer to examine whether there is any working opportunity in a workplace which is in the scope of another enterprise depending on the group of companies and holdings for the employee to be employed[873].

Employees working in the scope of temporary employment relation should also be taken into consideration while considering employer's obligation to employ the employee for another working position. With this regard, it should be waited from the employer to terminate employment contracts of employees working in the scope of temporary employment relation instead of terminating employee's employment contract and thus, so as to continue employment relation with his/her own employees instead of other employees. Indeed, an employer should observe his/her own employee while distributing working load among employees[874].

The Turkish Court of Appeals sought the application of measures such as eliminating overtime works, decreasing in the working period with employee's consent and extending works over a period of time before termination instead of terminating the employment contract in its one of judgments[875]. Similarly, in another its judgment regarding one of the public institutions, the Turkish Court of Appeals accepted that termination should not have been made without taking measures increasing productivity and producing and without following technological developments[876].

In the reasoning of LC, explanations as follows; "*the thing aimed with the article is to enable to continue employment relation by making specific changes in working conditions in the event of the existence of some specific negative conditions, instead of terminating employee's employment contract directly"* is placed and with this regard, as long as it is proper, provided that it is possible to maintain employment contract by making essential changes in the employment contract by complying with Article 22 of LC before terminating

873 Süzek; 605-606; Centel, p. 114; Köme Akpulat, Ultimo Ratio, p. 53; 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 22/12/2008 numbered 2008/39933 E. and 2008/34838 K. (NJIS).

874 Erdem Özdemir. "Feshin Geçerliliğinin Denetiminde Dürüstlük Kuralı". Kadir Has Üniversitesi Hukuk Fakültesi, İş Güvencesi ve İşe İade Davaları, Seminer, 29 May 2010, Istanbul, (2010): p. 70.

875 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 29/05/2018 numbered 2018/4636 E. and 2018/13333 K. (legalbank.com).

876 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 29/12/2003 numbered 2003/23204 E. and 2003/22988 K. (legalbank.com).

the employment contract, this manner should be tried and if maintenance of employment relation may be enabled, the employment contract should not be terminated[877].

It should be tried to maintain the employment contract with a manner being in conformity with Article 22 of LC before terminating employment contract in accordance with the principle of last resort[878]. Furthermore, according to the explicit explanation of LC, provided that an employee does not accept changing offer within the duration specified in this article, an employer may terminate the employment contract by declaring that changing depends on a valid reason or there is another reason for termination with written form and by complying with notice period. On the other hand, there should not be a measure that does not necessitate to change working position or that makes possible to reach to same purpose instead of termination[879]. Also, if it is possible, an employer should make less radical offer regarding changing of employment contract[880].

According to the Turkish Court of Appeals, in addition to Article 22 of LC, all employment conditions arising from constitution, codes, individual employment contracts, collective labour contracts, personal directives and similar sources with workplace practices should be deemed as working conditions. Employee's duty to work and, in return of this, employer's duty to pay wage, which are essential conditions of employment relations, are most important working conditions. In addition to this; where and when the work will be performed, working durations in the workplace, duration of paid leaves, extras of wage to be paid, break, social payments such as payments regarding marriage, birth, education, food, death, disability are deemed as working conditions too. Providing private insurance to the employee or making the employee enable to be in the scope of individual retirement system, on the condition that its bonuses are paid by the employer, shall also be deemed as working condition[881].

According to the Turkish Court of Appeals, the fact that cash payment system is brought by removing aid in kind practice such as food and transportation provided to the employee as its substitution or, on the contrary, the fact that giving transportation card or

877 Özdemir, Dürüstlük Kuralı, p. 66-67; Güzel, Son Çare, p. 85.

878 Mollamahmutoğlu and others, p. 1054.

879 Kar, p. 213.

880 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 18/11/2013 numbered 2013/33102 E. and 2013/25148 K. (legalbank.com).

881 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 01/03/2016 numbered 2014/31770 E. and 2016/4503 K. (legalbank.com).

providing food in workplace practice as an aid in kind is brought by removing cash payment system as its substitution is in the scope of management authority of the employer. Such applications shall not be deemed as essential changing of working conditions unless it is against Article 2 of TCC. Yet, because a decrease of the amount of social payment unilaterally without changing its qualification or not to pay at all shall be deemed as essential changing, an employee, who does not give written consent to this practice, has right to request for it[882].

Even though it is indicated that changes, which are not accepted by the employee within six working days with written consent, won't be binding for the employee in accordance with Article 22 of LC, the Turkish Court of Appeals decided in one of its judgments that promotion and removing food payment had become as an operational practice because all employees had accepted that by not objecting[883]. According to one opinion in the doctrine, in this circumstance, after an employee acts in a manner showing that s/he accepts this change, for example starting to work in conformity with his/her new working description or being transferred to a new workplace and working in there for a long period of time, acceptance intention is revealed hereupon in accordance with good faith and declaring otherwise shall constitute abuse of right[884]. On the other hand, it is not possible to support this opinion. In fact, it is explained that silence may not be deemed as acceptance for issues regarding money. According to the Turkish Court of Appeals, decreasing of amount of employee's wage is an essential change in working conditions and the employer may not decrease wage unilaterally in a manner being against employee's benefits. The fact that an employee did not object to the change having been made and s/he is silent shall not mean that s/he accepts this change in accordance with the explicit explanation of LC. The fact that payroll sheets are signed without objection records or termination is made with a reason that wage is decreased may not be interpreted as being against the employee. It is not possible to evaluate that not requesting these debts during period of time in dispute is regarding the principle of good faith[885]. The Turkish Court of Appeals has also changed its previous evaluation regarding promotions and according to its another judgment, without the existence

882 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 17/05/2021 numbered 2021/4643 E. and 2021/8989 K. (legalbank.com); Ufuk Aydın. "Çalışma Koşullarında Esaslı Değişiklikler ve Değişiklik Feshi". *Sicil İş Hukuku Dergisi*, I: 23, (September 2011): p. 24.

883 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 22/03/2005 numbered 2004/14486 E. and 2005/9433 K. (legalbank.com).

884 Çelik and others, p. 619-620.

885 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 02/04/2014 numbered 2012/6260 E. and 2014/11165 K. (legalbank.com).

of employee's written consent regarding removing of promotion practice, in accordance with Article 22 of LC, it is not possible to say that this issue became an operational practice in workplace with employee's implicit consent[886].

It is indicated in the doctrine that vast provisions causing ineffectiveness of Article 22 of LC may not be regulated in individual employment contract and with this regard, provisions regarding decreasing wage or decreasing wage by changing working hours should be evaluated as invalid even though they are regulated in individual employment contracts. On the contrary, according to one opinion in the doctrine, provisions regarding changing of workplace, related to the management and qualification of work, in conformity with the principle of good faith should be deemed as valid[887].

B. The Principle of Social (Objective) Selection

The principle of social selection, as a difference from the principle of last resort, is a principle to be considered for individualization of terminations for terminations depending on needs of enterprise, workplace or work. With another explanation, in the event of dismissal of an employee with a reason arising from needs of enterprise, workplace or work, the subject regarding which employee's employment contract will be terminated gives rise to the principle of social selection. This principle means employer's obligation to select the employee whose employment contract shall be terminated via some specific criteria with an aim to protect employees being in weaker positions for termination depending on needs of enterprise, workplace or work[888]. In other words, the principle of social selection is a manner that enables to embody intangible excessive employment arising from needs of enterprise, workplace or work by specifying employees whose employment contracts will be terminated[889]. Application of the principle of social selection should be restricted only with terminations arising from needs of enterprise, workplace or work and it should not be sought for terminations with reasons arising from employee's behavior or incapability[890].

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886 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 22/03/2016 numbered 2016/4030 E. and 2016/6861 K. (kazanci.com); 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 26/03/2014 numbered 2012/5399 E. and 2014/10344 K. (legalbank.com).

887 Çelik and others, p. 623; Gaye Burcu Yıldız. *İş Hukukunda Sözleşmesel Kayıtlar,* 12th Edition (Yetkin Yayınevi, 2014), p. 137.

888 Alpagut, Sosyal Seçim, p. 99; Gaye Burcu Yıldız. *İşverenin Eşit İşlem Yapma Borcu* (Ankara: Yetkin, 2008), p. 243.

889 Birben, p. 8; Centel, p. 115.

890 Kar, Yargıtay Uygulamaları, p. 481.

In the French Labour Code, the principle of social selection is clearly regulated. With this regard, for terminations of employment contracts with a reason arising from reorganization, reconstruction of employee's work or protection of workplace's compatibility, criteria regarding selection of employees whose employment contracts will be terminated will be detected by considering the number of family members that the employee has to take care of, duration of work, employee's personal difficulties (such as the existence of any disability), professional capacity and the professional abilities of each category, subject to any specific provisions in the applicable collective labour contract[891].

In accordance with the German Unfair Dismissals Act, in the event of termination of an employment contract with reasons arising from needs of enterprise, workplace or work, employers have to follow a selection procedure formed by three levels as deciding which employees' employment contracts will be included to selection procedure; deciding whose employment contract of this selected group shall be terminated in accordance with obliged selection criteria such as disability, duty of care, age, working duration and lastly; being able to except employees whose performance are higher than others from procedure of termination of employment contracts by taking workplace's benefits into account[892]. There is no obstacle for an employer to evaluate with other criteria instead of disability, duty of care, age, working duration. Indeed, it is only explained in this Act that the principle of social selection should be taken into consideration sufficiently and it should be understood from this point that legislative authority constituted this four critea as minimum and an employer may add more criteria for procedure of social selection[893]. The main aim of this principle is terminating employment contract of employees who need less protection socially by evaluating performance data of employees to be participated to procedure of social selection[894].

The principle of social selection may be deemed as a legal relation constituted by three parties. Within the scope of this principle, an employer should dismiss an employee who is considered to need less protection and an employee who is accepted as needing less protection should accept the termination of employment relation. Also, the employee needing more protection may declare to the employer that s/he has a justified reason for the continuance of

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891 Perotto and Yapo, p. 246.

892 Vossen and Willemsen, p. 260; Kirchner and others, p. 145-147; Birben, p. 8-9; Devrim Ulucan. "İş Güvencesi Kapsamında Sosyal Seçim Uygulaması ve Yargıtay'ın Yaklaşımı". *Legal İş Hukuku ve Sosyal Güvenlik Hukuku Dergisi*, I: 14, (April 2007): p. 499; Krichel, p. 180.

893 Birben, p. 11.

894 Krebber, p. 513.

his/her own employment relation and that it is needed to dismiss employees needing less protection[895].

This principle means the embodiment of the principle of equal treatment as a constitutional obligation. As a difference from evaluation of invalidity of termination (evaluation of employee's and employer's mutual benefits), it bases on evaluation of circumstances of employees that will be able to be exposed to termination. Also, as a consequence of this principle's purpose to dismiss an employee who will be damaged less relatively and to protect who should be protected socially with this manner; criteria used for selection are more than relation with work, it contains social issues[896].

The principle of social selection should not be confused with the principle of last resort. While the principle of last resort is regarding whether it is possible to avoid termination with alternative manners or not, the principle of social selection is regarding which employee's employment contract will be terminated, it means, it is to detect an employee individually. In other words, the principle of social selection is regarding specifying of employees whose employment contract will be terminated with reasons arising from needs of enterprise, workplace or work[897]. There is no purpose to create a general termination reason[898].

Even though the principle of social selection is not regulated explicitly in Turkish Law, the Turkish Court of Appeals determined selection criteria by emphasizing on which bases the principle of social security depended, in addition to the principle of last resort, in its many judgments for a while and showed it as a settled case-law. Indeed, one of its judgments, explanations as follows;

> *"It should be examined which critea were used for selecting the employees whose employment contracts were terminated from all employees. While the employer is selecting employees whose employment contracts will be terminated, employees working for the same work should be compared, the list to be prepared in conformity with criteria such as capability, inability to attend the work due to illness, caring for the performance of duty to work, seniority, having right to be retired, being married and having kid/kids or being young. In other words, it should be detected that social selection depends on which criteria"*

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895 Kar, p. 218; Manav, p. 117.
896 Alpagut, Sosyal Seçim, p. 100.
897 Bozkurt Gümrükçüoğlu, p. 323.
898 Bozkurt Gümrükçüoğlu, p. 334.

are placed and the principle of social security became a principle such as the principle of last resort[899].

The fact that the Turkish Court of Appeals had listed social selection criteria in priority to each other and had accepted an absolute obligation to comply with them without giving any restrictive and conditional explanation regarding the principle of social selection even though there had been no legal regulation regarding the principle of social selection and the fact that burden of proof for showing that the principle of social selection had been taken into account before termination had belonged to the employer had been criticized in the doctrine[900]. Indeed, the Turkish Court of Appeals' judgment about the fact that the burden of proof for showing that termination had been made in accordance with the principle of social selection had belonged to the employer had been criticized with the reasons that proof for showing that it had been acted against the principle of social selection may not have been evaluated within the scope of that general rule and therefore, the burden of proof may have belonged to the employee[901]. Following these criticisms, the Turkish Court of Appeals also changed its decision and it decided that there were no criteria as criteria of social selection in Turkish Law and that principle should not have applied to judgments[902].

On the contrary, even though the Turkish Court of Appeals decided not to apply criteria of social selection later, selection criteria regulated by collective labour contracts or employment contracts determining some criteria regarding termination of employment contract are accepted as valid by the Turkish Court of Appeals[903]. In other words, for termination with valid reasons arising from needs of enterprise, workplace or work, an employer may determine social selection criteria by taking employee representative's opinion and thus, s/he may minimize social effects caused by termination[904]. In this circumstance, these criteria regulated by collective labour contract will be deemed as contractual social

899 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 03/04/2006 numbered 2006/4878 E. and 2006/8253 K. (legalbank.com).

900 Centel, p. 116; Yıldız, Eşit İşlem, p. 245; Ulucan, Sosyal Seçim, p. 501 ff.

901 Nuri Çelik. "İşletmenin İşyerinin ve İşin Gerekleri Sebebiyle İş Sözleşmesinin İşverence Fesinde Eşit Davranma Borcu". *Sicil İş Hukuku Dergisi*, I: 4, (December 2006): p. 10-11.

902 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 24/10/2011 numbered 2011/1453 E. and 2011/3253 K. (Yargıtay Karar Arama); 9th Civil Chamber of Turksih Court of Appeals' judgment dated 12/02/2015 numbered 2015/1199 E. and 2015/6314 K. (kazanci.com).

903 9th Civil Chamber of Turksih Court of Appeals' judgment dated 18/10/2010 numbered 2009/29436 E. and 2010/29425 K. (lexpera.com); Mollamahmutoğlu and others, p. 1058; Centel, p. 117; Çelik and others, p. 567; Alpagut, Esaslı Değişiklik, p. 97; Tulukçu, p. 259.

904 Şahin Çil. "İşçi Temsilciği Kurumunun Gerekliliği ve İş Güvencesi ile Zorunlu Arabuluculuk Sistemine Katkıları". *Prof. Dr. Turhan Esener II. İş Hukuku Uluslararası Kongresi*, Ankara: Seçkin, (October 2017): p. 364.

selection criteria and termination issued against these criteria shall be deemed as beyond measure for the employee whose employment contract was terminated. As understood, the reason of invalidity is not the disproportionality between employer's benefits from termination and the employee's damages resulting from it. Instead, it concerns the unequal distribution of negative impacts of termination among employees and the failure to consider circumstances of employees whose employment contracts deserve greater protection compared to others[905].

In accordance with an opinion in the doctrine, when employer of workplace which started to make loss must dismiss some employees in order to prevent further losses, s/he will have a broad power of discretion. As a consequence of the duty to care waited from an employer, s/he must use this right fairly, proportionally and in accordance with needs of the work. Therefore, s/he has to choose the employee who will be least affected by termination. Although an employer dismiss some employees instead of employees needed for maintaining the existence of the workplace, if s/he acted explicitly unfairly and disproportionally, it should be considered that termination made by the employer is invalid and it is unjustified[906].

In accordance with another opinion in the doctrine, as the principle of social selection stays one step ahead of general protection and the purpose of the principle of social selection is to protect employees needing more protection, even if the present regulation in the Turkish legal system is insufficient for application of this principle, it is more appropriate to make a new regulation regarding social selection in Turkish legal system[907]. Also, with this same opinion, improving criteria restricting employer's right to terminate employment contract without any legal ground is not in conformity with the principle of legal security. Even though it is evaluated that it is possible to determine criteria with settled case-laws, settling case-laws takes longs time and it is possible to encounter with a risk for controversial practices during this duration[908].

The aim of using the principle of social selection in foreign law systems is to choose the employee who will be least affected by termination and thereby, to minimize the impact on society. While choosing employees that will be damaged least by termination, it should be examined whether there will be any additional charges on social security system or not if

905 Birben, p. 13-14.
906 Ulucan, Ekonomik ve Teknolojik Nedenler, p. 28-31; Ulucan, Sosyal Seçim, p. 507.
907 Bozkurt Gümrükçüoğlu, p. 329-331.
908 Bozkurt Gümrükçüoğlu, p. 338.

others, instead of these employees chosen for termination, are dismissed. For example, in accordance with this principle, it shall not be proper to terminate the employment contract without examining whether the employee has too much duty of care regarding his/her family, such that s/he is an unemployed person with two children, how long unemployment payment shall be paid for a single unemployed person and with no kids in the same circumstance, how long and how much unemployment payment shall be paid or whether there is a tax reduction in accordance with his/her family situation or not[909].

For collective dismissals, employees, whose employment contracts are terminated, may declare that excessive employment is not as much as that an employer declares even though it is certain that there is an excessive employment in workplace. For example, provided that an employer determined that there was excessive employment for 100 employees and terminated these employees' employment contracts, but according to an examination made by relevant first instance court, it is detected that there is excessive employment for 75 employees in the workplace. In this circumstance, if all employees initiated a legal procedure against these terminations, how should the judge of labour court decide on this case? First option for this circumstance may be giving all risk to the employer by depending on Article 20 of LC. With this regard, the judge may decide on reemployment by showing reason that, for each employee who initiated legal procedure, other employee became an excessive employee and there is not excessive employment regarding the claimant. Other option is only accepting 25 out of 100 reemployment cases having been initiated before and rejecting the other 75 reemployment cases. Indeed, as it is detected by judgment that there is excessive employment only for 75 employees, at least it is needed to reject these 25 reemployment cases that were initiated by employees. Yet, in this circumstance the judge of labour court may encounter with a problem; on what grounds will s/he reject 75 out of 100 reemployment cases? In this situation, according to one opinion in the doctrine, it should be appropriate to reach the result by depending on the list prepared by the employer regarding social selection if an employer chooses these employees in accordance with the principle of social selection. According to this, if employees are listed from highest point to lowest point in accordance with selection criteria such as their age, seniority, this problem may be solved by deciding on acceptance of reemployment cases of 25 employees who took highest point (it means employees who should be protected more socially) and rejecting reemployment cases of other employees. So, on the one hand, validity of terminations for employees for whom the

[909] Yıldız, Eşit İşlem, p. 247.

employer has proven the existence of valid reason shall be accepted and on the other hand, by deeming invalidity of terminations regarding employees who should be protected more and for whom there is no termination reason; it shall be possible to reach a fair judgment. On the other hand, provided that the social selection procedure prepared in accordance with objective criteria is not submitted to the court by the employer, in this circumstance, the court should decide on the invalidity of all terminations having been made by the employer[910].

In addition to all of these, since this principle does not have any legal ground or regulation, it shall not be appropriate to bring obligation whose contents and conditions are not clear for employer[911]. According to one opinion in the doctrine, even though circumstances causing invalidity of termination and giving rise to employee's reemployment in LC is that parties do not demonstrate any valid reason for termination or that parties show a reason but this reason is not valid for termination; the Turkish Court of Appeals extends the scope of circumstances causing invalidity of termination with this legal term which is not regulated by LC[912].

C. The Principle of Proportionality

Differences between termination with justified reason and termination with valid reason shall be determined by judicial bodies with the contribution of the doctrine. The principle of proportionality is another important principle for determining whether employee's behavior, which is against employment contract, constitutes a justified reason or a valid reason for termination of the employment contract[913]. This principle means that a manner used in order to reach an aim should be effective and necessary for reaching this aim. It also means that there should not be an inappropriate proportion between aim and manner[914]. The legal ground of the principle of proportionality is Article 13 of the Turkish Constitution indicating that restrictions regarding fundamental rights and freedoms may not be against the principle of proportionality[915]. According to an opinion in the doctrine, it is not necessary to search the legal ground of the principle of proportionality in constitutional or administrative

910 Birben, p. 21.
911 Alpagut, Sosyal Seçim, p. 104.
912 Birben, p. 16.
913 Kar, Ölçülülük, p. 2.
914 Muhittin Astarlı. "Genel Ekonomik Kriz Dönemlerinde İşletme Gerekleri Nedeniyle Fesih Ve Kısa Çalışma İlişkisi". *Sicil İş Hukuku Dergisi*, I: 17, (March 2010): p. 77.
915 Kılıçoğlu/ Şenocak, p. 184.

law; the legal ground of the principle of proportionality regarding Labour Law is the principle of good faith regulated in Article 2 of TCC[916].

This principle, which is considered for detecting whether termination with reasons arising from needs of enterprise, workplace or work is inevitability or not, shall be important for determining the difference between valid or justified reason and thus, the difference between termination and any other disciplinary punishment that may be used instead of termination, especially for terminations arising from employee's behavior[917].

Since termination is also a disruptive formal right, it is the most important risk to be encountered by employees, in other words, it means unemployment. Since termination as a disruptive formal right affects employees' legal area seriously, the principle of proportionality should apply. Therefore, it should be examined whether termination is appropriate and necessary for reaching the aim and whether there is an inappropriate proportion between termination and the aim or not[918]. According to one opinion in the doctrine, the principle of proportionality is a principle enabling to determine normative line between justified, valid and invalid reasons[919]. Indeed, the Turkish Court of Appeals also applies the principle of proportionality as a need of the principle of last resort for reviewing of validity of termination[920].

The principle of proportionality consists of sub-principles such as appropriateness/ convenience, necessity and proportionality[921]. Yet, it is not easy to distinguish these sub-principles from each other. For termination arising from needs of enterprise, workplace or work, the aim of the principle of proportionality is generally examining whether termination is the only manner to reach the operational aim or not. In fact, this is regarding the necessity of the manner having been used[922].

The principle of convenience applied in the scope of the principle of proportionality is regarding whether the manner, which is applied or will be applied in order to reach an aim, is

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916 Eyrenci, p. 36; Eyrenci, Feshin Geçerliliği, p. 347.

917 Kar, Yargıtay Uygulamaları, p. 465.

918 Kılıçoğlu/ Şenocak, p. 185-186.

919 Kar, Bektaş, Ölçülülük İlkesi, sfp 61.

920 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 13/07/2009 numbered 2009/289 E. and 2009/20632 K. (legalbank.com).

921 Kar, p. 433; Kar, Yargıtay Uygulamaları, p. 476.

922 Mustafa Alp. "Ölçülülük İlkesinin Özel Hukuku ve İş Hukukunda Özellikle de İş Akdinin Feshinde Uygulanması – Alman Hukukuna Göre-". *Yasa Hukuk İçtihat ve Mevzuat Dergisi*, V: 17, I: 205/12, (January 1999), p. 1529.

convenient for reaching this aim or not[923]. In addition to this, it should not be sought that the manner is absolutely convenient for reaching the aim, it should be deemed as sufficient that the manner is partially convenient for reaching the aim[924]. With this reason, except it is detected that the manner applied by the employer is not convenient for the aim without any hesitation, as a rule, the employer's prediction regarding the fact that manner is convenient for reaching the aim should be respected[925].

The principle of necessity as another sub-principle of the principle of proportionality means choosing the manner which does not affect or affects least to counter-party's legal area among manners that are convenient in order to reach the aim, in the event of necessity of intervention to someone's legal area for reaching the aim[926]. 22nd Civil Chamber of the Turkish Court of Appeals also indicates in its judgment[927] that;

> *"In addition that examination regarding convenience to the aim and review of expediency is not applied for operational decision, the employer should prove that reorganization measure applies seriously and constantly in accordance with a review of consistency. Except this, even though the burden of proof belongs to the employee, when it is alleged that the employer terminated the employment contract with another reason instead of economic and operational reasons and this right is used against good faith, the operational decision shall be subject to review of expediency and review of proportionality and necessity in the scope of whether needs of the workplace is inevitable or not."*

and decided that a review of the necessity of operational decisions should be made by judges.

Proportionality, in other words, the principle of proportionality in a strict sense, examines the relation between the aim and the manner to be used in order to reach the aim[928]. In accordance with this principle, there has to be a proportional relation between aim and manner. This principle obliges to examine whether there is an acceptable and reasonable proportion between the damage caused to employee's benefits and benefits provided for the employer or not[929]. If there is a disproportionality between the termination of the employment

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923 Kılıçoğlu/ Şenocak, p. 189-190; Alp, Mustafa Ölçülülük İlkesi, p. 1521; Astarlı, Ekonomik Kriz, p. 78.

924 Alp, Ölçülülük İlkesi, p. 1521; Kılıçoğlu/ Şenocak, p. 189.

925 Alp, Ölçülülük İlkesi, p. 1521; Astarlı, Ekonomik Kriz, p. 78-79.

926 Alp, Ölçülülük İlkesi, p. 1522; Kılıçoğlu and Şenocak, p. 190; Astarlı, Ekonomik Kriz, p. 80-81.

927 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 13/12/2016 numbered 2016/26383 E. and 2016/26946 K. (legalbank.com).

928 Kılıçoğlu and Şenocak, Kemal, p. 200; Alp, Ölçülülük İlkesi, p. 1523; Astarlı, Ekonomik Kriz, p. 81.

929 Eyrenci, Feshin Geçerliliği, p. 353; Kılıçoğlu/ Şenocak, p. 178- 179.

contract and benefits regarding termination, the employer should use another appropriate manner in order to reach the aim instead of the termination of the employment contract[930].

In accordance with one opinion in the doctrine, contrary to termination reasons which are indicated explicitly in Article 25/II of LC and which do not give any opportunity for the judge to use his/her judicial discretion, for terminations with duration arising from employee's behaviors, qualification of termination shall belong to judge. In this regard, *"unexpectedness"*, which is specified as a principle in not only German and French Law systems but also in many other judicial systems and which may be used for all contracts being subject to rules of Law of Obligations, shall also be a criterion for Turkish Labour Law[931]. Therefore, determining the *"unexpectedness",* the principle of proportionality shall be important while determining the difference between justified and valid reason[932]. According to this principle, while deciding whether termination is valid or not, in accordance with the specific circumstances of every case, the judge will decide whether there is a disproportionality between the employee's behaviors and the termination manner used by the employer by considering the seriousness of employee's behaviors[933]. The principle of proportionality is applied in many judgments of the Turkish Court of Appeals in order to demonstrate the difference between valid and justified reasons for termination. The difference between valid and justified reasons for termination of employment contracts shall be explained in accordance with disruption of trust relation between the employer and the employee or collapse of the basis of trust[934]. As a consequence of the qualification of termination with a justified reason as impossibility to wait from the employer to continue the employment contract, and as an extraordinary circumstance which may not be qualified within ordinary debtor-creditor relation, termination with justified reason is named as *"extraordinary termination",* while termination with notice period is named as *"ordinary termination"* [935].

Indeed, in one of judgments of the Turkish Court of Appeals, employee's employment contract is terminated in accordance with Article 25/II (b) of LC because s/he has an argument with a client and uses insulting words. It is indicated in this judgment that employee's behavior occurred because of the client's provocations and behaviors. Even though this

930 Mollamahmutoğlu and others, p. 1063.
931 Alpagut, Değerlendirme, p. 76-77.
932 Ugan Çatalkaya, p. 477.
933 Süzek and Başterzi, p. 614-615.
934 Süzek, Yetersizliği veya Davranış, p. 577.
935 Alpagut, Değerlendirme, p. 72.

argument may be managed by the employee with a basic manner, it is turned into a big fight because of partial personalization. Therefore, qualifying termination as a justified reason will cause serious consequences in accordance with the principle of proportionality. However, employee's behaviors cause negative impacts in the workplace and it should be proper to evaluate this behavior as a valid reason[936]. In another judgment, the employee benefits from sales and price differences of products by scanning the products' barcodes in the workplace that s/he is working in and his/her employment contract is terminated by the employer in accordance with Article 25/II (e) of LC. The Turkish Court of Appeals indicates that deeming employee's behaviors as a justified reason for termination, in accordance with the principle of proportionality, will cause serious consequences. However, it should be more proper to accept these behaviors as a valid reason for termination[937]. In another judgment, an employee's employment contract is terminated with reasons that s/he complains with a group of employees about the employer to the Regional Labour Institution because payments regarding overtime work were not paid, insurance premiums were not informed in accordance with real wage and transportation was not provided to him/her with the reason that s/he did not perform overtime work. According to the Turkish Court of Appeals, the employee tried to reach his/her rights with this manner and this employee also talked about his/her struggle to reach his/her rights with other employees during a break in cafeteria. It is indicated that the judgment of the first instance court regarding the existence of a justified reason for the termination should be upheld with the reason that the employee just recommended other employees to search for their rights. Therefore, the qualification of the termination as a termination with a justified reason is not in conformity with the principle of proportionality. Yet, employee's freedom to claim his/her rights is used by the employee even though s/he is not the representative of other employees and this circumstance causes negative impacts in the workplace. Therefore, there is a valid reason for termination arising from employee's behavior with this new reasoning[938].

In the concrete case that an employee worked as a launderer at a public institution, he was warned because he did not shave even though he had to while coming to work as a rule and said words as follows; *"I had convicted with 10 years, my child has cancer, I am in a*

936 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 08/10/2018 numbered 2018/61 E. and 2018/17736 K. (legalbank.com).

937 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 05/05/2008 numbered 2007/32768 E and 2008/11113 K. (NJIS).

938 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 16/02/2009 numbered 2008/11098 E. and 2009/2495 K (NJIS).

stressful and depressing situation, why are you messing around with me?" while having an argument with the deputy governor who represented the employer and his employment contract was terminated because of these behaviors in accordance with Article 25/II (d) of LC, it is decided that employee's behaviors and words have the characteristic of complaint and that these behaviors and words may not have given rise to the assault specified in Article 25/II (d) of LC. The acceptance of the fact that termination depends on a justified reason was not appropriate. Yet, the fact that the employee came to work without shaving, had unnecessary arguments with his supervisor and other employees caused negative effects in the workplace, therefore, it should be proper to evaluate these behaviors as valid reasons arising from the employee's behavior for termination instead of a justified reason for termination in accordance with the principle of proportionality[939].

D. The Principle of Comparison of Benefits

The principle of comparison of benefits should not be understood as a general comparison of employee's and employer's benefits. It means a comparison between employer's benefits regarding the workplace and employee's financial and social benefits to be taken with the continuance of the employment contract, in order to decide whether an employer may terminate the employment contract with a valid reason or whether employment relation should continue[940].

The Turkish Court of Appeals gave place to the principle of comparison of benefits in some of its judgments. Yet, it did not specify the scope of this principle, application of this principle for which terminations and criteria that should be taken into account while comparing benefits. Indeed, it gave place to the explanation as follows[941]; *"while comparing employer's benefits of terminating employment relation and employee's benefits of continuing to work, employer's benefits should be more protected when compared with employee's benefits. It is not possible to determine general criteria regarding this issue, examination should be performed by considering circumstances of every specific case. Provided that the only reason of decreasing in employee's capability and adaption is the employment relation,*

939 9th Civil Chamber of the Turksih Court of Appeals' judgment dated 01/12/2008 numbered 2008/6259 E. and 2008/32583 K. (NJIS).

940 Eyrenci, Feshin Geçerliliği, p. 349; Kılıçoğlu/ Şenocak, p. 179.

941 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 30/06/2008 numbered 2008/1935 E. and 2008/20014 K. (legalbank.com); for other judgments regarding the principle of comparison of benefits: 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 17/03/2008 numbered 2007/27583 E. and 2008/5294 K. (legalbank.com); 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 26/05/2008 numbered 2007/37454 E. and 2008/12655 K. (legalbank.com).

as an example it depends on occupational illness or accident, these issues should be taken into account as being on behalf of the employee. According to this, if employee's illness caused by the workplace, this issue should be evaluated as being on behalf of the employee."

This principle is accepted by different Regional Court of Appeals following the regulation indicating that reemployment cases shall be finalized at the Regional Court of Appeals and appealing their judgments is not possible. Indeed; Istanbul, Izmir, Bursa, Adana, Gaziantep, Diyarbakır Regional Court of Appeals indicated in their judgments that the level of employee's fault would be effective for comparison of benefits[942]. It is understood from these judgments that the principle of comparison of employees' and employers' benefits is still important for terminations of employment contracts.

While comparing and evaluating employee's and employer's benefits, not employer's subjective benefits but his/ her objective benefits should be taken into account. It means employer's reasonable and prudent benefits arising from the termination of employment contract shall be taken into consideration while comparing employee's and employer's benefits[943].

According to doctrine, the principle of comparison of benefits means that employee's benefits regarding the termination of the employment contract should be more protected than employee's benefits regarding the continuance of employment relation in order that an employer may terminate the employment contract with valid reason and this means the comparison of contractual parties' benefits which are worthy to be protected at the time of termination[944].

E. The Principle of Prediction (Negative Estimation)

The principle of prediction (negative estimation) means making prediction for the future by evaluating employee's previous behavior and circumstances[945]. This principle is

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942 Istanbul Regional Court of Appeals' judgment dated 17/01/2018 numbered 2017/906 E. and 2018/53 K. (Legalbank.com); Izmir Regional Court of Appeals' judgment dated 08/02/2017 numbered 2017/185 E. and 2018/104 K. (Legalbank.com); Bursa Regional Court of Appeals' judgment dated 12/04/2019 numbered 2018/4444 E. and 2019/889 K. (Legalbank.com); Adana Regional Court of Appeals' judgment dated 26/05/2022 numbered 2021/2620 E. and 2022/982 K. (Legalbank.com); Gaziantep Regional Court of Appeals' judgment dated 04/04/2018 numbered 2018/464 E. and 2018/496 K. (Legalbank.com); Diyarbakır Regional Court of Appeals' judgment dated 20/11/2019 numbered 2019/19 E. and 2019/19 K. (Legalbank.com).

943 Eyrenci, p. 41; Eyrenci, Feshin Geçerliliği, p. 352.

944 Kılıçoğlu and Şenocak, p. 178; Eyrenci, p. 38.

945 Çelik and others, p. 530; Süzek and Başterzi, p. 611-612.

used to demonstrate that it is quite possible that employment relation will be damaged and therefore, it is not possible to continue employment relation[946]. In accordance with this principle, termination is not a measure to punish a behavior having been shown in the past and having damaged to workflow, it is a measure for an employer from whom it may not be waited to continue to employment relation to terminate employment relation[947]. With another explanation, the aim of termination is taking precautions against the probability of continuance of incapability or negative behaviors in the future and probability regarding the fact that they may cause damage in the workplace in the future[948]. A warning must be issued to the employee based on the evaluation of past incidents, which suggest a likelihood of continued noncompliance with the employment contract. This potential recurrence of misconduct may adversely affect workplace operations, discipline, and overall harmony. Therefore, addressing these concerns through a formal warning is necessary to prevent further negative consequences. In fact, warning helps to make negative estimation objective. Provided that the employee acts in the same manner in spite of a warning issued in accordance with its procedure, it shall be proven that the employee will also continue to cause similar negative effects in the workplace in the future unless his/her employment contract is terminated. As a consequence of this, a warning is a mandatory condition for the principle of prediction[949]. The principle of prediction is not only for reasons regarding employee's identity but it shall also be a fact for reviewing of validity of terminations with reasons arising from needs of enterprise, workplace or work[950]. The answer to the question regarding whether it is possible for an employer to employ this employee despite the existence of a termination reason or not is sought with this principle[951].

In accordance with this principle, for the termination of the employment contract of employees being in the scope of employment security, the existence of the valid reason is a pre-requirement and this valid reason is not sufficient for termination solely. As a second requirement, it should be predicted that this reason will probably continue in the future[952].

Negative estimation should be determined in accordance with conditions being at the time of termination. In other words, termination reason and all facts that will be able to affect

946 Mollamahmutoğlu and others, p. 1065.
947 Çelik and others, p. 530; Mollamahmutoğlu and others,p. 1065.
948 Caniklioğlu, p. 71.
949 Astarlı, İhtar, p.987.
950 Manav, p. 137.
951 Mollamahmutoğlu and others, p. 1066.
952 Caniklioğlu, p. 70.

employment relation negatively should exist at the time of termination[953]. Therefore, the employment contract of the employee whose performance had decreased before but after who showed an increase in his/her performance or the employment contract of the employee who had not performed his/her work because of his/her illness but after who got well may not be terminated by depending on these reasons[954]. Additionally, even though an employer considers with negative estimation that some circumstances will be able to exist in the future but they do not exist as a consequence of effects happening after termination, termination of employment contracts shall not be deemed as invalid[955]. If employer's negative estimation is reasonable at the time of termination, whether this estimation will exist in the future or not, it shall be considered that the employer fulfills his/her obligation to observe the principle of negative estimation. It should not be waited from the employer to show a really high estimation and a serious prediction regarding this issue should be considered as sufficient[956].

In accordance with this principle, in order that terminations with reasons arising from employee's incapability may be deemed as valid, it should be proven that employee's incapability shall also continue in the future, that this employee will not be able to perform his/her duty to work partially or wholly and that, because of this, employee's benefits regarding enterprise or workplace shall be damaged. For terminations with reasons arising from employee's behaviors, the seriousness of employee's behaviors has a genuinely important role in determining whether employment relation will be able to be continued with trust in the future[957]. Indeed, the Turkish Court of Appeals gave place to explanations as follows[958]; *"in fact, one of the principles affecting the validity of termination is the principle of negative estimation. Especially, for the termination of the employment contract made by the employer, this termination should also oblige a condition regarding estimation (the principle of negative estimation). As a summary, in order that employee's behaviors or incapability may be deemed as a valid reason, it should be proven that this will also continue in the future, the employee will not be able to perform his/her duty to work partially or wholly and because of this, employer's benefits regarding enterprise and workplace will be damaged"* in its

953 Doğan Yenisey, Sona Erme, p. 480; Eyrenci, p. 44; Eyrenci, Feshin Geçerliliği, p. 355.

954 Eyrenci, p. 44; Eyrenci, Feshin Geçerliliği, p. 355.

955 Kılıçoğlu /Şenocak, Kemal, p. 219.

956 Caniklioğlu, p. 71-72; for the opinion indicating that it is not waited to prove termination reasons exactly and certainly in order to demonstrate negative estimations: Doğan Yenisey, Sona Erme, p. 480.

957 Eyrenci, p. 44-45.

958 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 08/12/2016 numbered 2016/1000 E. and 2016/21771 K. (legalbank.com).

judgment regarding this issue and decided that abovementioned principle was also going to apply in Turkish Law.

F. The Principle of Equal Treatment

The principle of equality is the principle aiming to prevent arbitrary discrimination between two persons being in the same or similar circumstances. This principle includes generally its opposite meaning in itself. With another explanation, the principle of equal treatment is a principle prohibiting equal-same treatment to two persons being in different circumstances[959].

In Turkish Labour Law, the principle of equal treatment takes its legal ground on the principle of equality regulated in the Turkish Constitution. In accordance with Article 10, titled as *"equality before the law"*, of the Turkish Constitution;

> *"Everyone is equal before the law without distinction as to language, race, color, sex, political opinion, philosophical belief, religion sect and or any such grounds. Men and women have equal rights. The State has the obligation to ensure that this equality exists in practice. Measures taken for this purpose shall not be interpreted as contrary to the principle of equality. Measures to be taken for children, the elderly, disable people, widows and orphans of martyrs as well as for the invalid and veterans shall not be considered as a violation of the principle of equality. State organs and administrative authorities are obliged to act in compliance with the principle of equality before the law in all their proceedings."*

On the other hand, by taking the explanation of this article into consideration, it should not be considered that the principle of equality consists of only discrimination prohibitions specified in this article and circumstances being similar with them. The principle of equality regulated in the Turkish Constitution is a regulation including both discrimination prohibitions depending on specific reasons and the principle of equality in a general way[960].

It should not be understood from the principle of equal treatment that an employer has to treat his/her employees equally for all circumstances. The principle of equal treatment which is a reflection of the principle of equality in Turkish Labour Law does not aim to oblige the employer to treat his/her all employees absolutely equally[961]. In fact, on the condition that

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959 Yıldız, Eşit İşlem, p. 260

960 Şükran Ertürk and İlke Gürsel. "İş Hukukunda Eşit Davranma İlkesi". *Prof. Dr. Sarper Süzek'e Armağan*, Istanbul: Beta, V: I, (2011): p. 426.

961 M. Fatih Uşan. "İş Sözleşmesinin Feshinde İşverenin Eşit Davranma Borcu Var Mıdır?", *Legal İş Hukuku ve Sosyal Güvenlik Hukuku Dergisi*, I: 8, (2005): p. 1626; Şahin Çil. "Geçerli Nedene Dayanan Fesihte İşverenin Eşit Davranma Borcu", *Legal Yargı Kararları ve İncelemeleri Dergisi*, I: 5, (September 2007): Legalbank.com Geçerli Nedene Dayanan Fesihte İşverenin Eşit Davranma Borcu (legalbank.net).

there is a justified reason to treat employees differently, the principle of equal treatment obliges to treat employees differently in order not to damage equality[962]. Indeed, even though an employer has to act differently in order to provide equality but s/he continues to treat employees equally, this behavior shall constitute the breach of this principle[963].

In the doctrine, the employer's obligation of equal treatment is qualified in two sections as discrimination prohibitions and the employer's obligation of equal treatment in a strict manner. The ground of discrimination prohibitions depends on Article 10 of the Turkish Constitution and Article 5 of LC. Discrimination prohibition is determined as both a fundamental right and freedom and a condition in order to use other fundamental rights and freedoms. The facts constituting discrimination prohibitions are regulated separately. In accordance with this, it is not possible to discriminate with reasons such as language, race, color, sex, political opinion, philosophical belief, religion, sect, union to which an employee participated, being handicapped or any such grounds. However, these facts are not *numerous clauses*[964]. In order that different action depending on one of these reasons may be deemed as justified legally, the principle of proportionality should apply seriously[965]. On the other hand, according to one opinion in doctrine, the legal ground of the employee's obligation of equal treatment in a strict sense depends on Article 2 of TCC. Employers should not act differently to employees being in equal circumstances with arbitrary and unjustifiable reason without any justified or valid reason. While using his/her right to operate, the employer may apply different practices among employees. These different practices may arise from employee's seniority, performance, experience, qualification of work or any such grounds. Yet, the employer may not use his/her right arbitrarily or in a manner being against good faith. The main issue here is whether a right is used in accordance with good faith or not[966].

Whether an employer should make termination in accordance with the principle of equality or not while terminating an employment contract is subject to different discussion in the doctrine.

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962 Melda Sur. "İş İlişkisinde Eşitlik İlkesi ve Ayrımcılık Yasağı", *Sicil İş Hukuku Dergisi*, I: 37, (2017): p. 39.

963 Süzek and Başterzi, p. 483; Mollamahmutoğlu and others, p. 724-725; Ertürk and Gürsel, p. 428- 429.

964 Ugan Çatalkaya, Eşitlik p. 868.

965 For the opinion indicating that termination issued by the employer against discrimination prohibition should be deemed as null and void whether the employee is in the scope of employment security or not: Ugan Çatalkaya, p. 207; Ugan Çatalkaya, Eşitlik, p. 871.

966 Ertürk and Gürsel, p. 431; Kübra Doğan Yenisey. "İş Kanununda Eşitlik İlkesi Ve Ayırımcılık Yasağı". *Çalışma ve Toplum*, 2006/4: p. 66-67.

According to *Uşan*, as a rule, there is no obligation of equal treatment for the termination of an employment contract, indeed, an employer who has to right conclude an employment contract within the scope of freedom of contract should also have right to terminate the employment contract within the scope of freedom of contract. Especially, for immediate termination with justified reason, an employer should be free to choose to continue some employees' employment relations while terminating employment contracts of other employees who are in the same position. Also, the employer may terminate employment contracts of employees being in the same position at the same time and following termination, s/he may conclude new employment contracts with some of them[967].

Çelik, Caniklioğlu, Canbolat and Özkaraca indicate that it is possible to say that an employer does not have to act in conformity with the principle of equal treatment as a consequence of employees' different circumstances while terminating employees' employment contracts with justified reasons. As an example, it is possible for an employer to terminate the employment contract of one of three employees who do not continue to work because of their absence and to continue to work with the other two employees[968].

Ertürk and *Tuncay* declare that employees' actions to participate illegal strike shall constitute a collective justified reason for an employer. Therefore, it shall not be possible to act differently regarding the dismission of these employees. Otherwise, this practice shall be evaluated as being against the principle of equal treatment. Yet, provided that dismissing all of employees shall be detrimental for employer's workplace, in other words it shall jeopardize the process of the workplace, employer's action regarding dismissing some employees and continuing employment relation with other employees shall not be deemed as against the principle of equal treatment[969].

Süzek and *Başterzi* evaluate that an employer who has a justified or valid reason in order to terminate employment contract has to act in conformity with the principle of equal treatment while terminating some or all employees' employment contracts. However, the employer may terminate some employees' employment contracts by justifying why s/he chooses these employees to dismiss. Therefore, the employer should not be arbitrary while terminating these employees' employment contracts and provided that s/he only dismisses

967 Uşan, p. 1630.

968 Çelik and others, p. 441.

969 Şükran Ertürk. *İş İlişkisinde Temel Haklar*. (Ankara: Seçkin, May 2002): p. 112; A. Can Tuncay. *İş Hukukunda Eşit Davranma İlkesi,* (Istanbul: Fakülteler Matbaası, 1982), p. 215-216.

some employees, the employer has to demonstrate an objective reason to make this choice[970]. *Süzek* also declares that as much as acting against individuals being in the same or similar circumstances in the same manner, acting differently against individuals being in different circumstances is also a requirement of the principle of equal treatment[971]. If it is needed, the judicial mechanism may try to find the fairness of termination of employment contracts by examining the feature of circumstances and it shall evaluate whether employer' acts against employees are in conformity with the principle of equal treatment[972].

Tulukçu emphasizes that the principle of equal treatment is not absolute, this principle is for employees being in the same circumstances. As a consequence of the feature of the employment contract as a contract establishing a personal relation between an employer and an employee, while finalizing the employment contract, the employee's personal circumstance and qualifications should also be taken into account. Yet, the employer should observe the principle of equal treatment and it is not possible for the employer to act differently to employees working in the same workplace without a reasonable and objective reason[973].

Doğan Yenisey declares that the principle of equal treatment shall apply limitedly for terminations of employment contracts. As a rule, an employer is free to determine whether to continue or to finalize an employment relation with an employee. This is the need of freedom of contract. Yet, provided that the employer terminates only some employees' employment relations and continues employment relations of other employees with bad faith and arbitrary purposes, this employer's practice should be deemed as being against the principle of equal treatment[974]. In order to consider that there is a need to apply the principle of equal treatment, there have to be some circumstances as collective dismissal or events that employees participated in. As a need of its nature, supposing that only one employee is dismissed by the employer, it may not be considered that this principle shall apply. However, it may not be considered that the employer always has to dismiss all employees participating in an event. Even though there is an event in which more than one employee participated, the individual circumstances of each employee and each employee's position against other employees shall

970 Süzek and Başterzi, p. 493.
971 Sarper Süzek. "İşverenin Eşit Davranma Borcu". *Sicil İş Hukuku Dergisi*, I: 12, (December 2008): p. 25
972 Süzek, Eşit Davranma, p. 31.
973 Tulukçu, p. 261-262.
974 Kübra Doğan Yenisey. "İşverenin Sözleşmenin Feshinde Eşit Davranma Borcuna İlişkin İki Yargıtay Kararının Düşündürdükleri". *Sicil İş Hukuku Dergisi*, (June, 2006): p. 61.

be taken into account in order to examine whether the termination depends on a valid reason[975].

In accordance with *Çil*'s opinion, as a rule, dismissing only some employees participating to the strike regarding leaving the work illegally and continuing employment relations with other employees participating in this strike shall not be deemed as being against the principle of equal treatment. Waiting from the employer to dismiss all employees participating in this strike collectively shall be against the normal process of life. If the employer dismisses all employees, the process of work shall encounter serious damage. Also, if otherwise accepted, dismissing all employees at the same time shall be against the principle of interpretation on behalf of the employee. However, provided that the employee acts against discrimination prohibitions while terminating these employees' employment contracts, these terminations shall be deemed as against the principle of equal treatment[976].

Ugan Çatalkaya indicates that the principle of equal treatment should be accepted for terminations of employments. Not to accept the existence of this principle for terminations shall give rise to a damage of balance between employee's right to work and employer's freedom of contract on behalf of the employer and it shall constitute the acceptance of employer's arbitrary transactions. This principle should apply for employees being in same circumstances. However, providing an opportunity for an employer to prove that his/her actions are not arbitrary and that there is a justifiable reason to terminate only some employees' employment contracts shall be proportional while intervening employer's freedom of contract. Even though employers should apply the principle of equal treatment without observing whether a termination depends on a justified or valid reason or whether a termination reason arises from an employer or needs of enterprise, workplace or work; the employer may demonstrate some reasons arising from employee's seniority, records or any other objective circumstance in order to terminate only some employees' employment contracts. The employer should prove an objective reason to act differently. Otherwise, employer's arbitrary actions shall be deemed as against the principle of equal treatment[977].

The Turkish Court of Appeals indicated that in accordance with Article 5 of LC, the employer is obliged to treat equally for both providing working conditions and termination. In the concrete case, the employee's employment contract is terminated with reasons that the

975 Doğan Yenisey, Eşit Davranma, p. 62.
976 Çil, Eşit Davranma Borcu, Legalbank.com.
977 Ugan Çatalkaya, p. 212-217.

employee does not accept to load products that were produced before the strike and are in stock on transportation vehicles. It is not controversial that there is a strike in the workplace and all blue-collar employees participated in the strike. The employer wants white-collar workers to embark products being in the stock on transportation vehicles even though this work normally belongs to blue-collar employees but the employee does not accept this. The Turkish Court of Appeals decided that this assignment was an essential change in working conditions and, as the employer did not make this assignment in accordance with the procedure regulated by LC, the employer did not prove that changing in working conditions depended on a valid reason or there was another valid reason and it was certain that only warnings had been issued for some employees instead of termination because of same reasons even though 20 employees, including claimant, had been made to come before discipline committee because of behaviors causing termination, employer's action was against the principle of equal treatment and termination made by the employer was invalid[978].

[978] 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 05/11/2015 numbered 2015/29765 E. and 2015/31435 K. (Yargıtay Karar Arama).

THIRD CHAPTER

CONSEQUENCES OF INVALID TERMINATION OF EMPLOYMENT CONTRACT

I. REEMPLOYMENT PROCEDURE

Employees who are in the scope of employment security and consider that termination notices made by the employer are invalid may initiate a case against employer's termination. This case is named as *"reemployment case"* in practice. Indeed, the case issued against termination is a manner which employees may apply against terminations made by employers without showing any valid reason or without complying with the legal procedure specified in LC[979]. On the other hand, even though the mediation procedure, which is an alternative dispute resolution system, is arbitrary as a rule, this mediation procedure is a system that is mandatory for an employee before initiating a reemployment case in accordance with Article 20 of LC and it is also a case condition. Therefore, it is not possible for an employee to initiate a reemployment case without applying to the mandatory mediation procedure.

In this section of our study, we will first explain the mandatory mediation procedure in reemployment cases. Following this, we will provide a detailed explanation of reemployment cases and their consequences.

A. Mandatory Mediation Procedure

1. Application to Mediation Procedure

In accordance with Article 2/1 (b) of the Code on Mediation Procedure for Civil Disputes numbered 6325, mediation is an alternative dispute resolution method that enables parties to meet in order to negotiate with systematical manners, that enables to provide a communication procedure between parties in order that they may understand each other and find their own resolution, that enables to find resolution about which parties do not find their own resolution and that is executed as voluntary with the participation of a impartial and independent third party having taken expertise education.

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[979] Akkışla, p. 433.

In accordance with Article 20 of LC, an employee whose employment contract is terminated shall apply, within 1 month from the time that termination notice is served, for a mediation procedure with a reemployment request about allegations that termination reason was not demonstrated or demonstrated termination reason is not a valid reason in accordance with provisions of LC. This period of time specified for applying to the mediation procedure is deemed as a period of prescription[980]. Therefore, the period of time specified in order to apply to the mediation procedure may not be interrupted or suspended. On the other hand, in German Labour Law, an employee has to initiate the legal procedure against dismissal in the relevant labour court within 3 weeks from the time that termination notice is served in written in accordance with German Protection Against Dismissal Act[981].

As it shall be explained below in detail, parties may agree that reemployment shall be subject to an arbitration procedure. However, even though parties of employment contract may agree on this issue, it is obliged to apply for a mediation procedure before applying to the arbitration procedure[982]. In accordance with one opinion in the doctrine, the obligation to apply for mediation procedure enables the employer, who is a better position financially and socially, to benefit from employees being in a difficult position. Besides, according to the same opinion, since legal procedures in labour courts last for a long period of time and, in the event of enforcement of final judgments, the possibility to reach these credits disappears because of the liquidation of the enterprise or any other reasons; an employee may encounter with a danger to receive less than his/her credits[983].

Although one opinion in the doctrine[984] declares that the period of time specified for initiating a reemployment procedure, which is within 1 month, shall commence passing from the time that notice period is finalized when the employment contract is terminated by providing the notice period to the employee; in accordance with the majority of opinions in the doctrine[985] and the Turkish Court of Appeals[986], this period of time shall commence

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980 Alp, p. 19; Secarettin Göktaş. "Asıl İşverenin İş Güvencesi Hükümleri Yönünden Sorumluluğu". *Sicil İş Hukuku Dergisi*, I: 27, (September 2012): p. 61; Güzel, Sona Erme, p. 269; Sümer, p. 107; Günay, Geçerli Fesih, p. 103; Senyen Kaplan, p. 417.

981 Krebber, p. 509; Krichel, p. 178.

982 Kar, p. 363.

983 Çil, İşçi Temsilciliği, p. 366.

984 Demir, Geçerli Sebep, p. 493.

985 Süzek and Başterzi, p. 647; Manav, Yargılama Usulü, p. 280-281; Centel, p. 137; Eyrenci and others, (2020), p. 214; Ekmekçi and Yiğit, p. 675; Mollamahmutoğlu and others, p. 1077; Doğan Yenisey, Sona Erme, p. 458; Çelik, p. 259; Cevdet İlhan Günay. "Geçerli Feshin Hukuki Sonuçlarına İlişkin Yargıtay Uygulaması, Yargıtay Kararları Işığında İş Güvencesi". *Yargıç Güven Çankaya'ya Armağan Semineri*, Ankara, (2008): p. 102.

passing from the time that termination notice is served to the employee. With another explanation, the important issue is not the time that the termination notice is issued but it is the time that the termination notice is served to the employee. Provided that there is a content that may give rise to deceive the employee about the time of termination, this content should be evaluated as being on behalf of the employee so as to provide right to legal remedies[987]. Supposing that termination notice is not issued in written despite clear provision of LC, the period of prescription as 1 month shall commence passing from the time that oral or actual termination happens[988]. It means, if an employer issues a termination notice orally, the time that termination notice is issued orally, in other words, the time that the employment contract is terminated actually, shall be taken into account[989]. In accordance with the Turkish Court of Appeals' judgment, provided that an employer terminates an employment contract orally, the period of time specified for initiating legal procedure shall commence passing from the time that oral termination is received by the employee[990].

Whereas, provided that an employee rejects to receive a termination notice, this circumstance shall be detected by issuing a minute and the date when the minute is issued shall be deemed as the date of termination so that the period of time specified for initiating a legal procedure commences to pass[991]. Even though an employer terminated the employment contract but s/he has not served termination notice to the employee yet, if the employee was informed about termination with his/her own actions, for example, the employee complained about the employer to authorized institutions and learned certainly about the date of termination with this manner, this date should be deemed as the date of termination[992].

As indicated above, the start of the period of prescription determined in order to apply for mediation procedure shall be accepted as the time that termination notice is served in accordance with the explicit explanation of LC. Even though parties' obligations and rights

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986 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 26/12/2011 numbered 2011/4965 E. and 2011/8356 K. (legalbank.com); 7th Civil Chamber of the Turkish Court of Appeals' judgment dated 19/12/2016 numbered 2016/32787 E. and 2016/21391 K. (Yargıtay Karar Arama); 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 06/12/2016 numbered 2016/24438 E. and 2016/21638 K. (legalbank.com).

987 Kar, p. 395; Kar, Yargıtay Uygulamaları, p. 450-451.

988 Mollamahmutoğlu and others, p. 1077; Günay, Geçerli Fesih, p. 102.

989 Manav, Yargılama Usulü, p. 283.

990 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 28/112005 numbered 2005/34667 E. and 2005/37461 K. (legalbank.com).

991 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 21/03/2005 numbered 2005/7361 E. and 2005/9084 K. (legalbank.com); Manav, Yargılama Usulü, p. 281; Günay, Geçerli Fesih, 103.

992 Kar, p. 394; Kılıçoğlu, p. 1225.

arising from the employment contract continue during the notice period for termination with duration and they are obliged to perform their duties in the same way, provided that the employment contract is terminated by giving notice period[993], the period of time to initiate a legal procedure shall also commence from the time that termination notice is served to employee[994]. As a consequence of this, according to one opinion in the doctrine, the fact that an employee initiates a legal procedure against termination while employee's employment contract is in progress shall be nonconformity with the relevant provision of LC[995]. Yet, according to the Turkish Court of Appeals' practice[996] and prevailing perspective in the doctrine, the period of prescription in order to initiate a legal procedure should be started from the time that termination notice is served to the employee by being binding with the explicit explanation of LC[997].

If the employment contract of the employee working for seasonal work is suspended at the end of the season but s/he is not called for work at the beginning of the new season, this may be considered a termination. In this case, the period of time as 1 month to initiate a legal procedure against termination shall commence from the time that new season commences[998]. In other words, provided that the end of suspension and the time that the employee starts to work again are known but on the other hand, the employee is not called back to work during this period of time, it should be accepted that the employment contract is terminated with actual termination and the period of prescription determined in order to initiate a legal procedure shall be started from this time[999].

Even though the notice period shall commence passing from the time that suspension expires, since it is regulated in LC that the period of time to initiate a legal procedure shall start from the time that termination notice is served to the employee, it is not important

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993 Tunçomağ and Centel, p. 220; Münir, Ekonomi. Feshin Geçersizliği Kararı Sonucu İşe Başlatılmayan İşçiye İhbar Tazminatı Ödenmesi". *Legal Yargı Kararları ve İncelemeleri Dergisi*, I: 10, (December 2008): Legalbank.com Feshin Geçersizliği Kararı Sonucu İşe Başlatılmayan İşçiye İhbar Tazminatı Ödenmesi (legalbank.net); for information in detail regarding to the fact that parties' obligations arising from employment relation shall continue during notice period in German Law: Vossen and Willemsen, p. 261.

994 Çelik and others, p. 577; Özcan, p. 98.

995 Mehmet Uçum. "İşe İade Taleplerinde Dava Açma Süresinin Başlangıcına İlişkin Sorunlar". *Legal İş Hukuku Ve Sosyal Güvenlik Hukuku Dergis*i, I: 4, (2004), p. 1303.

996 7th Civil Chamber of the Turkish Court of Appeals' judgment dated 25/03/2015 numbered 2015/341 E. and 2015/5499 K. (legalbank.com).

997 Süzek and Başterzi, p. 647; Manav, Yargılama Usulü, p. 280-281; Centel, p. 137; Eyrenci and others, (2020), p. 214; Ekmekçi and Yiğit, p. 675; Mollamahmutoğlu and others, p. 1077; Doğan Yenisey, Sona Erme, p. 458; Çelik, p. 259; Günay, Geçerli Fesih p. 102.

998 Manav, Yargılama Usulü, p. 282.

999 Kar, p. 397.

whether the notice period started or not. When an employment contract is suspended, as the employee may issue a termination notice, the period of time in order to initiate a legal procedure should also be started from the time that termination notice is served to the employee[1000]. Therefore, even if the termination notice is served to the employee within the duration of the medical report, the process of the period of time determined in order to initiate a legal procedure shall not stop processing[1001]. Similarly, the disciplinary procedure in the workplace is not a reason to stop this period of time either[1002].

Also, even though an employer may terminate the employment contract without complying with the notice period or by paying the payment in lieu of notice, as the need of an explicit explanation of LC, this issue shall not prevent the employee from initiating a legal procedure[1003].

Provided that the mediation procedure is not started within the period of prescription as 1 month, parties of the employment contract will lose their rights regarding the reemployment case and termination made by the employer shall constitute consequences of a valid termination.

LC specifies firstly the obligation to demonstrate a valid reason for termination and following that it determines a period of prescription as 1 month for an employee to be able to claim that termination having been made by the employer is invalid. With this mentioned regulation, LC regulates the ability of cancellation (relative collusion). Therefore, termination shall constitute effective consequences and rulings from the beginning but the employee who has a right to cancel this termination may retroactively cancel this legal transaction, if s/he wants. With another explanation, the existence of a reason causing the cancellation of the legal transaction shall not give rise to the invalidity of this transaction by itself. The invalidity of this transaction may only be considered only if the rightful party claims this. Indeed, the rightful party may use his/her right by declaring his/her intention or initiating a legal procedure. LC specified that the right of cancellation may only have been used by initiating a

1000 Manav, Yargılama Usulü, p. 287-288.

1001 9th Civil Chamber of Turksih Court of Appeals' judgment dated 24/03/2008 numbered 2007/30576 E. and 2008/6013 K. (kazanci.com); 9th Civil Chamber of Turksih Court of Appeals' judgment dated 28/11/2005 numbered 2005/34667 E. and 2005/37461 K. (legalbank.com).

1002 Yılmaz, Dava, 79.

1003 Sümer, p. 108.

legal procedure[1004]. Provided that termination having been issued by the employer is deemed as invalid, this termination shall be removed retroactively[1005].

Although it was regulated in the first edition of LC that parties of the employment contract may have initiated a case directly, with an amendment that has been effective from 01/01/2018, mandatory mediation procedure for labour disputes is regulated[1006]. Mandatory application to mediation procedure accepted with LC was considered to help for labour disputes to reach conclusions fast and in an economic manner. Therefore, it was generally considered that an alternative dispute resolution system should have been accepted instead of a litigation procedure, with the aim of decreasing of workflow by decreasing the number of cases both in first-instance courts and higher courts[1007].

The mandatory mediation procedure is a case condition for reemployment cases[1008]. In accordance with the explicit explanation of LC, in the event of initiating a case without applying the mediation procedure, the case shall be rejected on procedural ground. Judgment regarding rejection shall be served to parties of the case *ex officio*. Following this, an employee may apply for mediation procedure within 2 weeks from the time that judgment regarding rejection is served *ex officio* to him/her. On the other hand, if the employee does not apply to the mediation procedure within 1 month and initiates a reemployment case without submitting a mediation minute, his/her case shall be rejected on the procedural ground by the relevant labour court. However, since the employee shall lose his/her right to initiate a reemployment case when 1 month specified for applying mediation procedure expires, it is not possible for the employee to apply to the mediation procedure by benefiting from an additional period of time as 2 weeks[1009]. Besides, this period of time as 2 weeks is a period of prescription and, even though it is not obliged for a mediator to take this period of time into consideration, the court shall review this period of time *ex officio*[1010].

1004 Kar, p. 31-32.

1005 Kar, Güvence, p. 564.

1006 Didem Yardımcıoğlu. "İş Hukukunda Dava Şartı Arabuluculuk ile Hakem-Bilirkişiliğin Birlikte Uygulanması Halinde Karşılaşılabilecek Durumlar". *Türkiye Adalet Akademisi Dergisi,* Year: 14, I: 56, (October 2023): p. 470; Akkışla, p. 428.

1007 Tulukçu, p. 279.

1008 Akkışla, p. 435; Mollamahmutoğlu and others, p. 1078; Süzek and Başterzi, p. 648; Kar, p. 365.

1009 Mollamahmutoğlu and others, p. 1079; Çelik and others, p. 578; Muhittin Astarlı. "7036 Sayılı İş Mahkemeleri Kanunu'nun 4857 Sayılı İş Kanunu'nun İş Güvencesi Hükümlerinde Öngördüğü Değişikliklerin Değerlendirilmesi". *Sicil İş Hukuku Dergisi*, I: 38, (2017): p. 41-42.

1010 Çelik and others, p. 578

According to one opinion in the doctrine, it is possible to bring additional regulations regarding mediation procedure with collective labour contracts. On the contrary, it is not possible to bring regulations regarding arbitration as a consequence of the Turkish Constitutional Court's annulment judgment[1011].

Even though an application for mediation procedure, the process of legal procedure and consequences of reemployment claims are re-regulated with provisions of the LCC; any change on article 24 of CTUCLC specified for reemployment cases to be initiated by union representatives and amateur union managers about their rights arising from Article 24 of the CTUCLC has not been made. This issue makes it think whether these cases shall be subject to mediation procedure or not. Mediation procedure shall be accepted as a case condition for all reemployment cases. Since, unlike cases regarding compensation and recourse arising from occupational illness and accident, reemployment cases regulated under Article 24 of CTUCLC are not excluded explicitly from the application of the mediation procedure, these cases should also be considered within this scope. Additionally, this regulation arising from CTUCLC is more special when compared with the provision specified for reemployment cases under the LC. Therefore, previously article 24 of CTUCLC should apply and, if there is not a specific regulation in this regulation, article 20 and article 21 of the LC should apply subsequently for reemployment cases. As a general rule, provisions of LCC and CMPLD should be taken into account for mediation procedure specified regarding reemployment cases[1012]. Therefore, even though there is no regulation regarding mediation procedure in article 24 of the CTUCLC, it should be accepted that union representatives should also apply to mediation procedure before initiating a reemployment case. Whereas, provided that the mediation procedure is not finalized with parties' consensus, it is controversial when the parties should apply to labour courts in order to initiate a reemployment case.

In accordance with the one opinion in the doctrine, applying Article 20 of LC is not appropriate without observing 1 month period regulated for applying to labour courts with Article 24 of the CTUCLC. Therefore, not the period of time as 2 weeks specified in LC but the period of time as 1 month specified in Article 24 of CTUCLC for initiating a reemployment case should be taken into account. According to this opinion, a longer period

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[1011] Canbolat, Toplu İş Sözleşmesi p. 161; for the full text of the Turkish Constitutional Court's annulment judgment dated 19/10/2005 numbered 1003/66 E. and 2005/72 K. in Turkish; https://normkararlarbilgibankasi.anayasa.gov.tr/Dosyalar/Kararlar/KararPDF/2005-72-nrm.pdf

[1012] Ayşe Köme Akpulat. *İş Mahkemelerinde Yargılamanın Özellikleri.* İstanbul Üniversitesi Hukuk Fakültesi Özel Hukuk Doktora Tezleri Dizisi (Istanbul: Onikilevha, July 2018), p. 357-358.

of time specified for initiating a case shall be more appropriate for union representatives having more protective rights when compared with provisions of employment security regulated by LC[1013]. On the other hand, in one of Diyarbakır Regional Court of Appeals' judgments, it is decided that although the employee applied to mediation procedure for reemployment with reasons regarding the union within one month starting from the time that termination notice is issued, since the reemployment case was not indicated within 2 weeks from the time that last mediation minute was prepared and signed by the employee, the employer and the mediator; the case should be rejected because reemployment case was not initiated within the period of prescription as 2 weeks[1014].

Following employee's application, the Mediation Office shall appoint a mediator registered to the list of mediators. In addition to this, it is possible for parties to choose one mediator registered in the list of mediators prepared by the Mediation Office. However, it is not possible for parties to choose a mediator who is not registered in the list of mediators[1015]. In accordance with the sub-paragraph 9 of Article 3 of the LCC, it is not possible to examine whether mediator office having an appointed mediator is authorized or not *ex officio*. The counter-party should object to the authority of the mediator office regarding the venue by the first meeting, at the latest, by submitting documents regarding the domicile and place where the work is performed in. In this scenario, the mediator should submit this file to the mediator office in order the mediator office sends this file to the relevant Civil Court of Peace. The court shall decide certainly on which mediator office is authorized and send it to the relevant mediator office by examining on file without taking any charge.

A mediator should finalize the mediation procedure within 3 weeks from the time that s/he is appointed for the procedure. Yet, a mediator may postpone this procedure for 1 more week if it is necessary[1016].

As parties may participate to mediation meetings by themselves, they may be represented by their representatives in these meetings too. Besides, an employer may

[1013] Köme Akpulat, p. 358.
[1014] Diyarbakır Regional Court of Appeals' judgment dated 29/01/2020 numbered 2020/108 E. and 2020/107 K. (legalbank.com).
[1015] Yardımcıoğlu, p. 481.
[1016] Korkusuz/ Uğur, p. 135.

authorize one of employees working for him/her with a written authorization document in order that this employee may represent himself/herself during mediation procedure[1017].

In accordance with sub-paragraph 17 of Article 3 of the LCC, the period of prescription shall not process and the statue of limitation shall be suspended during the period of time passing from the time of application for the mediation procedure to the time that the last mediation minute is issued.

2. Agreement of Parties During Mediation Procedure

It is possible for parties to compromise in mediation meetings. In accordance with LC, provided that parties of employment contract compromise in the mediation procedure;

i. The beginning of being reemployed
ii. The monetary amount of the payment regarding the duration that the employee is not engaged in work and other rights
iii. Provided that the employee won't be reemployed, the monetary amount of the reemployment compensation

should be demonstrated in the last mediation minute. The last mediation minute shall be issued in accordance with this regulation. Otherwise, it should be considered that parties could not compromise. If the employee does not commence working at the time that parties agreed on; termination shall be deemed as valid and an employer shall be liable only for consequences of valid termination. It is obliged that the time compromised for employee's reemployment shall be a concrete date or a date that may be demonstrated objectively. As an example, definitions such that the employee shall be reemployed in a reasonable period of time or similar explanations will not be deemed as valid. Also, giving sole authority for the employer to decide on the time that the employee will be reemployed should not be deemed as valid[1018]. In addition to this, according to another opinion in the doctrine, if it is considered that parties are absolutely free to agree on the time that the employee will be reemployed, this would be against the employment security system and it may cause to leave operational risk to the employee. It should be accepted that parties may agree on the time that the employee will be reemployed only if this time is within 1 month from the time that parties compromise in the mediation procedure by taking Article 21 of LC into consideration[1019]. On the other hand,

[1017] Korkusuz and Uğur, p. 135.
[1018] Ekmekçi and Yiğit, p. 679.
[1019] Mollamahmutoğlu and others, p. 1083; Ekmekçi and Yiğit, p. 680; Astarlı, Değerlendirme, p. 49.

if parties compromise in the mediation procedure, the employer should reemploy the employee within the period of time specified in the mediation minute without needing conditions such as employee's application to the employer within 10 working days in order to be reemployed or for the employer to invite the employee in order to reemploy[1020].

Furthermore, since the first termination disappears with parties' consensus, supposing that the employee is not reemployed at the time that parties of the employment contract agreed on, it should be more appropriate to evaluate that the employment contract is terminated by the employer once again and an employer is obliged to pay the severance payment and the payment in lieu of notice if these payments' conditions occur[1021].

As it shall be explained in the following parts of our study, an employee is obliged to claim from courts to decide that termination is invalid and decide on his/her reemployment. S/he may not only request for the monetary consequences of this case. With another explanation, s/he may not request only for the reemployment compensation and the payment regarding the duration that s/he is not engaged in work. On the other hand, it is possible for parties to agree on the monetary consequences with their free wills in the mediation procedure without this restriction[1022]. Also, according to one opinion in the doctrine, parties may freely agree on the monetary consequences of their consensus and they may increase amounts of these measures only if it is on behalf of the employee[1023].

According to one evaluation in doctrine, even though there is a regulation in LC only regarding the fact that parties may agree on the reemployment of the employee during mediation procedure, it is possible for parties of the meeting to agree that the employee shall not be reemployed and they may have a consensus regarding payment of monetary consequences of this[1024]. It is possible in two manners for parties to agree that the employee shall not be reemployed. The first option is that the employee accepts the validity of the termination[1025]. In this circumstance, as parties may agree on not only the validity of the termination but they may also agree on consequences of the valid termination. It means that parties may agree on both the validity of the termination and compesantions or employee's credits, which are determined by parties of the employment contract and will be paid to the

1020 Mollamahmutoğlu and others, p. 1084; Astarlı, Değerlendirme, p. 50.
1021 Akkışla, p. 439; Mollamahmutoğlu and others, p. 1084; Astarlı, Değerlendirme, p. 50-51.
1022 Çelik and others, p. 580.
1023 Mollamahmutoğlu and others, p. 1083.
1024 Ekmekçi and Yiğit, p. 681-682; Çelik and others, p. 579; Mollamahmutoğlu and others, p. 1084.
1025 Çelik and others, p. 579; Mollamahmutoğlu and others, p. 1084.

employee in return for the validity of the termination. In addition to this, parties who have a dispute regarding whether the termination issued by the employer is valid or not may decide on finalizing the employment contract with an agreement concluded between them by eliminating employer's termination. In this manner, the employment contract shall not be deemed as being terminated but it shall be deemed as being finalized with a mutual rescission. Therefore, parties may agree on consequences which will arise from finalization of employment contract freely[1026].

Whereas, when parties do not have a consensus about reemployment dispute during mediation procedure, the employee has right to initiate a reemployment case within its duration specified in LC. Yet, provided that the employer invites the employee to continue to work within the duration specified for the employee to initiate reemployment case, it is not certain whether the employer may claim that s/he invited the employee but the employee did not accept the offer and therefore, the employee may not benefit from consequences of reemployment case. Even though there is not a specific regulation about this issue in LC, we think that the Turkish Court of Appeals' practice regarding whether initiated reemployment case shall become devoid of merit or not when the employer invites the employee to re-work in his/her workplace should be also taken into account for this issue. Although the reemployment case's main purpose is the reemployment of the employee to a workplace that the employee worked in before, according to the Turkish Appeals' judgments[1027], it is employee's right to receive consequences of his/her reemployment case with a *res judicata*. Therefore, the employee does not have to accept employer's offer regarding reemployment during the processes specified for the employee to initiate a reemployment case from the time that the last mediation minute is prepared. Additionally, even though the employer invites the employee to work in the workplace again, the employee does not have to believe employer's invitation. Indeed, in this circumstance, it is not certain whether the employer shall comply with conditions of his/her invitation. The employer who is aware that his/her claims in the reemployment case shall be rejected may apply this method in order that the employee won't

[1026] Mollamahmutoğlu and others, p. 1084-1085; Muhittin Astarlı. "4857 Sayılı İş Kanununda Değişiklik Öngören İş Mahkemeleri Kanunu Tasarısının Maddi Hukuka Etkisi". *İş ve Sosyal Güvenlik Hukuku 2017 Toplantıları, İş ve Sosyal Güvenlik Hukuku Komisyonu*, Istanbul Barosu Yayınları, (June 2018): p. 231; for the opinion indicating that parties may agree on the amount of the payment regarding the duration that the employee is not engaged in work and the reemployment compensation with their own will without binding with imperative provisions of LC, therefore, as it may be agreed on less than the amount specified in LC, it may be also agreed on more than this amount when parties agree on mediation procedure: Çelik and others, p. 580-581.

[1027] For more information regarding the Turkish Court of Appeals practice when the employee rejects employer's offer during a reemployment case please look: p. 263 ff.

be able to initiate a reemployment case and in order that the period of prescription specified for the reemployment case expires. Also, even though in order to be able to mention about reasonable offer, the offer made by the employer should be in conformity with employee's previous work's conditions. Therefore, an offer which is irrelevant to employee's previous work may not be deemed as reemployment invitation and the authority to examine whether the invitation is in conformity with employee's previous employment conditions or not should belong to the relevant labour court. When these conditions are taken into account, even though the employer claims that s/he invited the employee to continue to work after mediation minute had been prepared but the employee did not accept the offer so that the employee should not benefit from consequences of reemployment case, we think that the employee has right to reject this offer and may want to benefit from effects of *res judicata* so that s/he may apply to another legal procedures with this certain proof, if there is any problem regarding his/her reemployment. In this regard, unless the employee has bad faith, the employer may not claim that the employee should not benefit from consequences of a reemployment case because of employee's rejection and the relevant labour court should examine the validity of termination as if the offer had never been made by the employer.

Furthermore, according to one opinion in the doctrine, if the minute to be prepared at the end of mediation meetings is in the nature of *res judicata*, in this case, as a rule, it shall be needed to initiate an enforcement proceeding with the judgment[1028].

An employer is obliged to give documents regarding insurance premium and to pay insurance premiums until the time that the employment contract is finalized. In accordance with the Directive of Social Security Institution dated 18/06/2020 and numbered 2020/20, if parties agree during mediation meetings that the employee shall not be reemployed in employer's workplace, it shall be accepted that the finalization date of the employment contract is the time that the last mediation minute is signed by parties. Therefore, an employer will be responsible to give document regarding monthly insurance premiums and services, brief declaration and declaration regarding insurance premiums and services to SSI during the period of time passing from the time of termination of employment contract made by the employer to the time that the last mediation minute is signed by parties. On the contrary, according to one opinion in the doctrine, this evaluation is not appropriate. When it is taken into consideration that the duration passing from the date of termination to the time that the

[1028] Ekmekçi and Yiğit, p. 713

last mediation minute is signed by parties depends on parties' discretions, if they agree that the employee shall not be reemployed in employer's workplace, finalization of employment contract should be deemed as consequence of the termination having been made by the employer and the employer should not be obliged to give documents to SSI from the date of termination to the time that the last mediation minute is signed by parties[1029].

B. Reemployment Case

1. The Period of Time Specified for Initiating Reemployment Case

Provided that parties do not reach any consensus regarding termination with the mediator following the mandatory mediation procedure, it is possible to initiate a case before labour courts within 2 weeks from the time that the last mediation minute is issued. If parties decide that disputes arising from employment contract shall be resolved by arbitration procedure, employee should apply to an arbitrator or arbitrators within 2 weeks from the time that the last mediation minute is prepared[1030]. As the beginning of this period of time to initiate a case, the date of issuing of the last mediation minute is accepted. On the other hand, this period of time should commence from the time that the last mediation minute is served to the employee, if this minute is issued in the absence of the employee[1031].

This regulation is criticized with an opinion in the doctrine indicating that the period of time as 1 month shall be interrupted without even starting and it shall be deducted to 2 weeks if an employee applies for mediation procedure after one day from the time that termination notice is served[1032].

When it is considered that the mediation procedure is mandatory for reemployment cases, the official last mediation minute or its sample approved by the mediator should be submitted to the relevant labour court. Otherwise, the court shall issue a warning indicating that the claimant has to submit this document to the court within a certain period of time as 1 week. If this document is not submitted within this certain period of time, the case shall be rejected on procedural grounds. On the other hand, as it is indicated in the last judgments of the Istanbul Regional Court of Appeals, since it is possible to reach the official version of the

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1029 Ekmekçi and Yiğit, p. 683.

1030 Akkışla, p. 437.

1031 Şahin Çil. *İş Uyuşmazlıklarında Arabuluculuk ve 7036 sayılı İMK Uygulaması Tazminat ve Alacaklarda Hesaplamalar İş Güvencesi* (Ankara, 2018), p. 57; Çelik and others, p. 582; Mollamahmutoğlu and others, p. 1091.

1032 Çil, İşçi Temsilciği p. 365.

last mediation minute via National Judiciary Informatic System, even though official version of minute is not submitted to relevant labour court by hand, it is not proper to reject the case with procedural grounds[1033].

2. Parties of Reemployment Case

This case should be initiated against an employer by an employee because, as a rule, termination shall be issued by an employer if an employee does not terminate the employment contract. As it is clearly explained in Article 2 of LC, an employer may be a real or legal person. In addition to this, employer's representative authorized regarding this issue may also terminate the employment contract on behalf of the employer[1034]. Even though s/he has an authority to terminate the employment contract and s/he terminates employment contract by using this authority, it shall not be possible to initiate a reemployment case against the employer's representative. In fact, the employer's representative is not liable legally for transactions that s/he makes on behalf of the employer[1035].

Additionally, in accordance with the explicit regulation of LCC, in the event of the existence of sub-employment relation, if there is an application for a mediation procedure with a request for reemployment, in order to compromise, employers should participate to the mediation procedure jointly and their decisions should be same.

Even though, before this regulation, there was an evaluation indicating that reemployment case should have been initiated only against sub-employer for detecting invalidity of termination, it was not obliged to initiate against primary employer and therefore, there was a voluntary joinder of parties between primary employer and sub-employer[1036]; 22nd Civil Chamber of the Turkish Court of Appeals was indicating its judgments that there was a mandatory joinder of parties between primary employer and sub-employer for reemployment cases and therefore, reemployment case should have been initiated against both employer[1037].

1033 31st Civil Chamber of Istanbul Regional Court of Appeals' judgment dated 31/05/2019 numbered 2019/1441 E. and 2019/1299 K. (legalbank.com).

1034 Ertürk, p. 298; Tulukçu, p. 99.

1035 Centel, p. 132; Manav, Yargılama Usulü, p. 272; Gizem Sarıbay. *Türk İş Hukukunda İş Güvencesi Kapsamında Fesih Usulü, Feshe İtiraz Ve Feshe İtirazın Sonuçları* (Istanbul Legal Yayıncılık, June 2007), p. 111; Tulukçu, p. 296.

1036 Centel, p. 133; Kar, Yargıtay Uygulamaları, p. 448.

1037 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 24/01/2012 numbered 2011/5173 E. and 2011/485 K. (legalbank.com); 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 09/05/2012 numbered 2011/4002 E. and 2012/9294 K. (legalbank.com); 22nd Civil Chamber of the Turkish

In the event of the existence of sub-employment relation, since it was determined that there was a conflict between the last judgments regarding whether an employee should have been initiated mediation procedure against both sub-employer and primary employer, or in other words, both of employers should have been participated to mediation procedure, in order to eliminate this conflicts, the Board of Presidents of Civil Chamber of Regional Court of Appeals decided to apply to 9th Civil Chamber of the Turkish Court of Appeals. As the summary of the judgment of 9th Civil Chamber of the Turkish Court of Appeals[1038], it is indicated that there is a procedural mandatory joinder of parties between sub-employer and primary employer for cases initiated with the claim of reemployment, both sub-employer and primary employer should be demonstrated as defendants in the reemployment case initiated by an employee. The issue that should be understood from the explanation of LCC is that employee should apply for a mediation procedure for both employers even though an employee working for sub-employer claims that there is a collusive transaction between sub-employer and primary employer or this transaction is invalid. There is no difference regarding whether the transaction concluded between sub-employer and primary employer is invalid or collusive, if mediation meetings are not finalized with consensus, it is not possible to consider that it is sufficient for an employee to apply for mediation procedure only against sub-employer. Unless an employee who is a claimant of the case does not apply for mediation procedure against both sub-employer and primary employer at the same time, it is not possible to consider that one of the procedural mandatory joinder of parties may be participated to the case during pending judicial procedure. Therefore, the case may not be continued with this manner. On the condition that there is sub-employment relation with its conditions specified in LC, unless it is applied for mediation procedure against both sub-employer and primary employer, it shall not be considered that the mandatory case requirement is fulfilled and therefore, the case should be rejected on the procedural ground because of the absence of case condition[1039].

Court of Appeals' judgment dated 27/12/2011 numbered 2011/15333 E. and 2011/8461 K. (legalbank.com).

1038 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 13/10/2021 numbered 2021/9540 E. and 2021/14240 K. (Yargıtay Karar Arama).

1039 Before LCC came into effect, the Turkish Court of Appeals had decided if a reemployment case had been initiated only against sub-employer or primary employer, the case should not have been rejected immediately by the court and a specific period of time should have been provided for the employee to be able to extend the scope of the case in order that primary employer or sub-employer may have been participated in the case. Provided that the employee had enabled sub-employer or primary employer to participate in the case during that period of time given by the court, the case should have been continued, otherwise, the case should have been rejected on the ground of absence of title of the defendant (22nd

On the contrary, it is indicated by some scholars regarding this issue that mediation is not a judicial procedure and therefore, it may not be considered that there is a mandatory joinder of parties in mediation procedure. The addressee of the reemployment case is sub-employer. If a reemployment case is initiated against sub-employer because the procedure is initiated only against sub-employer and any consensus is reached at the end of the mediation procedure, with the reason that there is a formal joinder of parties, but if the case is initiated also against primary employer; application for mediation procedure against primary employer should not be deemed as a mandatory case requirement and the case should not be rejected on procedural grounds. On the other hand, currently, it is not possible to reach this consequence because of Article 3/15 of LCC[1040].

Regarding effects of judgment decided by the relevant labour court, the mandatory joinder of parties may be classified in two groups as procedural mandatory joinder of parties and mandatory joinder of parties regarding the merit of the case. Mandatory joinder of parties regarding the merit of the case shall be considered if a right should be used by more than one person jointly or it should be claimed against more than one person jointly and it is obliged to prepare one judgment for all of them as a consequence of substantive law. As a rule, individuals of mandatory joinder of parties regarding the merit of the case should act together and therefore, actions of some individuals of joinder of parties regarding the merit of the case shall not be binding unless other individuals do not give consent. Procedural mandatory joinder of parties is a situation that it is obliged to initiate and to continue to legal procedure against more than one person jointly with reasons arising from specific regulations of different codes or qualifications of the case. In this case, it is not obliged to decide on only the same one ground regarding the judicial relation which is the subject matter of that case for all joinder of parties. Besides, legal actions made by individuals of procedural mandatory joinder of parties are separated from each other's actions[1041].

As a specific function of reemployment cases, for cases where there are sub-employment relations, it should be considered that there is a procedural mandatory joinder of

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Civil Chamber of the Turkish Court of Appeals' judgment dated 09/02/2016 numbered 2016/1448 E. and 2016/2911 K. (legalbank.com)); for more information regarding this practice: Yılmaz, Dava, p. 85-86; Urhanoğlu Cengiz, p. 120; Doğan Yenisey, Sona Erme, p. 464.

1040 Kar, p. 367; Faruk Barış Mutlay, "İşe İade Davalarında Arabuluculuk", *Çalışma ve Toplum Dergisi*, V: 4, I: 59, (2018): p. 2149.

1041 Ramazan Arslan and others. *Medeni Usul Hukuku.* 7th Edition, (Yetkin Yayınları, 2021), p. 551 ff.

parties for defendants[1042]. Even though it is claimed by the claimant that there is a collusive transaction between sub-employer and primary employer or this transaction is not concluded in accordance with conditions specified in Article 2/7 of LC, the case should be initiated against both primary employer and sub-employer. If it is decided that there is no collusion and it is accepted that sub-employment relation is concluded in accordance with LC at the end, the case regarding the invalidity of the termination and reemployment should be rejected on the ground of absence of the title of the defendant for primary employer[1043]. However, provided that the claimant claims that there is a collusive contract between sub-employer and primary employer and this claim is proved by himself/herself, the case regarding the invalidity of termination and reemployment shall be rejected on the ground of the absence of the title of the defendant for employer indicated as sub-employer in collusive sub-employment relation. Indeed, it shall be deemed as if primary employer was employee's employer from the beginning of the employment relation and defendant primary employer shall be responsible for employee's reemployment. Yet, on the condition that this sub-employer does not give rise to the commencement of a case against him/her with his/her own fault, the fee for attorney-at-law shall not be held for employee's attorney-at-law even though the employee is represented by attorney-at-law[1044].

Sub-employer is legally liable employer for employees. This employer has right to manage the workplace. S/he is responsible for rights and obligations arising from the employment contract. S/he has authority to employ employees, to distribute the work, to dismiss employees and to issue a disciplinary punishment. Primary employer is not in a contractual relation with employees working for sub-employer and therefore, sub-employer is directly liable against his/her employees[1045].

The addressee of the reemployment case to be initiated is sub-employer. Yet, it is accepted that the employee should be reemployed at the end of the reemployment case, primary employer is also responsible for the reemployment compensation to be paid to the employee. In addition to this, primary employer shall be responsible with sub-employer

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1042 Arslan and others, p. 558; İştar Urhanoğlu Cengiz, "Geçersiz Fesih ve İşe İade Davalarında Asıl İşveren Alt İşveren İlişkisinin Bulunduğu Durumlarda Davalı Yönünden Şekli Bakımdan Mecburi Dava Arkadaşlığı". *Sicil İş Hukuku Dergisi*, I: 29, (March 2013): p. 118.

1043 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 12/10/2017 numbered 2016/24731 E. and 2017/15641 K. (legalbank.com).

1044 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 09/05/2012 numbered 2011/11437 E. and 2012/9301 K. (legalbank.com); Uğur, p. 75; Göktaş, Asıl İşveren, p. 62.

1045 Andaç, p. 582.

jointly with payments such as severance payment, unpaid leave, wage that was not paid before, payment regarding overtime work but primary employer has right to recourse these payment to sub-employer[1046]. Also, since sub-employer's and primary employer's joint responsibility arises from LC and this regulation is a statutory regulation, clauses which will be concluded between sub-emloyer and primary employer and which will indicate that primary employer shall not be responsible against sub-employer's employee jointly or that his/her joint responsibility is restricted by them shall not be deemed as being binding for sub-employer's employee[1047].

Besides, provided that employee's employment contract is terminated following the finalization of sub-employment relation, the employee may not initiate a legal procedure against primary employer regarding the invalidity of termination and reemployment. Indeed, there is no responsibility of primary employer for monetary payments arising from termination[1048].

Provided that an employer is an ordinary partnership, the case should be initiated against all partners[1049]. Indeed, the Turkish Court of Appeals decided in one of its judgments[1050] that the case should have been initiated against all of partners constituting an ordinary partnership and the organization of parties of the case should have been occurred in this manner because an ordinary partnership did not have a legal personality and therefore, it did not have the capacity of being party of reemployment case. Additionally, according to 9th Civil Chamber of the Turkish Court of Appeals, the joint venture is a type of partnership in which two or more real or legal persons accumulate their contributions in order to reach a specific purpose and this partnership does not have a separate legal personality. Since the joint venture does not have legal personality and both companies should be shown in the litigation petition, the litigation petition should be served to both companies being in the scope of the joint venture separately and the organization of parties of the case should be provided with this manner. It is inaccurate to act against procedural rules by serving litigation petition just on behalf of joint venture[1051].

1046 Andaç, p. 585.

1047 Göktaş, Asıl İşveren, p. 58.

1048 Manav, Yargılama Usulü, p. 276.

1049 Tulukçu, p. 296.

1050 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 24/10/2019 numbered 2019/7584 E. and 2019/19835 K. (legalbank.com).

1051 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 03/11/2008 numbered 2008/36899 E. and 2008/29878 K. (lexpera.com)

On the other hand, if an employer who is a real person has died, the case should be initiated against employer's heirs. Provided that an employer who is a legal person changes his type or merges with another company after termination, the case should be initiated against the new company[1052].

For the termination of the employment contract of the employee working in the scope of the temporary employment relation, the case regarding termination should be initiated against his/her own employer. Indeed, the right to terminate an employment contract, despite the existence of temporary employment relation, is not transferred to the temporary employer. In addition to this, after the conclusion of the temporary employment relation, it shall not be considered that the temporary employer is responsible for the payment regarding the duration that the employee is not engaged in work and other rights arising from the invalidity of the termination[1053].

In accordance with one opinion in the doctrine, employment may be constituted in the manner that employees are employed to work jointly for more than one employer. For such relations, as an employee may initiate legal procedure against all companies for reemployment, the employee may also initiate legal procedure only for one or some of these companies. Besides, it should be explained that employers who employ jointly and have organic relation between them will be considered as being jointly responsible in accordance with regulations regarding ordinary partnership[1054]. However, the Turkish Court of Appeals indicated in one of its judgment that each employer within the scope of joint employment was obliged to reemploy the employee following employee's application in order to be reemployed, therefore, it is incorrect to make only the employer, who was registered as employee's employer in insurance records, oblige for reemployment of employee[1055].

3. Judicial Procedure of Reemployment Case

Labour courts shall be competent for reemployment cases. Also, regarding the competence of the court, it is not obliged that a dispute arises from a valid employment contract. Labour courts will also have jurisdiction over disputes arising from invalid

[1052] Özcan, p. 99.
[1053] Tulukçu, p. 297.
[1054] Kar, p. 378-379.
[1055] 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 14/04/2016 numbered 2015/29051 E. and 2016/9441 K. (kazanci.com)

employment contracts[1056]. In accordance with Article 2/3 of LCC, in provinces or subprovinces where there is not any labour court, civil courts shall examine diputes arising from labour law in accordance with provisions of LCC with a title as labour court.

In accordance with Article 6 of the LCC, the venue of the court for cases to be initiated in labour courts is the court which is in the domicile of a real or legal person at the time that the case is initiated or the place where the work and contract is performed. In accordance with this specific regulation regarding the venue of labour courts, an employer and an employee have right to choose the venue of the court where the case shall be initiated. Since the venue of labour court arises from public order, it is not possible for parties of the employment contract to conclude a jurisdiction contract for the venue of labour court. Cases regarding termination of the employment contract may be initiated at the court which is in employer's domicile or which is in the place where the employee performs his/her duties, in accordance with the employee's preference. If the case is initiated within the period of time specified by LC but at the court which is not in conformity with the regulations of the LCC regarding the venue of the court, the period of time to initiate a legal procedure should be preserved if the dispute is transferred to the court which is authorized in accordance with the regulation regarding the venue of the court. Even though the transfer of the case to the court which is authorized in accordance with the regulations regarding the venue of the court is made after the expiration of period of time to initiate the legal procedure, the employee does not lose this right[1057]. Since the venue of labour courts is regarding public order, even though there is no complaint made by the defendant regarding the venue of the court, the judge may review the venue of the court *ex officio*[1058]. The judge may take this issue into consideration at any stage of the case. On the other hand, provided that the defendant side consists of more than one person, the court that is in one of these persons' domiciles shall be deemed as being authorized in accordance with the regulation regarding the venue of the court[1059].

The case regarding the reemployment of the employee should be reviewed and concluded immediately. Additionally, if one of parties of the case applies to the Regional Court of Appeals against the judgment of the first-instance court, the Regional Court of Appeals shall review and conclude the case immediately and certainly. The finalization of the procedure of reemployment cases with the judgment of the Regional Court of Appeals is

[1056] Mollamahmutoğlu and others, p. 145; Kar, p. 357.
[1057] Manav, Yargılama Usulü, p. 264-265.
[1058] Kar, p. 364; Kar, Yargıtay Uygulamaları, p. 441-442.
[1059] Kar, p. 364.

criticized by scholars by indicating that Labour Law has a dynamic feature, judgments of the Turkish Court of Appeals are really important for this dynamic feature, not only the Turkish Court of Appeals does not have a function such as interpreting positive regulations but it also has a function such as revealing some legal principles being in the deep of law system and harmonizing them with life and showing some new principles. Therefore, it is only possible to interpret stable regulations of Turkish Labour Law in accordance with changing conditions and to find current solutions for new problems with the Turkish Court of Appeals' case-laws[1060].

In accordance with Article 8 of the LCC, provided that the main case is regarding invalidity of termination and reemployment of the employee, even though the amount of the reemployment compensation and the payment in lieu of notice which are consequences depending on this case are more than the limit specified in the CPC in order to apply to the Turkish Court of Appeals, this case shall be certain with the judgment of the Regional Court of Appeals. On the other hand, in a case initiated independently from the reemployment case by the employee, provided that the amount of the reemployment compensation and the amount of the payment regarding the duration that the employee is not engaged in work and other rights exceed the limit set for applying the Turkish Court of Appeals, the judgment regarding these claims may be appealed[1061].

Besides, in accordance with the explicit explanation of Article 9 of the LCC, for issues which are not regulated by this code, the regulation of CPC will be taken into consideration. Whereas, oral and fast proceedings had been applied in labour courts before CPC came into effect, in accordance with Article 447 of the CPC, from now on, basic judicial procedure regulated from Article 316 to Article 322 of the CPC shall apply for cases to be reviewed in labour courts.

According to one opinion in the doctrine, in the case regarding invalidity of termination, an employee shall claim invalidity of termination of employment contract and request for his/her credits arising from invalid termination. With this regard, initially, the employee has to prove that there is an employment relation between him/her and the employer. Following this, since regulations regarding employment security are not applied to all employees, including the condition regarding the existence of 30 or more employees

[1060] Ali Güzel. "İş Mahkemeleri Kanunu Tasarısı Taslağı Hakkında Bazı Aykırı Düşünceler!...". *Çalışma ve Toplum*, 2016/3: p. 1137-1141; Mollamahmutoğlu and others, p. 1093-1094.

[1061] Kar, p. 460-461.

working in the workplace, the employee has to prove conditions specified for him/her to be deemed as being in the scope of employment security[1062]. Besides, the employee has to prove that s/he initiated the case which is before the court within the time specified in LC[1063].

In accordance with Article 25 of the CPC, the principle of preparation of case by parties applies for civil cases in Turkish Law. According to this principle, instead of exceptions specified in relevant codes, the judge may not take issues or events that parties of the case do not claim into consideration *ex officio* and even s/he may not act in a manner that s/he may remind these to them. Furthermore, the judge may not collect proof regarding the case *ex officio*, instead of exceptions regulated by relevant codes. On the other hand, the feature of Turkish Labour Law which is in the scope of both Public and Civil Law is considered, it is seen that the principle of *ex officio* examination applies more especially for cases regarding the invalidity of the termination and reemployment of employee[1064]. With this regard, in reemployment cases and cases regarding invalidity of termination initiated within the scope of Article 18. ff. of LC, it is indicated explicitly in judgments of the Turkish Court of Appeals[1065] whether the period of time as 1 month specified by LC in order to apply mediation procedure and whether the employee is in the scope of employment security or not should be examined *ex officio*[1066]. On the other hand, in accordance with the explicit regulation of LC, the burden of proof regarding the fact that termination depends on a valid reason belongs to the employer and if the employee claims that termination depends on a different reason, s/he has to prove it.

Since employee's claims are regarding the invalidity of the termination of the employment contract and legal consequences depending on this, it may not be considered that an employee may request for his/her right depending on the finalization of the employment contract in accordance with LC (such as the severance payment and the payment in lieu of

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1062 Alp, p. 20; for the evaluation in the doctrine indicating that the burden of proof of the employee also covers proving the seniority period as at least 6 months which is one of the conditions to be in the scope of employment security and which depend on the employee: Ekonomi, Altı Aylık Kıdem, p. 28.

1063 Centel, p. 140-141.

1064 Kar, p. 410.

1065 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 07/02/2013 numbered 2012/28204 E. and 2013/4613 K. (legalbank.com); 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 13/04/2012 numbered 2011/13464 E. and 2012/7335 K. (legalbank.com); Yargıtay 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 29/11/2018 numbered 2018/3283 E. and 2018/21881 K. (legalbank.com); 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 14/01/2019 numbered 2018/5434 E. and 2019/737 K. (legalbank.com).

1066 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 28/11/2011 numbered 2011/3475 E. and 2011/6237 K. (legalbank.com); 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 04/06/2015 numbered 2015/12365 E. and 2015/20435 K. (legalbank.com); Kar, İspat Yükü, p. 1011-1012.

notice) with a complaint regarding termination. Previously, on the one hand, the reemployment case was reviewed with fast judicial procedure; on the other hand, other requests were reviewed with oral judicial procedure. Therefore, it was accepted that requests depending on difference judicial procedures may not have been reviewed in the same case. Now, even though it is regulated with the LCC that all cases to be initiated in labour courts will be reviewed with the basic judicial procedure, such requests shall be against consequences of invalidity of termination specified in LC and the subject of the complaint[1067]. Indeed, an employment contract is suspended when a reemployment case is pending and therefore, it shall be deemed that termination has not existed yet. Therefore, it is not possible to request for claims depending on the termination of employment contract during the period of time that termination is suspended[1068]. In this regard, it is not possible to request for credits arising from annual leave not having been used before. In fact, these credits will be due following the finalization of the employment contract in accordance with LC. Besides, for the case that reemployment and the credits arising from annual leaves not having been used before are requested together, the judgment accepted by first instance by separating the request regarding credits arising from annual leaves not having been used was overturned by the Turkish Court of Appeals with the reasons that the conclusion of reemployment case was not waited in order to decide on that case[1069]. In addition to this, although it is not possible to request for reemployment and credits and compensations depending on consequences of the finalization of the employment contract together, these requests may be requested from the court in the case that claims are alternatively requested in accordance with Article 111 of the CPC[1070]. This is also same for the severance payment and the payment in lieu of notice too[1071].

According to another similar opinion, since a reemployment case is a declaratory action, an employee who has a claimant about termination may not request for reemployment and his/her credits such as the severance payment and the payment in lieu of notice together. When s/he requests for two requests jointly in one case, the case shall not be rejected.

1067 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 11/09/2003 numbered 2003/14994 E. and 2003/14267 K. (legalbank.com).

1068 9th Civil Chamber of The Turkish Court of Appeals' judgment 21/01/2020 numbered 2016/11969 E. and 2020/816 K. (legalbank.com).

1069 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 04/04/2016 numbered 2016/6970 E. and 2016/9733 K. (legalbank.com).

1070 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 11/12/2017 numbered 2015/22856 E. and 2017/28386 K. (legalbank.com).

1071 Çelik and others, p. 590; Şükran Ertürk. "İşe İade Davalarına İlişkin Yasal Düzenleme Ve Uygulamanın Yarattığı Sorunlar". *Legal İş Hukuku Ve Sosyal Güvenlik Hukuku Dergisi*, I: 23, (2009): p. 946.

However, the case regarding employee's credits should be separated from reemployment case and the conclusion of the reemployment case should be waited for the separated case[1072].

According to one opinion in the doctrine, it is possible to reemploy the employee as an interim measure from the time that case is initiated to the time that the case will be concluded. With this interim measure, the employer shall be liable to reemploy the employee and it should be avoided that the employee will be unemployed during the reemployment case. Reemployment of the employee as an interim measure during a reemployment case is an interim measure with a performance aim. Indeed, interim measures with performance aims have a purpose to satisfy the requesting person temporarily until the main case is finalized[1073]. In addition to this, in conformity with this view, this issue shall not be against the regulation indicating that it is not possible to decide on an interim measure that may finalize the merit of the case. According to this opinion, the issue trying to be explained with this prohibition is that interim measure is not binding for the last decision regarding the dispute. For this reason, this prohibition should be interpreted to mean that interim measure may only be decided if it does not give rise to any situation that may not be fixed[1074]. According to the same opinion, in order that such interim measures may be decided, the employee has to prove plausibly that his/her allegations are right[1075]. Since the possibility regarding the fact that third parties or the employer who is the defendant in the case may be damaged because of interim measure decision for the employee to be reemployed is low, it is possible for the judge to decide on the interim measure without deposit by taking conditions and circumstances into consideration[1076]. On the other hand, according to another opinion in the doctrine, because interim measure decisions regarding employee's reemployment have characteristics that may finalize the merit of the case, these decisions shall be against Article 397 of the CPC and Article 21 of LC. Also, it should not be possible to compel the employer to reemploy the employee with interim measure even though it is not certain whether the employer will be obliged to reemploy the employee at the end of the reemployment case[1077].

1072 Özcan, p. 100; Akyiğit, p. 297; 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 04/04/2016 numbered 2016/6970 E. and 2016/9733 K. (legalbank.com).

1073 Mustafa S. Özbek. "İşe İade Davasında Davacı İşçinin Tedbiren İşe İadesi". *Çalışma ve Toplum*, I: 35, 2012/4: p. 30.

1074 Özbek, p. 33.

1075 Özbek, p. 34.

1076 Özbek, p. 34.

1077 Özcan, p. 105-106.

According to the Turkish Court of Appeals, employees' cases having been initiated for reemployment by them may be changed to cases regarding their credits and payments with an amendment. This issue is indicated with explanations as follows [1078];

> *"Request for reemployment and invalidity of termination which has a declaratory feature was changed to request for the severance payment and credits arising from overtime working with amendment petition. There is an absolute amendment of the case and request. The amendment is regulated as an exception to the prohibition to change and to extend the case without other party's consent. It does not depend on other party's or judge's acceptance. Provided that it is issued in accordance with Article 83 and the rest of the Civil Procedural Code, it is not accurate to reject the amendment. The Court's grounds regarding rejection are not in conformity with these mentioned regulations. If the amendment is in conformity with specified conditions and it is reviewed regarding procedural requirements, it should be decided on request regarding the severance payment and credits arising from overtime working by examining the merit of the case. The rejection with written manner is not appropriate"*

in one of its judgments and it decided that the reemployment case may have been changed to the case regarding employment credits with an absolute amendment and therefore, decided to overturn the judgment of the first-instance court. On the other hand, by analogy, it is also possible to change cases regarding payment and credits into cases regarding reemployment. However, the period of prescription as 1 month shall commence to process from the time that termination is made even though the claimant changes his/her reemployment case to the case regarding employment credits with amendment[1079]. Therefore, if an employee changed his/her case regarding credits and payments to cases regarding reemployment and 1 month has passed from the time that termination was issued till the time that amendment is submitted by the employee in order to change his/her case, it shall be accepted that the period of prescription determined for reemployment case expired and the case regarding reemployment shall be rejected by relevant labour court. If otherwise is accepted, it shall cause an evasion of law regarding the period of prescription with amendment and this circumstance may not be accepted in any way[1080].

Although an employee may waive from his/her reemployment case at any time s/he wants in accordance with Article 307 of the CPC, a declaration taken from the employee during the process of employment relation regarding the fact that s/he will not initiate a

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[1078] 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 05/03/2007 numbered 2006/34954 E. and 2007/5758 K. (legalbank.com).

[1079] 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 04/06/2012 numbered 2011/6894 E. and 2012/12218 K. (legalbank.com); Özcan, p. 98; Kar, p. 466.

[1080] Çelik and others, p. 591.

reemployment case will be deemed as invalid[1081]. In fact, even though there is no regulation in LC regarding the invalidity of employee's waive from employment security, it should be considered that the employee may not be aware of his/her rights arising from employment security. The employee may be anxious about being unemployed and termination of employment contract, which could lead to pressure or distortion of his/her discretion. Therefore, the acceptance regarding the fact that waives taken from the employee during the process of the employment contract are invalid shall be more proper for the aim of employment security[1082].

Declarations expressed in mediation meetings in order to waive from reemployment are contradictory. Firstly, it should be explained that mediation is not a judiciary procedure. As a consequence of this, regardless of whether it is an arbitrary mediation procedure or mandatory mediation procedure, according to one opinion in the doctrine, employee's declarations in mediation minute regarding the fact that s/he waives from his/her rights about reemployment case should be deemed as invalid[1083]. In fact, Konya Regional Court of Appeals evaluated in one of its judgments that even though the employee had waived from his/her right to initiate a reemployment case with the arbitrary mediation minute prepared between the employee and the employer, as a result of the fact that it was not possible to waive from a right not having occurred yet and waive from a reemployment case, which has not been initiated yet, was invalid[1084]. On the other hand, Bursa Regional Court of Appeals does not have the same opinion and when the employee waives from his/her right to initiate a reemployment case in the last mediation minute, it was decided that the employee may not have initiated a reemployment case anymore[1085].

According to one aspect of the doctrine, if an employer may not prove the validity of termination, an employee claiming that termination depends on employer's bad faith or that it is against the prohibition of discrimination or that it depends on reasons regarding union affairs is obliged to prove these allegations[1086]. According to one another aspect in the

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1081 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 11/11/2004 numbered 2004/9480 E. and 2004/25643 K. (legalbank.com); Mollamahmutoğlu and others, p. 1089; Süzek and Başterzi, p. 649-650; Alp, Emeklilik, Legalbank.com.

1082 Tulukçu, p. 311.

1083 Kar, p. 465.

1084 8th Civil Chamber of Konya Regional Court of Appeals' judgment dated 14/11/2019 numbered 2019/3255 E. and 2019/1668 K. (NJIS).

1085 3rd Civil Court of Bursa Regional Court of Appeals' judgment dated 05/04/2019 numbered 2018/4550 E. and 2019/812 K. (legalbank.com).

1086 Bakırcı, p. 117.

doctrine employee's obligation to prove his/her allegation was not regulated with the Code numbered 4773 and it is regulated for the first time with LC. Yet, it is not possible to consider that employer's burden of proof which constitutes the fundamental principle of the employment security system is eliminated by LC. Employee's burden of proof is only regulated for some termination reasons giving rise to an increase of the amount of the reemployment compensation and it is accepted restrictively only with employee's allegations regarding these termination reasons. Indeed, in accordance with Article 25 of the CTUCLC (in accordance with Article 31 of the previous Union Code numbered 2821), compensation for invalid termination is regulated more than the amount specified in LC as the amount of at least employee's total 1 year wage. Therefore, it is needed to evaluate employee's burden of proof specified in Article 20 of LC in this regard[1087]. With another explanation, as the burden of proof belongs to himself/herself, an employer previously has to prove that the employment contract is terminated with valid or justified reason. The fact that an employee may not prove his/her counter-proof as termination arising from reasons regarding union affairs does not eliminate employer's burden of proof[1088].

Furthermore, in addition to proving the existence of a valid reason for termination, an employer shall be obliged to prove that the termination notice is issued in written form, that the termination reason is indicated in this notice explicitly and certainly, for terminations with valid reasons arising from employee's behavior or incapability, that employee's defence was taken before termination or s/he tried to take this defence and that s/he terminated employment contract in conformity with the principle of last resort[1089]. An employer has to submit all proofs such as employee's personal file, workplace records, insurance documents, minutes, witness statements, evidentiary investigation, expert examination and swear to the relevant court[1090].

Besides, Antalya Regional Court of Appeals decided that, by evaluating that termination of employment contract depended on records of claimant's phone call having been made with the internal phone with another employee and even though it was possible to record phone calls having been made between the employee and client, recording phone calls having been made between employees with internal phone did not depend on any legal

[1087] Nuri Çelik. "İş Sözleşmesinin Geçersizliği ve İşe İade Talebiyle Açılan Davada İspat Yükü". *Devrim Ulucan'a Armağan,* Legal, (2008): p. 345-346.

[1088] 9th Civil Chamber of Court of Appeals' judgment dated 19/06/2006 numbered 2006/14801 E. and 2006/17539 K. (legalbank.com).

[1089] Centel, p. 141-142.

[1090] Kar, p. 405.

ground, even though the burden of proof regarding the fact that termination depended on a valid reason belonged to the employer, termination made by depending on information received by listening communication was against the Law[1091].

Even though an employee does not have a right to request for reemployment compensation and payment regarding the duration that the employee is not engaged in work without initiating a reemployment case, if the employee does not want to be reemployed, it is possible for him/her to initiate a case for his/her credits which should be paid by the employer such as the severance payment, the payment in lieu of notice or wages that have not been paid yet by the employer[1092]. Whereas, as it is explained above, it is not possible to claim for both reemployment and credits arising from employment relation in one case at the same time[1093].

C. Effects of Circumstances Occurred during Judicial Procedure

Judicial procedures may last for a long period of time because of some reasons such as proofs that have to be collected, the number of witnesses to be listed before the court in order that the truth may be releaved, evidentiary investigation that should be made by the court or court's workflow. Because of the long process of labour cases, it is possible that some developments and events may occur for both the employer and the employee during this long process of the case. These circumstances that may occur or events that happen during the process of a case sometimes affect the pending case whose merit or procedure is reviewed by the court.

In this part of our study, it shall be tried to explain what these events and developments affecting the pending case are and how these developments and events may affect the pending case reviewed by the court.

1. Reemployment of the Employee

There is no provision in LC regarding which manner shall be followed if the employer invites the employee to work in the workplace again during the process of judicial examination. The main purpose of the employee initiating a reemployment case is to provide the continuance of the employment contract by proving that the termination reason giving rise to the termination of the employment contract is invalid. For this reason, due to the principle

[1091] 10th Civil Chamber of Antalya Regional Court of Appeals' judgment dated 09/10/2020 numbered 2020/1724 E. and 2020/1777 K. (lexpera.com).
[1092] Sümer, p. 108.
[1093] Uşan and Erdoğan, p. 163.

of good faith, as a rule, acceptance of this offer is waited from the employee. On the other hand, every offer made by the employer may not be deemed as being in this qualification and this offer shall be considered as being in the qualification only if the employer recalls the employee in order to reemploy and s/he reserves previous working conditions and employee's seniority[1094]. Yet, it may not be considered that the employee is absolutely obliged to accept this offer when it is taken into consideration that the scope of the offer and the real purpose of the offer should be evaluated by the judge.

The Turkish Court of Appeals previously evaluated that after the case regarding reemployment and compensation had been initiated, the fact that the employee was recalled by the employer to work again was an offer for a new employment agreement and it may not have eliminated the termination of previous employment contract, therefore, the rejection of the case by accepting that there was not case requirement was not appropriate[1095]. In its later judgments, it accepts that reemployment of the employee during the process of judicial examination processed by the court should be deemed that the employer, who was a defendant in the case, accepts the invalidity of the termination. In accordance with Articles 21/3 and 21/5 of LC, the payment regarding the duration that the employee is not engaged in work depends on conditions as the existence of judgment regarding invalidity of termination and employee's application to the employer in order to be reemployed. It should be considered that these conditions occur in the concrete case from the time that the employee is reemployed during the process of judicial examination[1096].

According to one opinion in the doctrine which is against the Turkish Court of Appeals' opinion regarding this issue, the fact that the employee is recalled by the employer in order to work in the workplace again or even the fact that the employee is reemployed during the continuance of the reemployment case does not give rise for the case to become devoid of merit. Even though the termination reason demonstrated for termination is valid, in accordance with conditions happening during the continuance of the reemployment case, it is possible that this reason loses its validity and that the employee is reemployed by the employer. As a consequence of this, regardless of whether the employee is recalled by the

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1094 Ünal Narmanlıoğlu. "İş Güvencesi Hükümleri Çerçevesinde Açılacak Davanın Konusu, Niteliği ve Davayı Tamamen ya da Kısmen Konusuz Bırakan Olgular". *Prof. Dr. Sarper Süzek'e Armağan*, Istanbul: Beta, V: I, (2011): p. 641.

1095 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 29/01/2004 numbered 2004/499 E. and 2004/1489 K. (legalbank.com).

1096 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 21/04/2008 numbered 2007/30747 E. and 2008/9409 K. (legalbank.com).

employer in order to commence working again or s/he is reemployed again or not, whether termination depends on a valid reason or not should be evaluated in accordance with circumstances having happened at the time of termination. It should not be deemed that the employee waived from his/her right to initiate a reemployment case by commencing working again. However, the employee may explicitly waive from his/her case after starting to work. With this regard, the fact that the employer recalls the employee should not be deemed as withdrawing of the termination notice or reverting from termination. As a rule, it shall not be possible to return or to withdraw from termination intention unilaterally after this intention is served to counter-party of the employment contract. The fact that parties of the employment contract agree on this issue mutually constitutes a new employment contract. Due to this, the fact that the employee is reemployed by the employer during the continuance of the reemployment case should not affect the reemployment case. The court should evaluate whether termination depends on a valid reason or not without taking these circumstances happening after termination and should decide whether termination is valid or not. Termination shall be effective as valid termination until it is deemed as invalid by the court. Whether there is a new employment contract or not shall be determined in conformity with the judgment of the relevant labour court. Indeed, if the court decides that employer's termination depends on a valid reason, the relation concluded between the employer and the employee within the reemployment case shall be deemed as a new employment relation. On the other hand, if the court decides that there is no valid reason for termination having been issued by the employer and the employee is reemployed by the employer within the reemployment case, it shall be accepted that the employment relation continues as if it was not interrupted before[1097].

According to another opinion, the employee whose employment contract was terminated by the employer and the employer having terminated the employment contract are free to conclude a new employment contract between them upon mutual agreement as a need of freedom of contract before finalization of reemployment case. Reemployment cases regarding previous termination having been made by the employer shall not be effective for concluding a new employment contract. On the other hand, the fact that a new employment contract is concluded with a specific content shall be effective for consequences which will happen provided that the previous employment contract is deemed as invalid and it shall also

[1097] Haluk Hadi Sümer. "İş Sözleşmesinin Feshedilen İşçinin İşe İade Davası Devam Ederken İşveren Tarafından İşe Davet Edilmesi". *Sicil İş Hukuku Dergisi*, (December 2006): p. 92-93.

cause devoid of merit of the part of reemployment case which is regarding compensations to be paid by the employer. In addition to this, parties' freedom of contract is restricted for determining the content of the new employment contract. Offer and reemployment of the employee should be made by providing working conditions and materials as same as they were before. The work to be performed by the employee, the wage to be paid in return of performing this work and providing vehicles for transportation, bonuses and other extra payments to be paid by the employer should be conluded in a new employment contract[1098].

On the other hand, according to a similar opinion in the doctrine, provided that an employee is reemployed in his/her previous work by the employer during a reemployment case, employee's allegations regarding the invalidity of the termination having been issued by the employer shall become devoid of merit. Indeed, following the employee is reemployed, employee's main purpose shall be realized. However, provided that parties of the employment contract agree that this employment relation shall be deemed as the continuance of the previous employment relation and it is not a new relation, the reemployment case should be continued regarding judicial expenses and employee's payment regarding the duration that s/he is not engaged in work and other rights[1099].

Only recalling the employee shall not affect the case. It is also necessary for the employee to be reemployed for the work. In addition to this, the fact that the employee is invited in order to work and is reemployed by the employer does not directly casue the case to become devoid of merit. Even though employee's claims regarding reemployment and the reemployment compensation become devoid of merit, since his/her benefits for the payment regarding the duration that the employee is not engaged in work and his/her other rights continue, unless the employee explicitly waives from them or takes his/her claims back, the court should accept his/her payment regarding the duration that s/he is not engaged in work and his/her other rights[1100]. Indeed, also the Turkish Court of Appeals evaluated this issue in one of its judgments with explanations as follows;

> *"Unless otherwise is claimed, reemployment of the employee should be deemed that the employer who is the defendant of this case accepts that termination does not depend on a valid reason and therefore, it*

[1098] Münir Ekonomi. "Feshin Geçersizliği İstemi İle Açılan Dava Sürecinde İşe Başlatma Daveti, Şartları ve Hukuki Sonuçları". *Legal Yargı Kararları ve İncelemeleri Dergisi*, I: 8, (June, 2008): Legalbank.com Feshin Geçersizliği İstemi İle Açılan Dava Sürecinde İşe Başlatma Daveti, Şartları ve Hukuki Sonuçları (legalbank.net).

[1099] A. Eda Manav. "Feshe İtiraz Davasının Yargılama Sürecinde Gerçekleşen Olayların Davaya Etkisi". *Sicil İş Hukuku Dergisi*, I: 17, (March 2010): p. 63.

[1100] Ekmekçi and Yiğit, p. 691; Canbolat, p. 98-99; Şahlanan, p. 63; Kar, Yargıtay Uygulamaları, p. 485.

should be decided on invalidity of termination. In this circumstance, it should be accepted that employee's claims regarding reemployment and reemployment case become devoid of merit. On the other hand, it should be decided on employee's payment regarding the duration that s/he is not engaged in work and his/her other rights"[1101].

On the contrary, according to one judgment of the Turkish Court of Appeals, even though deciding on the payment regarding the duration that the employee is not engaged in work and his/her other right is proper, if the employee is reemployed by the employer during the continuation of the case and the duration that passed from the time of termination which is evaluated as invalid to the time that the employee is reemployed is less than 4 months, only wage and other rights occurring within this duration should be considered for the payment regarding duration that the employee is not engaged in work[1102].

In addition to this, in one of judgments of 9th Civil Chamber of the Turkish Court of Appeals[1103], it is explained with an explanation as follows;

"According to the practice of our chamber, employee's reemployment accepted by an employer during the continuance of reemployment case should be deemed that an employer accepts that termination does not depend on a valid reason. In such circumstances, it should be decided that termination is invalid and it should be decided on the payment regarding the duration as 4 months at most that the employee is not engaged in work together with his/her other rights. Also, it should be decided as "unnecessary to decide on" regarding the employee's claims for reemployment and the reemployment compensation. Without any doubt, this consequence is regarding "reemployment" which shall mean acceptance of the invalidity of termination. Provided that an employer claims that termination depends on a valid reason even though s/he reemploys the employee after termination, reemployment may not be evaluated as accepting invalidity of termination. In this situation, "reemployment should be evaluated as an offer for concluding a new employment contract and by deeming as if it was never offered, whether termination, which is the subject matter of case, depends on a valid reason or not should be reviewed by examining and it should be decided in accordance with the consequence that will occur after this review"

and this issue is explained in a category occurred by two groups, based on whether reemployment shall be deemed as acceptance of invalidity of termination or not.

1101 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 11/04/2018 numbered 2017/24328 E. and 2018/8364 K. (legalbank.com).

1102 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 25/05/2015 numbered 2015/11668 E. and 2015/18756 K. (Yargıtay Karar Arama).

1103 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 23/02/2009 numbered 2008/17120 E. and 2009/3175 K. (lexpera.com).

2. Closing of Workplace

As an employer may close the workplace with some reasons, s/he may close without any reason or with personal reasons. On the other hand, it is possible that the workplace may be finalized its activity because of judicial reasons. Finalizing its activity with financial, technological, structural or any other reason regulated for collective dismissal in LC may be shown as a reason. Yet, LC shall not compel an employer who wants to close his/her workplace to show a reason[1104].

According to one opinion in the doctrine, provided that the workplace is closed during the process of legal procedure, it is not accurate to consider that it is not possible to apply to the employer in order to commence working again because of the absence of the workplace. The right to close his/her workplace, which is given to the employer in order that s/he may use any time s/he wants and which depends on the Turkish Constitution, may not be shown as a reason in order to avoid employees' rights arising from their own employment relations. With this regard, even though the workplace is closed, if the invalidity of the termination is detected by the court or arbitrator/arbitrators, an employer should be liable for consequences specified by LC for the invalidity of the termination[1105]. Initially, if there is another working position for which the employee may be employed by the employer, the impossibility for termination shall disappear. Secondly, even though an employer does not have such an opportunity, it may also be possible to apply consequences of invalid terminations[1106]. Indeed, closing of the workplace shall not be effective for the reemployment compensation and payment regarding the duration that the employee is not engaged in work[1107].

The Turkish Court of Appeals explained this issue with explanations as follows[1108];

> *"It is understood from the scope of the case that employee's employment contract was terminated with reasons that the number of orders was decreased and with other general reasons. The closing of the workplace was not shown as a termination reason and the workplace was active at the time of termination. The finalization of workplace's activity, 4 months after the time of termination, shall not make termination valid. Indeed, it should be examined whether termination depends on a valid reason or not in accordance with conditions that were at the time of issuance of the termination notice. Even though s/he shows financial reasons in the termination notice, it is understood from the scope of the*

1104 Narmanlıoğlu, p. 643.
1105 Manav, Feshe İtiraz, p. 66; Odaman, İşyerinin Kapatılması, p. 78-79
1106 Narmanlıoğlu, p. 648.
1107 Odaman, İşyerinin Kapatılması, p. 78-79.
1108 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 25/12/2006 numbered 2006/27396 E. and 2006/34577 K. (legalbank.com).

case that the employer who is the defendant of the case employed new employees in March 2005. In accordance with this situation, it may not be deemed that there is a valid termination. Even though it should have been decided on reemployment of the claimant, deciding that the case became devoid of merit by explaining that workplace's activity was finalized after termination and therefore, deciding that there is no need for judgment is inaccurate. It should be explained that closing of workplace after termination is a problem regarding the enforcement of final judgment regarding reemployment. This issue should be discussed in the case to be initiated regarding the reemployment compensation and the payment regarding the duration that the employee is not engaged in work".

In fact, even though workplace's activity is finalized during the process of judicial examination regarding reemployment, it should be examined whether termination depends on a valid reason or not in accordance with conditions having been occurred at the time that termination was issued[1109]. Contrary to the judgment of the first-instance court, in order to consider that one case becomes devoid of merit, it is needed that both of the parties of the reemployment case do not have any legal interest from the decision regarding the merit of the case[1110]. With this regard, becoming devoid of merit of the case for only one party of the case does not give rise to the same consequence for other party of the case. In this circumstance, the case should continue and it should be decided on the merit of the case. Without any doubt, there is employee's benefit regarding the continuance of the case and detecting whether the reason shown in the termination notice is valid or not. In fact, if the case is concluded on behalf of the employee, the employee may apply to the employer within 10 working days from the time that the final judgment of the court is served to him/her in order to be reemployed[1111].

If it is decided on reemployment of the employee because of invalidity of termination and if the employer has another workplace that the employee may be reemployed in, following employee's application within its period of time, an employer has to offer to the employee so that the employee may commence working in this workplace or the employer has to pay the payment regarding the duration that the employee is not engaged in work and the reemployment compensation. The employee may commence working in this workplace by accepting employer's offer or, without accepting this offer, s/he may request for his/her payment regarding the duration that s/he is not engaged in work and the reemployment

[1109] Mollamahmutoğlu and others, p. 1098; Özkaraca, Eleştirel Bakış, p. 109-110; Süzek and Başterzi, p. 653-654; Sümer, p. 107; Haluk Hadi Sümer. "İş Sözleşmesinin Feshinden Sonra İşyerinin Kapatılmasının İşe İade Davasına Etkisi". *Prof. Dr. Bilge Öztan'a Armağan*, Turhankitapevi, (2008): p. 799-800; Göktaş, İşyeri Kapanması, p. 73; Senyen Kaplan, p. 103.

[1110] Tulukçu, p. 326; Narmanlıoğlu, p. 631; Astarlı, Sona Erme, p. 306-307; Sümer, İşyerinin Kapatılması, p. 799.

[1111] Odaman, İşyerinin Kapatılması, p. 78.

compensation[1112]. Indeed, provided that the employer finalizing his/her workplace's activity during the process of reemployment case offers to the employee in order that the employee starts to work in another workplace and this offer is rejected by the employee, it should not be deemed that the employee rejects to work for the employer again and this may not cause any damage to employee's right to receive the reemployment compensation[1113]. Indeed, employer's offer for the employee to work in another workplace does not impose an obligation on the employee to accept this essential change in working conditions in accordance with Article 22 of LC. On the other hand, if the employee accepts this offer regarding starting to work in this new workplace, employment relation shall continue with this new condition[1114].

On the other hand, even though the court or arbitrator should decide on reemployment with conditions having occurred at the time of termination and this circumstance should not be affected from closing of the workplace, if an employer has only one workplace and this workplace is closed during reemployment case, it is not possible anymore to decide on employee's reemployment. In this circumstance the court or arbitrator, if its conditions occur, should decide on invalidity of termination and the payment regarding the duration that the employee is not engaged in work. Yet, the employer should not be obliged to pay the reemployment compensation[1115].

According to one opinion in the doctrine which is the opposite opinion to the aspect of the Turkish Court of Appeals, provided that it is detected by the court that workplace's activity is finalized absolutely during the reemployment case having been initiated by the employee, because there is no workplace that the employee may work in, it should not be decided on reemployment of the employee. Yet, it should be decided on the payment regarding the duration as 4 months at most that the employee is not engaged in work. Additionally, even though it is not possible to reemploy the employee, since there is no fault of the employee for finalization of workplace's activity, the reemployment compensation

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1112 Tulukçu, p. 326.

1113 Süzek and Başterzi, p. 654.

1114 Mollamahmutoğlu and others, p. 1101; Aydın, p. 32.

1115 Sümer, İşyerinin Kapatılması, p. 800-801; Göktaş, İşyeri Kapanması, p. 74; for the evaluation in the doctrine that reemployment case shall become devoid of merit when the workplace is closed during the judicial examination, in this circumstance, there is not any workplace that the employee may be reemployed but the case should be continued for the payment regarding the duration that the employee is not engaged in work which shall be calculated from the date of termination to the date of the closing of the workplace: Alpagut, p. 244; Ömer Ekmekçi. "Yeni İş Kanunu Karşısında Yargı, Dava Süreci ve Olası Uygulama Sorunları Üzerine". *Mercek*, I: 31, (July 2003). p. 137.

should also be decided[1116]. According to one another opinion in the doctrine, provided that workplace's activity is finalized, regardless of being during the process of reemployment case or before the reemployment case is finalized, it should be decided on invalidity of termination. Since there is no workplace to reemploy the employee, finalization date of workplace's activity should be evaluated as termination date and the severance payment, the payment in lieu of notice and the payment regarding the duration that the employee is not engaged in work should be calculated in accordance with this date. However, since there is no workplace that the employee may apply and may be reemployed in, it should not be decided on the reemployment compensation[1117].

However, according to one opinion in the doctrine, if there is a condition regarding changing of the workplace in the employment contract, employer's right to operate shall be extended. If the employee accepts this from the beginning of the employment relation, following the employee's application to the employer in order to commence working, the employer offers to the employee in order that s/he works for another employer in another workplace, this offer shall be legally binding for this employee since it is accepted from the beginning of employment relation. If the employee rejects this offer, this employee shall be considered as an employee who does not apply to the employer in order to work and the employer shall be responsible only for consequences of a valid termination. Yet, even in this case, the employer should use his/her right to change the workplace in accordance with the principle of good faith[1118].

3. Death of Employee

The Turkish Court of Appeals had decided in its previous judgments[1119] that if an employee had died during the process of reemployment case, it should have been decided to reject his/her heirs' claims regarding the reemployment compensation and the payment regarding the duration that the employee had not been engaged in work. These judgments had been criticized[1120] with reasons that it should have been accepted as a function that the employee would have applied to the employer following the finalization of the reemployment case if s/he had lived and, with that regard, it should have been decided on the payment

1116 Süzek; 622; Mollamahmutoğlu and others, p. 1098; Ertürk, Yasal Düzenleme, p. 954.
1117 Kar, p. 450-451.
1118 Mollamahmutoğlu and others, p. 1101.
1119 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 06/11/2006 numbered 2006/20109 E. and 2006/29326 K. (legalbank.com).
1120 Mollamahmutoğlu and others, p. 1102.

regarding the duration that the employee had not been engaged in work and employee's other rights on behalf of employee's heirs. On the other hand, according to the one opinion in the doctrine[1121], since the reemployment of the employee, paying of the reemployment compensation and the payment regarding the duration that the employee had not been engaged in work had been binding with employee's application to the employer in order to commence working within the period of time specified in LC. If the employee had died during the process of reemployment case, it had not been possible to apply to the employer. Therefore, with this evaluation, the Turkish Court of Appeals' judgments regarding the fact that claims about the reemployment of the employee and the payment regarding the duration that the employee had not been engaged in work should have been rejected because of becoming devoid of merit had been supported. On the other hand, the Turkish Court of Appeals changed its opinion regarding this issue and decided that if the employee died during the process of reemployment case, it should be decided on employee's payment regarding the duration that the employee is not engaged in work and other rights arising from employment relation[1122].

According to the opposite opinion in the doctrine, since employee's right to have the payment regarding the duration that s/he is not engaged in work is subject to employee's application to the employer and this application shall be impossible with employee's death, heirs of the employee having died during reemployment judgment may not claim for the payment regarding the duration that the employee is not engaged in work[1123]. In fact, even though whether employee is reemployed by employer after employee's application or not shall not be effective for having right to claim for the payment regarding the duration that s/he is not engaged in work, when employer wants to reemploy employee, whether employee wants to be reemployed or not shall be effective so as to decide whether the employee shall have right to claim for the payment regarding the duration that s/he is not engaged in work or not [1124].

On the other hand, according to another opinion in the doctrine that we also support, although it is accepted as a presumption that the employee would apply to the employer in

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1121 Akyiğit, İşçinin Ölümünü, p. 24.

1122 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 15/09/2009 numbered 2009/21710 E. and 2009/22886 K. (legalbank.com); General Civil Chamber of the Turkish Court of Appeals' judgment dated 16/09/2015 numbered 2013/2309 E. and 2015/1761 K. (legalbank.com).

1123 Osman Güven Çankaya. "İşçinin Ölümünün Feshin Geçerliliğinin Tespiti Davalarına Etkisi, Yargıtay'ın Yeni Görüşü". *Sicil İş Hukuku Dergisi,* I: 17, (March 2010): p. 205.

1124 Özkaraca, Eleştirel Bakış, p. 113.

order to commence working if s/he had not died, since this circumstance may not give a certain result regarding whether the employer shall reemploy the employee for work within the period of time specified in LC or not, it should not be possible for employee's heirs to claim for the reemployment compensation. In this case, employee's heirs may only request for payment regarding the duration that the employee is not engaged in work and employee's other rights arising from employment relation[1125].

According to one opinion in the doctrine[1126], if the employee died during the period of time specified for an employee to apply to the employer in order to commence working in LC but before applying to the employer (even in the notary that s/he went to for sending a written warning to the employer), employee's heirs may not apply to the employer and may not request for the reemployment compensation in any way. Indeed, because employment relation may not be transferred to employee's heirs, it is not possible for employee's heirs to apply to the employer and to receive the consequences of this application. Employee's heirs may only claim for the payment regarding the duration that the employee is not engaged in work as 4 months. According to the same evaluation, on the one hand, if the employee applies to the employer in order to commence working but s/he dies within the period of time specified for an employer to reemploy the employee, employee's heirs may only request for the payment regarding the duration that the employee is not engaged in work and other rights arising from employment relation but they may not request for the reemployment compensation[1127].

On the other hand, according to the opposite evaluation in the doctrine, provided that an employee dies after reemployment case was finalized on behalf of him/her but before applying to the employer within 10 working days, this employee should receive the payment regarding the duration that the employee is not engaged in work. In addition to this, provided that this employee applies to the employer within 10 working days from the time that the reemployment case was finalized but s/he dies within 1 month which is specified for the employer to reemploy the employee, the reemployment compensation evaluated as a right to claim may be requested by employee's heirs[1128].

Furthermore, it is controversial in the doctrine what is going to happen if an employee dies before initiating a reemployment case. According to one opinion in the doctrine although

[1125] Centel, p. 149-150; Çelik, Süreli Fesih, p. 113.
[1126] Akyiğit, İşçinin Ölümü, p. 25; Çankaya, p. 206.
[1127] Akyiğit, İşçinin Ölümünü, p. 24.
[1128] Mollamahmutoğlu and others, p. 1103.

if an employee dies before the expiration of the termination notice period, since it shall be deemed that the employment contract is not terminated by employer's termination but it is finalized with employee's death, employee's heirs may not initiate for reemployment case. However, if an employee dies after the period of termination notice expired, employee's heirs may initiate legal procedure about the payment regarding the duration that the employee is not engaged in work from the time that period of termination notice expired to the time that the employee died[1129]. In accordance with the opposite opinion in the doctrine that we also support, the right to initiate legal procedure belongs to the person himself/herself and if an employee dies before initiating a legal procedure, it is not possible for employee's heirs to initiate legal procedure by replacing with this employee[1130]. On the other hand, for employee's other rights which are not attached strictly to the personality of someone, employee's heirs may initiate a legal procedure against the employer. Therefore, for example, the case that employee's heirs shall initiate against the employer regarding employee's severance payment and other rights arising from employment relation shall be reviewed by labour courts[1131].

4. Employee's Rejection of Employer's Offer

The termination of the employment contract is a unilateral disruptive formative right and it is not possible to withdraw it after it was served to counter-part of the employment relation[1132]. An offer made by the employer during the process of reemployment case shall not avoid consequences of termination having been made before. As the offer may not make invalid termination valid, recalling the employee during the reemployment case because the employee initiated a case shall be deemed as acceptance of the case made by the employer out of hearing. Employee's efforts for providing his/her reemployment at the end of reemployment case initiated by him/her is his/her legal right. As the employee who has the right to request for his/her reemployment with the security of court judgment may not be compelled to accept this offer, the case may not be rejected solely because the employee does not accept the offer[1133].

1129 Manav, Yargılama Usulü, p. 268; Manav, Feshe İtiraz, p. 59.

1130 Süzek; 623; Centel, p. 132; Mollamahmutoğlu and others, p. 1104; Ekmekçi, Dava Süreci, p. 136; Tulukçu, p. 303; Ertürk, Yasal Düzenleme, p. 955; Çelik, Süreli Fesih, p.113.

1131 Kar, Yargıtay Uygulamaları, p. 430; Çankaya, p. 203.

1132 Başbuğ and Yücel Bodur, p. 185; Canbolat, p. 93; Çelik and others, p. 480.

1133 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 25/05/2017 numbered 2016/13328 E. and 2017/9011 K. (legalbank.com).

Even though an employee does not want to commence working again and to be under employer's supervision, it is not possible to consider that there is no benefit for this employee in identifying the transaction as being against LC. The fact that an employee does not accept the offer made by the employer in order to commence working is not an obstacle for the continuance of the reemployment case and for deciding on the invalidity of termination. It is not possible to evaluate employee's behavior differently and to amend invalid termination with valid termination[1134].

In one of the Turkish Court of Appeals' judgments given in 2006, it had indicated that the main aim of provisions of employment security had been preventing arbitrary termination of employment contract, protecting the continuance of employment relation. Additionally, employee should act in accordance with the principle of good faith in order to benefit from that protection of LC. The purpose of a reemployment case had been to ensure that the employee may have commenced working again. The fact that the employee had not accepted employer's offer shows that the employee had not been sincere regarding his/her reemployment claim and his/her final purpose had been reaching the reemployment compensation and the payment regarding the duration that the employee had not been engaged in work. For this reason, it had not been possible to protect that purpose in accordance with provisions of employment security and employee's action would have given rise to the validity of the termination made by the employer[1135].

Even though accepting employer's offer is a need of the principle of good faith, it shall not be deemed that the employee has to accept this offer made by the employer in all circumstances. The offer that is made by the employer and that the employee had to comply with is the offer that is regarding the employee's previous working conditions. Therefore, an employee should be reemployed in previous circumstances without any condition. Employer's offer should be certainly, sincerely and also, it should not contain any condition for the employee[1136]. In spite of the offer, if employer's some actions make the employee presume that the employer shall not reemploy the employee, rejection of this offer to be made by the employee shall not constitute any circumstance that is against the principle of good faith. For example, in spite of employer's offer issued during the process of reemployment case, since it is not certain whether the employee shall be reemployed in accordance with previous working

[1134] Süzek; 621; Narmanlıoğlu, p. 634-635.

[1135] 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 18/12/2006 numbered 2006/26675 E. and 2006/33403 K. (legalbank.com).

[1136] Çelik and others, p. 595.

conditions or not and whether the employee shall continue to work or not, the Turkish Court of Appeals decided on invalidity of termination in one of its judgments[1137].

An employee should not be obliged to accept the offer made by the employer during the process of a reemployment case[1138]. Indeed, there is employee's justified benefit to receive judicial judgment. Due to this, it should not be evaluated that employee's rejection of the offer made by the employer is a waiving from the case or that it is not necessary to continue to the reemployment case. Besides, it is possible for an employee to commence working in the workplace during the process of reemployment case. In both of circumstances, it should be possible for the employee to be able to continue to reemployment case and the employee may request from the relevant labour court to hold for reemployment and its legal consequences[1139].

In fact, the Turkish Court of Appeals evaluated in one of its judgments[1140] by changing its opinion with explanations as follows;

> *"The termination of the employment contract is a unilateral disruptive formative intention and it is not possible to withdraw it from the time that it is served to counter-party. The offer made by the employer during the process of reemployment case shall not cause to eliminate termination having been made before. While the reemployment case is continuing, when the employer understands that s/he did not follow legal procedure for termination before and in order to have the case become devoid of merit, s/he may invite the employee to commence working. The fact that the employee does not accept the offer made by the employer in order to make the employee commence working in his/her previous work should not affect the reemployment case negatively. Rejection of an offer made by the employer should not be evaluated as if the employee did not want to commence working again sincerely. The struggle regarding being reemployed at the end of the case initiated by the employee is employee's right. The employee who has a right to claim to be reemployed with the protection of judicial judgment in the case initiated by him/her should not be deemed as being obliged to accept this offer, since s/he does not accept the offer, the case should not be rejected. Especially, it should be taken into account whether the offer is sincere and whether it shall cause the case tobecome devoid of merit or not, employee's claim regarding this issue should be taken into account, parties of the case should be listened and it should be decided in accordance with its consequence."*

1137 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 25/05/2009 numbered 2009/17726 E. and 2009/14144 K. (legalbank.com).

1138 For the opposite opinion indicating that the employee has no right to choose reemployment or compensation, the main purpose of the reemployment case is the reemployment of the employee, employee's rejection of the reemployment offer made during the reemployment case shall demonstrate that the employee waives from his/her right to be reemployed: Manav, Feshe İtiraz, p. 64.

1139 Canbolat, p. 95.

1140 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 01/02/2010 numbered 2009/13902 E. and 2010/1829 K. (legalbank.com).

and the fact that the employee was not obliged to give a positive answer to an offer made by the employer became as a case-law.

Whereas, even though the mere fact that the employee does not accept the offer made by the employer during the process of reemployment case shall not give rise to rejection of the case; if it is understood that the employee does not sincerely want to be reemployed, with another explanation, s/he will not commence working again even though it is decided on reemployment, and the employee's only purpose is to benefit from its legal consequences; reemployment case should be rejected by the court because of employee's rejection to offer made by the employer during the process of reemployment case[1141].

5. Retirement of Employee

The Turkish Court of Appeals had deemed employee's application made for retirement during the notice period as termination made by the employee by taking into consideration that the employment contract had continued during the notice period on the condition that the payment in lieu of notice had not been paid by the employer and it had rejected reemployment cases with this reason[1142].

These judgments of the Turkish Court of Appeals had been being criticized in the doctrine with reasons that retirement had been a social security right and application in order to benefit from that right may not have been deemed as waiving from employment security and also there had not been any obstacle for retired employees to work in accordance with the Social Security Law[1143].

The Turkish Court of Appeals indicated by abandoning its settled case-law with explanation as follows[1144];

> *"Previously, termination of the employment contract of an employee having applied for retirement before the payment in lieu of notice had been paid by an employer during the process of notice period had been deemed as being terminated by the employee by our Chamber. Especially, in order that the working duration of employees working for public institutions may have been united or in order to gain the right to receive the severance payment regarding the mandatory military service, the mentioned interpretation had been made on behalf of the employee. After Labour Code numbered 4857 was taken*

1141 Canbolat, p. 97.

1142 9th Civil Chamber of the Turkish Court of Appeals' deicion dated 21/05/2005 numbered 2005/10772 E. and 2005/14042 K. (legalbank.com).

1143 Akyiğit, p. 307; Mollamahmutoğlu and others, p. 1106.

1144 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 23/06/2008 numbered 2007/39446 E. and 2008/17066 K. (legalbank.com).

into effect, since the mentioned case-law gives rise to negative effects on the employee, it is decided that the issue should be re-evaluated….. In the concrete case, the employment relation was terminated by the employer with a termination notice issued on 05/09/2006 and served to the employee at the same time. Employee's application for retirement payment following the termination of the employment contract shall not change the reality as the employment contract was terminated by the employer who is the defendant in this case. As there is no agreement between parties of the case regarding the fact that termination made by the employer shall not be effective, it may not be accurate to accept that the employment contract is terminated by the claimant with the reason of retirement".

As it is appropriately indicated in this judgment, employee's application for retirement payment following the termination of the employment contract made by the employer shall not change the reality as the employment contract is terminated by the employer. Also, if there is no agreement between parties of the case regarding the fact that termination of the employment contract made by the employer shall not be effective, it shall not be accepted that the employment contract is terminated by the employee with the reason of retirement and whether termination made by the employer is valid or not shall be reviewed in accordance with the relevant provisions of LC. Indeed, there is no regulation indicating that retired employee may not initiate a reemployment case. While right to terminate an employment contract is a disruptive formal right finalizing the employment relation concluded between an employee and an employer, retirement is a social right which is a constitutive formal right[1145].

Additionally, it is also controversial in the doctrine what is going to happen if employee's employment contract is terminated by the employer by providing a notice period but an employee applies to SSI in order to receive retirement payment? Whether it shall be deemed that there is a termination made by the employer or the employee? As it is explained above, the employment contract shall be effective until the notice period expires. As a consequence of this, parties of the employment contract should perform their obligations arising from the employment contract during the notice period. On the other hand, in accordance with one opinion in the doctrine that we also support, the important issue for retirement payment is not the existence of termination but it is the existence of the finalization of the employment contract. Therefore, it should be deemed as sufficient for the employee to inform SSI that the employment contract is finalized, in other words, that s/he won't work after the notice period expires, it is not mandatory for the employee to declare that s/he resigned or terminated employment contract[1146]. In this circumstance, the employment

[1145] Manav, Feshe İtiraz, p. 66.
[1146] Okur, p. 135-136.

contract should be deemed to be terminated by the employer, not by the employee applying to SSI.

6. Transfer of Workplace

As mentioned above, just transfer of workplace may not be demonstrated as a valid reason by employer while terminating employment contracts of employees being in the scope of employment security. As the consequence of freedom of enterprise, employers may also transfer their workplaces during the reemployment case. Indeed, since reemployment cases last for a long period of time because of some reasons such as collecting proofs and workload, employers may need to transfer their workplaces because of economic circumstances that they encounter. On the other hand, it should be evaluated which manner should be followed by the judge examining a pending reemployment case when the workplace is transferred to another employer while the reemployment case is pending.

In German Law, provided that the workplace is transferred to another employer after termination, a reemployment case should be initiated against transferor[1147]. According to one opinion in the doctrine, in the Turkish legal system, since terminations made by employers shall not be deemed as certain within the duration specified for initiating a reemployment case or until certain judgments of labour courts or arbitrators, it may be considered that employment relation is transferred to transferee and reemployment case should be initiated against both transferee and transferor. Reemployment of the employee is in the scope of transferee's authority but, for the reemployment compensation, the payment regarding the duration that the employee is not engaged in work and other rights, transferee and transferor shall be in accordance with Article 6/3 of LC[1148]. However according to another opinion in the doctrine that we also support, if the workplace is transferred to another employee within the period of time specified for a reemployment case following the termination, an employee whose employment contract is terminated should initiate a reemployment case against transferee[1149]. Indeed, when the court decides on reemployment, the employer who will reemploy the employee shall be the transferee. In addition to this, if the workplace was transferred before the reemployment case but the employee initiates the reemployment case

[1147] Manav, İşyeri Devri, p. 1377; Akyiğit, p. 288-289.

[1148] Ertürk, Yasal Düzenleme, p. 949; For the evaluation in the doctrine indicating that employment relation is transferred to transferee, complaints about termination should be directed to both transferee and transferor, even though authority to decide whether the employee shall be reemployed belongs to transferee, transferee and transferor should be jointly liable for the reemployment compensation and the payment regarding the duration that the employee is not engaged in work: Akyiğit, p. 288-289.

[1149] Manav, İşyeri Devri, p. 1375-1376; Günay, Geçerli Fesih, p. 99.

against transferor because s/he does not know that the workplace was transferred, the case should not be rejected immediately because of the absence of the title as the defendant and it should be directed to transferee.

Furthermore, according to one evaluation in the doctrine, if the workplace is transferred while the case is continuing and there has been no decision regarding the case yet, Article 125 of the CPC shall apply and the case should be directed to the transferee. With this regard, if the reemployment case is accepted, judgment regarding reemployment of the employee should be enforced against transferee[1150]. Indeed, in accordance with Article 125 of CPC, provided that the subject matter of the case is transferred to a third party by the defendant when the case is pending, a claimant may waive from the transferor and him/her s/he may direct the same cae against transferee or, if s/he wants, s/he convert his/her reemployment case into compensation case against transferor. This right to choose should be reminded to the employee by the court and it may be made in every phase of judgment[1151]. According to our opinion, as the reemployment compensation and the payment regarding the duration that the employee is not engaged in work shall not be requested without judgment for invalidity of termination and reemployment of the employee, this right to choose compensation instead of continuing reemployment case shall not be effective for reemployment cases. In fact, an employee may not request for compensation without receiving judgment for his/her reemployment and invalidity of termination. Therefore, according to our opinion, Article 125/1-b of CPC is not effective for reemployment cases. However, if the court continues to the present case as if transfer of workplace never occurred, decides on this case and this judgment becomes certain, such judgment shall not be deemed as *res judicate* for the transferee because there is no judgment about him/her in the judgment[1152]. Because of this, it is crucial for reemployment cases to find a manner regarding this transfer. According to our opinion, the court should *ex offico* give a certain duration for the claimant to make transferee participate in the pending reemployment case in accordance with the Article 125/1-a of CPC and if the claimant wants transferee to participate in the case, the defendant side of the case should be changed with transferee and organization of parties of reemployment case should be concluded with this manner.

1150 Centel, p. 149; Canbolat, p. 120; Kar, p. 373.

1151 Kar, p. 373; Baki Kuru. *İstinaf Sistemine Göre Yazılmış Medeni Usul Hukuku (*Istanbul: Legal, August, 2016), p. 570-571.

1152 Kuru, p. 571.

For transfer of workplace, employee's all rights having occurred before transfer are protected by provisions of LC. Indeed, circumstances giving rise to joint liability are regulated under Article 6 of LC. According to the mentioned article, if the workplace is transferred, transferee and transferor will be jointly responsible for employee's credits that occurred before termination and that should be paid at the time of transfer. Yet, employer's responsibilities arising from this liability are restricted with a duration as 2 years. On the other hand, provided that these employers agree, it should be possible to extend this duration regarding this liability[1153].

Another important issue that should be examined is responsibilities of transferee and transferor. In accordance with Article 6 of LC, transferee and transferor are jointly liable for debts that have already occurred before the time of transfer and should be paid at the time of transfer. In order to consider the joint liability of transferee and transferor, the reemployment compensation and the payment regarding the duration that the employee is not engaged in work and other rights should be qualified as debts having occurred before transfer and that should be paid at the time of transfer. Provided that at the time of transfer, these debts have not occurred yet, transferor shall not be responsible for these debts[1154]. According to one opinion in the doctrine, in order that transferor and transferee are jointly liable, judgment regarding the reemployment of the employee should have been finalized, the employee should have applied to the employer in order to be reemployed and the employee was not reemployed by transferor before transfer. For example, for transfers made during the reemployment procedure or made after finalization of the reemployment case but before the employee applies to the employer in order to be reemployed or made within 1 month starting from the time of application of the employee; transferor shall be jointly liable neither for the reemployment compensation nor the payment regarding the duration that the employee is not engaged in work and other rights[1155]. However, according to one opinion in the doctrine that we also support, even though Article 6 of LC shall not be effective for reemployment cases when the workplace is transferred to another employer during a reemployment case, provided that its conditions occur, Article 202 of TCO may be applied for employee's credits regarding

[1153] Manav, İşyeri Devri, p. 1350-1351.
[1154] Manav, İşyeri Devri, p. 1381; Yiğit, p. 1197-1198.
[1155] Yiğit, p. 1197-1198.

the reemployment compensation and the payment regarding the duration that the employee is not engaged in work[1156].

If the workplace is transferred after reemployment judgment becomes certain, even though the employee has a *res judicata* regulated against transferor, since applying to his/her shall not be effective for employee's reemployment, it should be evaluated that this judgment may be used against transferee in accordance with Article 6 of LC regulating the transfer of workplace[1157].

Additionally, when the workplace is transferred by transferor employer partially before the reemployment case, a reemployment case should be initiated against both transferor and transferee. Indeed, when the employee may be reemployed by transferor for the departments of the workplace which are not transferred to transferee following the judgment indicating that the employee should be reemployed and that termination is invalid, transferor shall be responsible for reemployment of the employee. However, if it is not possible to reemploy the employee for these departments of the workplace, the part of the judgment which is regarding the reemployment of the employee shall be important for transferee[1158].

7. Employee's Starting to Work for Another Employer

The fact that an employee works independently or dependently following initiating a reemployment case may not be evaluated as if this employee waived from his/her reemployment case. With another explanation, the fact that an employee works for someone or works on something shall not prevent the employee from benefiting from provisions of employment security. Indeed, whether the employee shall be ready to be reemployed or not may not be known in this part of the jurisdiction[1159]. Provided that the court decides on invalidity of termination or in other words, it accepts the case, the provision regulating that the employee has to apply to the employer for performance of this judgment shall not be deemed as an obstacle for the employee to work for another job[1160].

Even though employees have right to receive the payment regarding the duration as 4 months at most that s/he is not engaged in work, the duration of jurisdiction lasts more than 4

1156 Çelik and others, p. 148; 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 01/07/2020 numbered 2016/16654 E. and 2020/6857 K. (kazanci.com).

1157 Centel, p. 149; Manav, İşyeri Devri, p. 1380; Günay, Geçerli Fesih, p. 101.

1158 Ertürk, Yasal Düzenleme, p. 949.

1159 Centel, p. 147; Akyiğit, p. 311; Narmanlıoğlu, p. 632-633.

1160 Narmanlıoğlu, p. 632.

months in Türkiye and it is not possible to wait from the employee providing his/her wellness with only the wage that s/he gains to wait to the end of the case without working anymore. Indeed, Istanbul Regional Court of Appeals has declared that it is not possible to accept employer's allegations regarding the fact that the employee is not sincere by evaluating that it is not possible to wait from the employee not to work during the period of time starting from the time of termination to the time that reemployment case is finalized[1161].

Besides, according to one opinion in the doctrine, an employee should not reveal employer's confidential trade secrets and should not work for a competitor company in accordance with the principle of good faith. Otherwise, as this issue shall give rise to the rejection of the reemployment case, the employee shall also be responsible to compensate employer's damages. Provided that an employer for whom the employee works gives rise to employee's behavior causing termination of the employment contract or s/he receives employer's confidential trade secrets in a manner that is against fair competition, new employer shall also be responsible for these damages with the employee[1162].

8. Termination of Employment Contract with Justified Reason Made by the Employer within the Notice Period or within the Process of Reemployment Case

While a reemployment case initiated by an employee against an employer within the period of time specified for the notice period is in progress, if an employer terminates employee's employment contract with justified reason, there is going to be a problem regarding the continuance of the reemployment case. Even if an issue occurring after the termination of the employment contract may not be shown as a termination reason and it may not amend the first termination reason[1163], the fact that the employer used his right to terminate the employment contract with a valid reason may not be deemed as an obstacle for the employer to terminate the employment contract with justified reason immediately[1164]. Indeed, the employer having terminated the employment contract without depending on a valid reason may terminate the employment contract with a justified reason after that[1165]. In this scenario, the employer does not change his/her previous termination reason but s/he uses

[1161] 28th Civil Chamber of the Istanbul Regional Court of Appeals' judgment dated 04/06/2020 numbered 2019/3256 E. and 2020/739 K. (Lexpera.com).

[1162] Canbolat, p. 108.

[1163] Odaman, İşyerinin Kapatılması, p. 77; 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 30/11/2017 numbered 2017/7442 E. and 2017/19493 K. (Yargıtay Karar Arama).

[1164] Centel, p.147; Ertürk, p. 302.

[1165] Baycık, Fesih Sebebi, p. 117.

his/her right to terminate the employment contract with justified reason because of circumstances that are figured out afterward, before the notice period expires and the employment contract is finalized. Employer's use of his/her right to terminate the employment contract with duration does not prevent him/her from terminating the employment contract with justified reason[1166].

On the other hand, as indicated by the Turkish Court of Appeals, during the process of jurisdiction, termination made by the employer shall be deemed as being suspended until the final judgment[1167]. Even though the employee does not have the duty to perform his/her obligations arising from employment relation and the employer does not have the duty to pay wage either during the suspension period, employee's duty of fidelity and employer's duty to observe the employee will continue during this period[1168].

It is not regulated in LC which manner shall be followed if an employee acts in a manner that gives rise to termination with justified reason during notice period or during the process of reemployment case. On the other hand, according to one opinion in the doctrine, it is evaluated that a reemployment case is regarding the continuance of employment relation, if parties' faulty behaviors that are against the relevant regulations of LC and that make it impossible to wait from parties of employment relation to continue this relation occur during the process of reemployment case, it is not possible to wait from a person encountering this situation to endure these behaviors and if it is decided to reject reemployment case when it is detected that the employee does not want to be reemployed and his/her only aim is receiving the payment regarding the duration as 4 months at most that s/he is not engaged in work and the reemployment compensation, this practice should also be effective when it may not be waited from parties of employment relation to continue to this relation and the trust relation between parties is damaged seriously. It shall not be enforceable and justifiable to decide on reemployment of the employee by knowing that it is not possible to wait from parties to continue to employment relation. Indeed, there is no difference between employee's declaration regarding the fact that s/he will not come back to work and employee's struggle to avoid the continuance of employment relation because of his/her own faulty behavior[1169].

1166 Baycık, Fesih Sebebi, p. 120-121.

1167 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 15/06/20015 numbered 2014/12857 E. and 2015/20531 K. (legalbank.com).

1168 Taşkent, Askı, p. 20.

1169 Canbolat, p. 105-107.

In accordance with our opinion, this evaluation may not be deemed as appropriate especially regarding the civil procedural system. Indeed, the judge should decide in accordance with conditions that happen at the time of initiating the case, new developments that occur during the process of litigation should not be effective for the pending cases, except in certain circumstances. In addition to this, if employee's faulty behaviors, which make it impossible to wait from the employer to continue to employment relation and are against provisions, the employment contract or the principle of good faith, occur during the process of reemployment case, this issue may be declared by the employer only with a new termination notice.

According to the Turkish Court of Appeals, if a reemployment case was initiated after the termination of the employment contract with a notice period, following this, this employment contract is terminated by the employer once again with justified and the employee initiates one more case against this termination depending on justified reason; the case initiated against termination with justified reason should be deemed as a preliminary issue for the case initiated against termination with notice period[1170]. Therefore, the case regarding the termination depending on a justified reason should be finalized and if it is accepted that termination depends on a justified reason, the case regarding the termination with notice period should be rejected because of the absence of legal interest. On the other hand, if it is decided that termination does not depend on a justified reason, the case regarding the termination with notice period should continue to be reviewed by the relevant court[1171]. In accordance with our opinion, it shall be more appropriate to accept this practice for circumstances that an employer terminates an employment contract with notice period and following this, s/he terminates the same employment contract once again with justified reason with immediate effect. Therefore, previously termination issued with justified reason should be examined by the relevant labour court and following its consequence, whether termination issued with a notice period depends on a valid reason or not should be evaluated.

D. Arbitration in the Scope of Employment Security

In accordance with the explicit explanation of LC, if parties of dispute agree mutually, a dispute regarding the reemployment may be reviewed by arbitration procedure which is an alternative dispute resolution. On the other hand, it is decided by the Turkish Court of

[1170] 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 26/01/2006 numbered 2006/34038 E. and 2006/1467 K. (kazanci.com).

[1171] Tulukçu, p. 328-329; Sarıbay, p. 170; Centel, p. 147.

Appeals that regulations regarding the venue of labour courts are in the scope of public interest, instead of reemployment disputes, arbitration clauses or agreements may not be deemed as valid, concluding arbitration agreement in accordance with Article 21 of LC regarding reemployment disputes is arbitrary and on the condition that parties agree that this dispute may be solved by arbitration procedure, instead of this, it is not possible to eliminate competence and venue of labour courts[1172]. With another explanation, the arbitration committee does not have any authority to decide on unpaid leave or wage arising from employment relation[1173]. Indeed, as it is indicated in the judgment, the application of parties to arbitration procedure is sometimes mandatory but instead of this, as a rule, applying for arbitration procedure is arbitrary.

Besides, in the same judgment, it is explained that the arbitration clause or agreement concluded in the employment contract or during the continuance of employment relation is not valid. Yet, arbitration clause or agreement concluded following the termination of the employment contract shall be deemed as valid[1174]. In fact, in order to conclude this agreement, there has to be free and mutual intentions of both parties[1175]. Accepting employee's intention to confirm the arbitration agreement or arbitration clause as valid when an employee is in a weaker position against an employer may confront an employee with negative

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1172 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 02/10/2017 numbered 2016/21367 E. and 2017/14609 K. (legalbank.com); For opposite evaluation indicating that Article 20 and 21 of LC may not be deemed as a list of disputes that may be resolved in arbitration procedure, even though it is indicated explicitly in the LC that arbitration procedure may apply in regulation regarding reemployment cases, the fact that there is no reference to arbitration procedure for other labour disputes may not be evaluated as if LC prohibited arbitration procedure for other labour disputes and therefore, provided that the employee and the employer signed arbitration agreement after inequality of power between the employee and the employer disappeared, it means employment contract concluded between the employer and the employee was finalized, application of arbitration procedure should not be hindered by alleging that it is against public order: Ömer Uğur. "Bireysel İş Uyuşmazlıklarının Tahkime Elverişliliği". in Milli Tahkim Kapsamında Tahkime Elverişlilik, editor: Serkan Kaya (Istanbul: Onikilevha, 2022), p. 172 ff.

1173 Çelik and others, p. 584; Manav, Yargılama Usulü, p. 266-267.

1174 *"While concluding the employment contract, the employee is economically weaker than the employer and s/he is dependant to the employer during performance of work. Supposing that the arbitration clause is regulated under the employment contract while concluding the employment contract, since the employee is dependent on the employer, it may not be said that the arbitration clause is valid. Yet, provided that the arbitration clause is regulated for disputes to be happended between parties after termination, the arbitration clause shall be valid. In the concrete dispute, since the arbitration clause having been regulated under an employment contract is not valid, even though the court should have decided on claims by examining the merit of the case, with incorrect evaluation and reasoning, deciding on the rejection of the case with the procedural grounds by accepting defendants first claim regarding the fact that disputes should have been settled through arbitration needed to overturn the judgment"* (9th Civil Chamber of the Turkish Court of Appeals' judgment dated 02/10/2017 numbered 2016/21367 E. and 2017/14609 K. (legalbank.com)); 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 23/03/2012 numbered 2011/12705 E. and 2012/5291 K. (legalbank.com).

1175 Tulukçu, p. 289.

circumstances[1176]. It is also indicated in the doctrine that since the employee whose employment contract is terminated is mentioned in the script of LC, arbitration clauses or agreements concluded during employment relation or while concluding an employment relation should be accepted as invalid[1177]. In this regard, according to one evaluation in doctrine, an arbitration clause or agreement regarding the fact that reemployment dispute shall be reviewed with arbitration procedure may be deemed as valid only if it is concluded within 2 weeks from the time that the last mediation minute is prepared[1178].

On the condition that parties agree on an arbitration procedure, if an employee initiates a reemployment case in labour court, even though it is not possible for an employee to apply labour courts anymore, the court may not take this issue into consideration *ex officio* but if the counter-part of the case claims this arbitration clause concluded between them as a first claim, the court may decide on lack of jurisdiction[1179]. Especially, Articles 19 and 20 of TCO restricting freedom of contract negatively will be taken into account while reviewing the validity of the arbitration clause. If the arbitration clause is against moral, it shall not be considered as valid. This situation may occur as a part of the arbitration clause that compels the other party of the employment relation to accept conditions changing equality on behalf of himself/herself by using financial and social power or as giving an opportunity to one of parties of employment relation to choose half of number of arbitrators or all arbitrators. Such arbitration clause shall be deemed as void[1180].

II. INVALID TERMINATION AND ITS LEGAL CONSEQUENCES

In accordance with Article 21 of LC, legal consequences of invalid termination are reemployment of the employee, obligation for the employer to reemploy the employee in the workplace, if s/he does not comply with this obligation, paying the reemployment compensation. As it is understood from this provision, it is not possible to decide on the reemployment of the employee without deciding on the invalidity of the termination and in this regard, pre-requirement of the reemployment of the employee is to decide on the

1176 Uğur, Tahkim, p. 170.
1177 Çelik and others, p. 585; Şahlanan, Gazeteci, p. 577.
1178 Süzek and Başterzi, p. 648; Senyen Kaplan, p. 414.
1179 Kuru, p. 626 ff.
1180 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 12/05/2008 numbered 2007/35895 E. and 2008/11994 K. (legalbank.com).

invalidity of the termination[1181]. In addition to this payment regarding the duration as 4 months at most that the employee is not engaged in work is one another consequence of invalid termination of the employment contract.

After an employee initiates a reemployment case, the relevant employment court may accept or reject employee's claims regarding the invalidity of the termination and reemployment. If the court accepts employee's claims, termination issued by the employer shall be deemed as invalid and it shall be decided to reemploy the employee in employer's workplace. In this circumstance, the court shall also determine the amount of the reemployment compensation and the payment regarding the duration that the employee is not engaged in work and his/her other rights on behalf of the employee. On the other hand, if employee's claims are not deemed as legitimate, the reemployment case shall be rejected and termination issued by the employer shall be an effective termination for employment relation.

However, according to one opinion in the doctrine, it is declared that while evaluating whether termination is valid or not, the court should also decide on reemployment or compensation in accordance with conditions of the concrete case by reviewing whether it is possible for an employee to work in the workplace with same working conditions, even though it may be considered as possible, whether it is possible to wait from parties to continue to employment relation constituting strict personal relation[1182]. However, in accordance with the current positive provision, it is not possible for an employee being in the scope of employment security to claim for reemployment compensation instead of reemployment. On the other hand, according to Swiss Law accepting the principle of freedom of termination, if right to terminate an employment contract is not used in accordance with the principle of good faith, parties of an employment contract may only claim for compensation. The amount of this compensation to be held by the court may be the wage of the employee for 6 months at most. Therefore, even though it is accepted that the right to terminate an employment contract is used against the principle of good faith, it shall have a similar effect as valid termination and in spite of termination made against good faith, it shall not be possible for an employee to be reemployed[1183].

According to another opinion in the doctrine, invalidity regulated by Article 21 of LC does not constitute consequences of invalidity completely. Indeed, in order to consider that

[1181] Özcan, p. 104.
[1182] Subaşı, p. 635.
[1183] Portmann, p. 647.

termination is completely invalid, it is needed that an employer is absolutely obliged to reemploy an employee and has to pay the payment regarding the total duration that the employee is not engaged in work. On the contrary, since it is provided an option for the employer to choose whether to reemploy the employee or not to reemploy the employee by paying compensation in LC, if it is decided on invalidity of termination, this invalidity is a unique type of invalidity[1184].

In the part of the petition regarding employee's claims, an employee shall request namely from the relevant court to decide on reemployment and invalidity of termination. With this regard, the reemployment compensation, which shall be between 4 and 8 months' wage of the employee, and the payment regarding the duration as 4 months at most that the employee is not engaged in work may be requested by the employee. Even though the employee does not request explicitly for the reemployment compensation and the payment regarding the duration that the employee is not engaged in work with a litigation petition issued for a reemployment case, the relevant court should decide *ex officio* on the reemployment compensation and the payment regarding the duration that the employee is not engaged in work in reemployment case[1185].

What should be understood from the invalid termination is controversial in the doctrine. According to *Çelik*, the invalidity of the termination means that termination does not constitute any consequence on the employment contract and the employment contract shall continue in the same manner[1186]. On the other hand, according to *Süzek* and *Başterzi*, it should be deemed that the employment contract is not concluded again, the employment contract having been concluded between parties continues without any interruption with judgment regarding the invalidity of the termination if it is decided on reemployment of the employee and the employer the reemploy the employee following employee's application. Yet, there is a restriction regulated by LC for the employee to request for reemployment compensation and payment regarding the duration that the employee is not engaged in work provided that the employee is not reemployed by the employer within the period of time specified by LC following employee's application. Employment relation that was not terminated until the time

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1184 Yiğit, p. 1159-1161.

1185 Ejder Yılmaz. "İşe İade Davasında Verilen Hükmün İcra Takibine Konulması". *Sicil İş Hukuku Dergisi*, I: 17, (March 2010): p. 48; Kar, p. 387; Ekonomi, Davet, Legalbank.com; Ünal Narmanlıoğlu. "İş Kanunu'un İşçiye Güvence Sağlayan Feshin Geçersizliği Davasının Yeni Çerçevesi (İş Mahkemkeri Kanunu'nun Feshin Geçersizliği Davasında Yaptığı Değişiklikler)". *Sicil İş Hukuku Dergisi*, I: 38, (2017): p. 20; Günay, Geçerli Fesih, p. 105; Manav, Yargılama Usulü, p. 263; Şahlanan, p. 62; Ertürk, Yasal Düzenleme, p. 952.

1186 Çelik, Güvence, p. 44.

that the employee is not reemployed should be deemed as being terminated by the employer at the time that the employee is not reemployed[1187]. *Ekonomi* declares that there is no provision regulating that the employment contract shall continue as if it was not interrupted when it is decided on the invalidity of the termination. Therefore, there is no absolute invalidity in this circumstance. The right to choose has been provided to the employer and the procedure shall continue in accordance with employer's choose[1188]. *Ekmekçi* declares that invalidity of termination means that termination never affected the employment contract before, that the employment contract continues without any interruption and if an employer does not accept reemployment of the employee, the employer will be responsible for compensation[1189]. According to *Demir,* it should be decided that the employment contract is suspended during the process of the case and the employer is default because of not providing any work to the employee within the duration being in conformity with Article 66 of LC if it is decided on invalidity of termination and therefore, it should be deemed that employee's seniority and employment contract continue until the time that the employer reemploys the employee or at the end of period of time as 1 month specified for the employer to reemploy the employee in workplace[1190]. On the other hand, according to *Narmanlıoğlu*, if it is decided on the invalidity of termination by arbitrators or the court, this does not mean that consequences of termination are avoided and the previous employment contract continues, it should be deemed that just a new employment contract shall be concluded between parties of employment contract by preserving employee's previous seniority on the condition that the employee is reemployed by the employer upon his/her application[1191]. *Mollamahmutoğlu, Astarlı* and *Baysal* declare that the circumstance should be evaluated according to whether the employee shall apply to the employer in order to be reemployed following the judgment indicating that termination is invalid. Judgment indicating invalidity of termination is suspended until employee's application in order to be reemployed. If the employee does not apply to the employer in order to be reemployed, it should be accepted that termination of the employment contract is valid from the beginning. Yet, provided that an employer does not reemploy the employee in spite of employee's application to the employer made within its duration, it should be deemed that

1187 Süzek and Başterzi, p. 659.
1188 Ekonomi, p. 16.
1189 Ekmekçi. İş Güvencesi Yasası, p. 107.
1190 Demir, İş Hukuku Uygulaması, p. 369.
1191 Ünal Narmanlıoğlu. "İş Güvencesi Hükümleri Çerçevesinde Süresinde İşverene Başvuruda Bulunup Davet Edildiğinde İşe Başlamayan İşçinin Davranışına Bağlanan Hukuki Sonuçlar". *Sicil İş Hukuku Dergisi*, I: 19, (September 2010): p. 20.

there is an invalid termination and not reemploying the employee constitutes a new termination of the employment contract[1192].

A. Employee's Application to Employer

In accordance with the explicit provision in LC, an employee is obliged to apply to an employer within 10 working days from the time that the judgment held by the relevant labour court or arbitrator/arbitrators regarding reemployment is served. If the employee does not apply to the employer within this period of time, termination made by the employer shall be deemed as a valid termination and the employer shall be responsible only for consequences of a valid termination. With another explanation, supposing that it is not applied to the employer within this specific period of time, as employer's obligation to reemploy the employee disappears, the employer shall not be obliged to pay the reemployment compensation and the payment regarding the duration that the employee is not engaged in work[1193].

Since this period of time specified for an employee to apply to the employer is occurred by working days, leaves may not be included in this duration. On the other hand, as there is no application to be made for official authorities, Saturdays shall also be included in this period of time[1194].

Besides, it is not obliged for the employee to submit judgment regarding reemployment to the employer with this application's suffix. It is sufficient that the reemployment case is finalized at the time of application and even though the finalization of this case is not known by the employer, it is an issue that may be figured out by the employer himself/herself[1195].

This period of time specified for an employee to apply to an employer shall commence from the time that finalized judgment regarding reemployment is served to the employee and it is not possible to accept that this period of time commences to pass from the time that judgment regarding reemployment is served orally[1196]. Also, even though it is possible that the employee may figure out the finalized judgment regarding reemployment by

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1192 Mollamahmutoğlu and others, p. 1111.

1193 Demir, Geçerli Sebep, p. 495-496.

1194 F. Burcu Savaş Kutsal. "Geçersiz Feshin Yaptırımları: İşe İade veya Tazminat". *Prof. Dr. Turhan Esener II. İş Hukuku Uluslararası Kongresi*, Ankara: Seçkin, (October 2017), p. 273.

1195 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 02/12/2008 numbered 2008/42501 E. and 2008/32931 K. (lexpera.com); Kar, p. 491; Savaş Kutsal, p. 275.

1196 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 09/11/2015 numbered 2014/18378 E. and 2015/31595 K. (legalbank.com).

himself/herself, this period of time as 10 working days shall start to pass from the time that this finalized judgment is served to the employee[1197]. Therefore, it is not possible to accept that the judgment is served to the employee when s/he figures out that the judgment is finalized via internet[1198].

Application to be made before the finalization of the judgment shall not be deemed as valid. In this case, following the finalization of the judgment, the employee should re-apply to the employer[1199]. The employer is not obliged to reemploy the employee before the finalization of the judgment[1200]. According to one opinion in the doctrine, this issue shall be the same for circumstances the judgment regarding reemployment was finalized but it has not been served to the employee yet and the employee applies to the employer in order to be reemployed before service of the final judgment. Therefore, this application should be deemed as invalid and the employee should apply to the employer one more time[1201]. However, in one of the Turkish Court of Appeals' judgments[1202], it is decided that the provision indicating that the employee should have applied to the employer within 10 working days is a regulation on behalf of the employee in accordance with Article 21 of LC. The legislative authority regulated a procedure that would be started from the service of the judgment as a unique regulation for reemployment cases since it is not possible for the employee to detect when the judgment was finalized certainly. Yet, it was possible for the employee not to apply to the employer in order to be reemployed in spite of detecting that the judgment had been finalized. Therefore, in the concrete case, it is evaluated that the employee may apply to the employer in order to be reemployed after figuring out that judgment regarding reemployment was finalized via NJIS and employee's application should be deemed as valid.

Furthermore, provided that an employee is represented by an attorney-at-law during the process of reemployment case, this period of time shall start to pass from the time that this judgment is served to his/her attorney-at-law. However, if judgment is served to the employee himself/herself, instead of his/her attorney-at-law, this period of time shall not start to pass

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1197 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 07/10/2020 numbered 2016/25551 E. and 2020/11050 K. (legalbank.com).

1198 Centel, p. 166.

1199 Ekmekçi and Yiğit, p. 701; Canbolat, p. 113; Yiğit, p. 1162-1163; Savaş Kutsal, p. 273.

1200 Canbolat, p. 101.

1201 Tulukçu, p. 335.

1202 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 03/06/2020 numbered 2016/16190 E. and 2020/4836 K. (legalbank.com).

until a new service is issued for employee's attorney-at-law or until his/her attorney-at-law is informed about the fact that this judgment is served to his/her client[1203]. On the other hand, provided that finalized judgment is served to employee's attorney-at-law, it is not obliged to serve this judgment to the employee separately[1204].

As there is no regulation regarding the form of application, an employee may apply to the employer orally or with a written form[1205]. Indeed, in one of its judgments, the Turkish Court of Appeals indicated that the application made via fax was valid by explaining that the application was not subject to any formal obligation[1206]. In addition to this, if it is understood from the content of the message which the employee wants to be reemployed, at the time that message is served to the employer, it should be accepted that the application is made by the employee[1207]. Also, in one of the Turkish Court of Appeals' judgments, it was evaluated that the collective application of the claimant and his/her friends to the employer, after the judgment regarding reemployment had been served, was made for being reemployed and not accepting these employee's entrances to the workplace was evaluated as avoiding their application[1208].

An employee may apply to the employer with *"courier"*. As a different from representative, a courier transfers one party's intention to the counter-party and s/he does not make any transaction on behalf of himself/herself or the relevant person. If an employee wants another employee or driver working in the same workplace to inform the employer about the fact that s/he reaches reemployment judgment and wants to be reemployed in the workplace, this employee or driver shall be deemed as courier. The fact that the courier transmits employee's intention to the employer should be deemed as a valid application. The important issue is that the employee informs the employer regarding his/her intention. The risk regarding the possibility that the courier does not transmit employee's intention to the employer belongs to the employee. In order to consider the existence of a courier, the employee should want the courier to inform the employer about his/her intention, otherwise, if

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1203 Mehmet Uçum, "İşe İade Taleplerinde Başlıca Sorunlar", Türk Hukuk Sitesi İşe İade Taleplerinde Başlıca Sorunlar - Hukuki İncelemeler Kütüphanesi (turkhukuksitesi.com).

1204 Centel, p. 166; Canbolat, p. 114.

1205 Ekmekçi and Yiğit, p. 700; Çelik and others, p. 592; Narmanlıoğlu, Hukuki Sonuçlar, p. 13; Yiğit, p. 1164; Savaş Kutsal, p. 274-275; Demir, Geçerli Sebep, p. 496.

1206 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 19/12/2017 numbered 2017/26994 E. and 2017/21810 K. (legalbank.com).

1207 Canbolat, p. 116.

1208 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 23/12/2008 numbered 2007/32482 E. and 2008/35247 K. (lexpera.com).

the employee talks about the fact that s/he receives reemployment judgment and s/he will come back to work again while hanging out with his/her friends, when employee's friends who heard this intention inform the employer about this, it may not be possible to consider that there is a courier in this circumstance and that there is a valid application to the employer made by employee[1209].

Furthermore, in one of the Civil General Chamber of the Turkish Court of Appeals' judgments[1210], it was decided that it was possible for the employee to inform the employer in order that s/he wanted to be reemployed by himself/herself, s/he may also have informed the employer with his/her representative or via the union of which s/he was member and there was not any regulation indicating that the employee should have applied personally. According to one opinion in the doctrine that we also support, since the right to apply to the employer is not a right that strictly binding with an individual's personality, a representative may also make this application without needing special authority[1211]. Indeed, according to this opinion, it is possible to consider that a reemployment case contains three degree; as the first degree is that the court or arbitrator decides on the invalidity of the termination, as the second degree is that the employee is obliged to apply to the employer in order to be reemployed within 10 working days from the service of the finalized judgment and as a third degree is that the employer informs the employee regarding the fact that s/he will reemploy the employee (or regarding the fact that s/he will pay the reemployment compensation by declaring that s/he will not reemploy). As a consequence of this, the power of attorney-at-law initiating a reemployment case also includes the authority to apply to the employer for reemployment (and also s/he is obliged to follow the attorney duty –including enforcement procedure- until the end of performance)[1212]. On the other hand, in accordance with another opinion in the opposite evaluation declared in one of judgments of the Turkish Court of Appeals, since the aim of provisions of employment security is enabling the employee to receive his/her rights, unless there is a really serious excuse (such as force majeure), the employee should apply to the employer personally as an active party, s/he is obliged to demonstrate that s/he is ready and is willing to work again by proving that; it may not be deemed as being appropriate that the employee applies to the employer in order to be reemployed with his/her representative

1209 Canbolat, p. 118.

1210 General Civil Chamber of the Turkish Court of Appeals' judgment dated 17/06/2009 numbered 2009/9-232 E. and 2009/278 K. (legalbank.com).

1211 Ejder Yılmaz. "İşe İade Başvurusunun Avukat Aracılığıyla Yapılabilirliği". *Sicil İş Hukuku Dergisi*, I: 14, June (2009): p. 131-132; Mollamahmutoğlu and others, p. 1118; Kar, p. 492.

1212 Yılmaz, Avukatın Başvurusu, p. 130.

(attorney-at-law) or via notary or telegram even though the employee is in same province with the workplace[1213]. It is not possible to accept this opinion. In fact, the fact that the employee should demonstrate that s/he is ready and willing to work again is not important at the time of application. This issue shall be important at the time that the employer calls the employee to be reemployed.

According to the Turkish Court of Appeals, even though attorney-at-law represents the employer during the process of reemployment case, application in order to be reemployed should be issued against the employer himself/herself and, unless a specific authority is provided for employer's attorney-at-law, application issued against employer's attorney-at-law should be deemed as invalid and transactions should be made by taking into account that this application is invalid[1214]. Indeed, the power of attorney-at-law representing the employer during the process of reemployment case shall be finalized at the end of this case and, unless a specific authority is provided for him/her, attorney-at-law may not reemploy any employee on behalf of the employer[1215]. The Turkish Court of Appeals decided in one of its judgments regarding this issue that the power of attorney was provided only for following a case, attorney-at-law was not authorized for other cases or enforcement procedures on behalf of the employer, there was not any obligation for employer's attorney-at-law to continue as representative regarding reemployment claims, as a need of LC, the fact that application has been issued against the employer or the fact that the employer had been informed about invalid application made by the employee but s/he did not reemploy the employee should be proved by the employee[1216].

Even though an employee initiates a reemployment case also against primary employer, the employer who may reemploy this employee is sub-employer and in order to be reemployed, this employee should apply to sub-employer. Whereas, for collusive sub-employment relations, judgment regarding the reemployment of the employee should be held

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1213 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 02/12/2008 2008/42501 E. and 2008/32931 K. (NJIS); even though the prevailing perspective in the doctrine that we also support declares that employee's application to the employer in order to be reemployed may be made by attorney-at-law, in the opposite evaluation of this judgment, the abovementioned evaluation has been declared.

1214 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 09/10/2018 numbered 2016/12 E. and 2018/21484 K. (Yargıtay Karar Arama).

1215 Canbolat, p. 119.

1216 7th Civil Chamber of the Turkish Court of Appeals' judgment dated 10/02/2014 numbered 2013/17948 E. and 2014/3443 K. (Yargıtay Karar Arama).

for primary employer[1217] and the employee should apply to primary employer in order to be reemployed[1218]. According to one opinion in the doctrine, if application regarding reemployment of the employee is issued against primary employer instead of sub-employer and during this period, the period of prescription specified for the employee to apply to the employer in order to be reemployed passes, as the intention for being reemployed is shown by the employee, by taking the principle of interpretation on behalf of the employee into account, it should be accepted that the employee may repeat his/her application and may apply to sub-employer within reasonable period of time[1219].

For temporary employment relations, an employee is obliged to apply to the employer providing this employee to other employers as private employment agencies[1220]. Whereas, if there is a legally valid temporary employment relation, reemployment case initiated against the employer receiving these temporary employees from private employment agencies shall be rejected with the reason of absence of the right to be sued[1221].

If there is a joint employment, as an employee may apply to all employers together, it is also possible for this employee to apply to only one of them in order to be reemployed[1222].

Although the main principle is that an employee applies to an employer within 10 working days, this employee shall not be responsible for delays occurring during shipping[1223]. With this regard, as an example, the fact that the employee sends this application via notary is sufficient, it is not important whether notary warning is served within 10 working days or not[1224]. Yet, it should be indicated immediately that the responsibility regarding the delay occurring during shipping because the employee sends notary warning in the last day, although s/he knows that there will be able to be delay for shipping, shall belong to the

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1217 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 21/02/2005 numbered 2004/32666 E. and 2005/5738 K. (legalbank.com); 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 17/10/2004 numbered 2004/25957 E. and 2004/22245 K. (legalbank.com).

1218 Yiğit, p. 1166; Uğur, p. 76; Göktaş, Asıl İşveren, p. 63.

1219 Yiğit, p. 1166; for the evaluation in the doctrine indicating that employee's application to primary employer should be deemed as valid, by evaluating concrete circumstances in conformity with the good faith, whether the employee is informed or not should be detected on the condition that sub-employment relation continues, otherwise, another 10 working days passing from the time that it is undertood that employee's application is issued misapprehensively should be provided for the employee to apply to sub-employer: Tulukçu, p. 338.

1220 Kar, p. 494.

1221 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 19/03/2007 numbered 2007/3158 E. and 2007/7418 K. (legalbank.com); Canbolat, p. 122.

1222 Kar, p. 494.

1223 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 22/03/2010 numbered 2008/22949 E. and 2010/7943 K. (legalbank.com).

1224 Yılmaz, Avukatın Başvurusu, p. 129-130; Kar, p. 494; Kılıçoğlu/ Şenocak, p. 481.

employee because of his/her fault and it shall not be deemed that the employee is in good faith and that application is made within its period of time and also employee's behavior which is against good faith shall not be protected by both LC and practice[1225].

As it is not possible to evaluate an application that does not contain the intention to be reemployed in the workplace as being in conformity with the explicit provision of LC, accepting that a fake application has legal effects shall be against the aim of employment security and codified procedure[1226].

According to principle case-laws of the Turkish Court of Appeals, the employee should be sincere while applying to the employer, the fact that the employee applies to the employer only in order to benefit from legal consequences of employment security shall not be deemed as a valid application, if the employee applies to the employer in order to be reemployed within the period of time specified by LC but does not come back to work after employer's calls, it should be accepted that employee's real purpose is not to be reemployed and in accordance with Article 21 of LC, it should be evaluated that valid termination constitutes its own consequences[1227]. With another explanation, the fact that the employee does not apply to the employer within the specific period of time in accordance with provisions of employment security or in spite of application, s/he does not accept the offer made by the employer and does not come back to work shall give rise to validity of termination made by the employer[1228]. As a consequence of this, it shall not be possible for the employee to request for reemployment compensation and payment regarding the duration that the employee is not engaged in work even though it is decided on the invalidity of termination by the court or arbitrator/arbitrators. Yet, the severance payment, the payment regarding annual leaves and the payment in lieu of notice should be paid to the employee if their conditions occur[1229]. Also, the Turkish Court of Appeals explained this issue with explanations as follows [1230];

1225 Canbolat, p. 115.

1226 Narmanlıoğlu, Hukuki Sonuçlar, p. 14.

1227 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 14/10/2008 numbered 2008/29383 E. and 2008/27243 K. (legalbank.com).

1228 Narmanlıoğlu, Hukuki Sonuçlar, p. 19.

1229 7th Civil Chamber of the Turkish Court of Appeals' judgment dated 07/03/2016 numbered 2015/6023 E. and 2016/5504 K. (legalbank.com).

1230 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 10/10/2011 numbered 2011/6908 E. and 2011/2518 K. (legalbank.com).

"Employee's application for reemployment should be sincere. Even though in reality the employee does not want to be reemployed, the application made by the employee only in order to benefit from consequences of the reemployment case shall not be evaluated as a valid application for reemployment.

In the concrete case, it is certain in the scope of the file that the claimant applied to the employer with a reemployment claim on 18/09/2006 and the employer sent a warning regarding the fact that s/he would reemploy the employee on 16/10/2006. It is understood from witnesses' declarations and minutes prepared in the workplace that the claimant went to the workplace with his/her attorney-at-law on 16/10/2006 and the employee did not start to work by declaring that s/he would not work with other doctors, his/her table was changed, the table provided for him/her was for nurses. Whereas, there is a paper submitted to the file indicating that the employee would start to work part-time in Health Institution on the same day. Changing of claimant's table and allegation regarding the fact that this table is provided for nurses may not be deemed as a change in working conditions or aggravation of them, and also the fact that another doctor is reemployed is an issue regarding the need and there is no illegality to employ two doctors at the same time"

and decided to overturn the judgment of the first-instance court with reasons that while it should have been needed to reject the case of the doctor that it had been decided on his/her reemployment and had applied to the employer in order to be reemployed but that it was understood from his/her behaviors shown in the workplace that s/he was not sincere to commence working and that it was clear that s/he had applied to the employer only in order to benefit from legal monetary consequences of reemployment case even though in reality s/he did not have intention to commence working again; accepting this case was not appropriate.

On the other hand, the fact that an employee works for another employer from the time of the finalization of the judgment to the time of application issued by the employee against the employer or the time that s/he comes to work following employer's invitation shall not affect the validity of the application. Indeed, the important issue is whether the employee commences working in the workplace at the time that s/he is invited[1231].

B. Employer's Obligation to Reemploy Employee

In accordance with the explicit provision of LC, when it is decided by the court or arbitrators that any valid reason is not demonstrated by the employer for termination or reason demonstrated by the employer is not valid, an employer has to reemploy the employee within 1 month. This regulation is an absolute imperative provision. Besides, this period of time is

[1231] Ekmekçi and Yiğit, p. 707.

not provided for the employer to re-invite the employee to commence working, this is regulated for the employer to reemploy the employee within this period of time[1232].

As an employer may choose to reemploy the employee in accordance with his/her right to choose, s/he may also choose to pay the reemployment compensation instead of reemployment of the employee[1233]. It is possible that the employer shows his/her intention regarding the fact that s/he does not want to reemploy the employee explicitly or implicitly. As this period of time may expire without any declaration of the employer regarding the reemployment of the employee, the employer may serve his/her negative decision to the employee regarding this issue[1234]. On the other hand, after the employer declares his/her intention regarding whether s/he would reemploy the employee or not, s/he may not take this declaration back anymore. With another explanation, after the employer declares that s/he would not reemploy the employee, even though it is within 1 month, the employer may not request from the employee to commence working again by abandoning his/her previous declaration[1235].

Employer's invitation regarding the fact that s/he accepts employee's intention to commence working should be declared to employee himself/herself. Indeed, the Turkish Court of Appeals decided that the invitation served to employee's attorney-at-law was not valid[1236].

An employer should make his/her invitation in accordance with the principle of good faith. An employer may make his/her invitation in any form that s/he wants. In addition to this, making this invitation in written form makes it easy for the employer to prove it. Any pre-condition should not be indicated in a written invitation[1237]. Otherwise, it shall not be accepted that the invitation is made in conformity with its procedure[1238].

After this invitation is sent by the employer, the employer shall not be responsible for delays that may occur during the shipping of this invitation. Indeed, the Turkish Court of

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1232 Mollamahmutoğlu and others, p. 1120-1121; Ekmekçi and Yiğit, p. 702; Çelik and others, p. 595; Tulukçu, p. 345.

1233 Centel, p. 163; Süzek and Başterzi, p. 657; Kar, p. 495; Süzek, Yargı Kararı, p. 12.

1234 Savaş Kutsal, p. 278.

1235 Canbolat, p. 129.

1236 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 20/05/2014 numbered 2012/10994 E. and 2014/16072 K. (Yargıtay Karar Arama); 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 27/11/2018 numbered 2016/13996 E. and 2018/21664 K. (Yargıtay Karar Arama).

1237 Ekmekçi and Yiğit, p. 704; Süzek and Başterzi, p. 669; Savaş Kutsal, p. 291.

1238 Canbolat, p. 123-124.

Appeals also indicated that the employee should have commenced to work as a need of the principle of good faith even if the invitation was served to the employee late because of faults and delays in shipping that were not predicted by the employer[1239]. The reasonable period of time in order to commence working in workplace again shall be deemed as 2 days at most if the employee resides in the same province with the workplace. Provided that invitation is served to the employee in different province, the period of time as 4 days at most specified for travel period regulated by Article 56 of LC shall be deemed as a reasonable period of time. In this regard, the employee should apply to the employer within 4 days[1240]. On the other hand, the Turkish Court of Appeals evaluated in one of its other judgments that provided that the employer had sent an invitation to the employee when there had been a really short period of time in order that 1 month had expired and predicted that invitation would be served to the employee after 1 month, employer's action would not be protected and therefore, such invitation may not have been deemed as a valid invitation[1241].

When an employee applies to the employer in order to be reemployed following the finalized judgment regarding reemployment and the employer declares that s/he will reemploy the employee but the employee does not give a positive response to this invitation, it should be considered that consequences of valid termination occur by accepting as if the employee had never applied to the employer[1242].

Furthermore, the Turkish Court of Appeals examines whether the employee is reemployed for his/her previous work and whether previous equipment is provided for the employee or not, in order that there is a real reemployment[1243]. In fact, the employee who will be reemployed may not be deemed as a new employee who will commence working in the workplace and increases having been made on employee's previous wage should also be taken into account for employee's current wage[1244]. With this regard, the fact that the employee is reemployed for less precious work and previous working conditions are changed or less wage when compared to the previous employee's wage is paid should be deemed as an

1239 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 25/03/2010 tarihli 2008/22949 E. and 2010/7943 K. (legalbank.com).

1240 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 18/11/2008 numbered 2007/32727 E. and 2008/31214 K. (legalbank.com).

1241 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 11/05/2016 numbered 2015/2713 E. and 2016/11801 K. (legalbank.com).

1242 Tulukçu, p. 343.

1243 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 13/05/2008 numbered 2007/42521 E. and 2008/12221 K. (legalbank.com).

1244 Çankaya and others, p. 297.

essential change in working conditions in accordance with Article 22 of LC and it is not obliged for the employee to commence working with this new working conditions[1245].

The Turkish Court of Appeals indicated in one of its judgments regarding this issue that after application of the employee to the employer, as a rule, employee should have been reemployed with previous working conditions which were at the time of termination and regarding his/her previous work following the judgment regarding reemployment and invalidity of termination, since there was not any opportunity to reemploy the employee having applied to the employer in order to be reemployed in previous work or workplace, initially the employer should have offered a work offer without making any essential change on working conditions in accordance with Article 22 of LC, if the employee did not accept employer's offer, provided that there was no essential change on working conditions, it would accept that the employee never applied to the employer and termination having been deemed as invalid became a valid termination, otherwise, if employer's offer constituted an essential change on working conditions, in that circumstance, the employer should have acted in accordance with Article 22 of LC[1246].

The Turkish Court of Appeals decided in its other judgment that in the concrete case that the employee had been invited to commence working in Büyükçekmece district because the workplace being in Gebze district had finalized its activity following employee's application to the employer in order to be reemployed after finalization of reemployment case, it was clear that the employee had not been invited to commence working for his/her previous work, the offer regarding commencing to work in another district constituted an essential change on working conditions, the fact that the employee had not accepted employer's offer may not have been deemed as employee's insincerity to be reemployed, as it was understood that employee had not been reemployed in accordance with the court judgment, the time that the employee had not been reemployed should have been deemed as the termination date[1247].

Provided that a new duty is offered for the employee or a new offer is made for the employee because of the finalization of workplace's activity, this offer should not constitute an essential change in employee's working conditions[1248]. Also, according to the Turkish

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1245 Centel, p. 173.

1246 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 19/03/2012 numbered 2012/10514 E. and 2012/8813 K. (legalbank.com).

1247 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 18/03/2019 numbered 2015/35204 E. and 2019/5919 K. (legalbank.com).

1248 Eyrenci and others, (2020), p. 219.

Court of Appeals, an employee is not obliged to accept an offer made for commencing working in a workplace being in the scope of group companies but not for commencing working in the workplace that the employee worked in before[1249]. Besides, provided that there is an offer which is against this condition and the employee rejects this offer, this issue should be deemed as not reemploying the employee[1250].

As it is indicated above, as a rule, an employee should be reemployed for the previous and for the previous workplace that this employee was working in at the time of termination whose invalidity was detected with a judgment. Previous conditions and the same amount of wage should be paid to the employee. On the other hand, provided that it is decided on invalidity of termination with reason that the employee did not act in conformity with the principle of last resort in the judgment of reemployment case, the work or workplace that the employee shall be reemployed for will be different. Indeed, it is accepted that the employee may not be reemployed for his/her previous work or workplace (such as transfer of workplace, department, finalization of activity and health issue). Yet, it is declared that there is an opportunity for the employer to reemploy the employee in another department and therefore, termination is invalid. Since an employee applying to the employer in order to be reemployed following the judgment may not be reemployed for previous work or workplace, initially, the employer should offer a new work for the employee without issuing any essential change on working conditions, if it is not possible, s/he should offer for essential change in accordance with Article 22 of LC[1251].

Even though an employee accepts employer's offer and starts to work, if an employer compels this employee to work for a different work instead of the work specified in the invitation, this employee is not obliged to work in this work. In this circumstance, it shall be accepted that the employee is not reemployed by the employer. Whereas, provided that the employee commences working in duty shown by the employer by accepting this new offer even though s/he is not obliged to work, this shall not be deemed as a new employment contract but it shall be estimated as the continuance of the previous employment contract[1252].

1249 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 21/03/2016 numbered 2014/35250 E. and 2016/6633 K. (legalbank.com).

1250 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 03/06/2004 numbered 2004/1080 E. and 2004/13416 K. (legalbank.com).

1251 Ertürk, p. 335-336.

1252 Canbolat, p. 124.

The fact that after an employee goes to the workplace in order to be reemployed by accepting employer's offer but the employer does not let this employee work in the workplace may be an action that is against the principle of good faith. Especially if the employer knowing that the employee is working for another employer invites the employee with the thought that this employee shall not accept this offer and this employee resigns from his/her work by believing employer's offer, this employee may initiate a legal procedure for his/her credits such as the severance payment, the payment in lieu of notice. Especially, even though the employer indicates that the employee shall be reemployed with the same wage and social rights in his/her invitation, if it is wanted the employee to work in conditions being against this invitation and it is clear that the employee would not accept these conditions meaning non-reemployment of the employee, the employer is liable for damages arising from this circumstance[1253].

Although an employee is invited for the same workplace and same work, if this employee having commenced working endures psychological assault, it should be deemed that the invitation is not issued in accordance with its procedure[1254].

An employer should be sincere and serious about reemploying the employee. With this regard, in order to consider that an employee is reemployed by the employer, the reemployment of the employee should not be subject to any condition[1255]. Provided that the employer makes a condition on the reemployment of the employee, this invitation may not be deemed as being issued in accordance with its procedure and the employer shall be responsible for consequences of the invalid termination. The Turkish Court of Appeals also evaluated that since the employer made a condition on reemployment as being accomplished from an exam by making training condition for the employee before reemployment, it would be deemed that the employer made a condition on reemployment, with this regard, employer's purpose was no reemploying the employee and that employer's intention regarding reemployment of the employee was not sincere[1256]. In another judgment, the Turkish Court of Appeals indicated that, because the employer obliged the employee to submit some documents before commencing to work, s/he made a condition on reemployment and therefore, employer's intention to reemploy the employee was not sincere and the invitation

[1253] Canbolat, p. 102.
[1254] Ekmekçi and Yiğit, p. 704.
[1255] Süzek and Başterzi, p. 669; Kar, p. 496.
[1256] General Civil Chamber of the Turkish Court of Appeals' judgment dated 01/10/2014 numbered 2013/22-1158 E. and 2014/743 K. (legalbank.com).

having been made by the employer and depended on a condition regarding reemployment of the employee was not a real invitation for reemployment[1257].

The Turkish Court of Appeals has recently placed some explanations as follows [1258];

> *"The fact that the employee commenced working following the finalization of the judgment regarding the invalidity of termination and terminating employment contract in the same day with the reason having occurred before termination and having been shown as termination reason shows that the employer was not sincere with the invitation, s/he did not have an intention for reemployment and, as a short explanation, the employer did not want to reemploy the employee. In this circumstance, it should be accepted that the employer chose to pay reemployment compensation. The employee being the claimant has right to claim for the reemployment compensation and the payment regarding the duration that s/he is not engaged instead of reemployment and invalidity of termination in work since s/he is not reemployed. As it is explained, in …. 02.2008 …contract was terminated by not reemploying the employee after the finalization of the judgment regarding reemployment of the employee. It is not possible to claim for invalidity of termination and reemployment again as a need of LC. The employer being the defendant chose to pay the reemployment compensation instead of the obligation to reemploy the employee. Instead of rejecting the case, accepting the case with written form is not accurate"*

in one of its judgment and provided that the employee commences working again following employer's invitation and after a short period of time, employee's employment contract is terminated with termination reason whose invalidity was detected by the finalized judgment, it is decided that the employer did not choose to reemploy the employee in reality but that s/he chose to fire the employee by paying compensation regulated by LC.

Besides, since the working position for which the employee is invited is not available, it is not possible to evaluate that the employer is not sincere in reemploying the employee. Indeed, as it is not possible for the employer to know whether the employee shall commence working again or not, it is not either possible to consider that the employer is obliged to fire the employee working in this position. Since the fact that the employee works for another employer at the time of the invitation regarding reemployment shall not solely show that the employee is not sincere to be reemployed, it is not either possible to consider that the employer is obliged to fire employees working for this position before the employee

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1257 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 23/02/2017 numbered 2017/3537 E. and 2017/2503 K. (legalbank.com).

1258 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 08/02/2013 numbered 2012/25581 E. and 2013/2315 K. (legalbank.com).

commences working in this position[1259]. However, in one of the judgments of 22nd Civil Chamber of the Turkish Court of Appeals, it is accepted that reemployment of the employee whose employment contract had been terminated and who received judgment regarding reemployment was impossible in practice in one sense because s/he was working in Libya at the time that notice regarding start of work was issued and it was decided that the employee may not have benefited from consequences of the finalized judgment regarding reemployment[1260].

Even though it is within 1 month, an employer may not take his/her intention back regarding the fact that s/he will not reemploy the employee and s/he may not change it after this intention was served to the employee. It should be indicated that period of time as 1 month specified for the employer to reemploy the employee in LC shall be effective during this period of time unless the employer does anything. From the time that the employer declares that s/he won't reemploy the employee, this period of time shall become meaningless. Indeed, the employer shall finalize the employment contract by informing the employee regarding the fact that s/he will not reemploy the employee, after this, employee's declaration to commence working again shall be accepted as an offer for concluding a new employment contract between parties[1261].

For all degrees as termination of employment contract, reemployment case and reemployment of the employee, the important thing is protection of and continuance of employment relation. Employer's offer is also for the continuance of the employment relation. For circumstances where it is not possible to wait from an employer to maintain employment relation because of employee's faulty behaviors, it is not either waited from the employer to invite the employee to commence working. The employee avoiding continuance of employment relation because of his/her own fault shall be responsible for consequences of this. In this circumstance, the employee may not benefit from legal consequences of the reemployment[1262].

1259 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 28/06/2022 numbered 2022/6020 E. and 2022/8366 K. (legalbank.com).

1260 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 09/11/2012 numbered 2012/20499 E. and 2012/24680 K. (legalbank.com).

1261 Centel, p. 174; Sarıbay, p. 257.

1262 Canbolat, p. 124.

C. Legal Remedies of Reemployment Cases

The feature of reemployment judgments is controversial in the doctrine. According to one opinion in the doctrine, since the reemployment compensation and the payment regarding the duration that the employee is not engaged in work will be calculated in accordance with the wage paid to the employee at the time of the beginning of litigation if they are requested by an employee and since an employer is obliged by the relevant court to pay these credits, these credits should be deemed as judgment for performance[1263]. On the other hand, according to scholars supporting the opposite opinion, provided that it is decided on the reemployment of the employee, the payment regarding the duration that the employee is not engaged in work should be deemed as judgment for performance; on the other hand, judgment regarding the fact that employee's request for reemployment is rejected by the court, judgment regarding reemployment and judgment regarding the reemployment compensation should be deemed as declaratory judgment[1264]. In accordance with the prevailing perspective that we also support, judgment regarding the reemployment of the employee should be deemed as declaratory judgment[1265]. The judgment declares that termination is invalid and employment relation having been interrupted with this termination should continue[1266]. Occurrence of other consequences of employment security and being able to request them will not occur in accordance with the judgment to be made by the relevant court regarding the invalidity of termination but whether they will occur or not shall be determined in accordance with parties' behaviors to be performed following judgment regarding the invalidity of the termination[1267].

The speciality of the declaratory judgment is not to be issued for enforcement procedure with judgment, except the part of it held for judicial expenses[1268]. A person who has a declaratory judgment regarding monetary credit may initiate an enforcement procedure without judgment or s/he may initiate a case for performance by using this judgment as a certain proof and by receiving another judgment from this case, s/he may initiate an enforcement procedure with judgment with this new judgment[1269]. Therefore, this judgment regarding reemployment of the employee is not a judgment for performance and it is

1263 Tulukçu, p. 294-295.
1264 Ertürk, Yasal Düzenleme, p. 955-956.
1265 Süzek and Başterzi, p. 656; Mollamahmutoğlu and others, p. 1109; Yılmaz, Hükmün İcrası, p. 50; Özkaraca, Eleştirel Bakış, p. 128; Kar, p. 381-382; Özcan, p. 100; Akyiğit, p. 297.
1266 Kar, p. 381; Astarlı, p. 223.
1267 Narmanlıoğlu, p. 627.
1268 Sarper Süzek. "İşe İade Davalarında Yargı Kararı". *Sicil İş Hukuku Dergisi,* I: 40, (2018): p. 12.
1269 Yılmaz, Hükmün İcrası, p. 45; Kar, p. 507-508.

sufficient to decide on reemployment of the employee in this case. It is not obliged to request for reemployment compensation and payment regarding the duration that the employee is not engaged in work with reemployment claim. The court should decide on these credits in addition to the reemployment of the employee in such case *ex officio*[1270].

On the other hand, the part of judgment regarding fees for attorneys-at-law and judicial expenses held by the court has an enforcement power and therefore, they may be requested by initiating enforcement procedure with judgment. According to one opinion in the doctrine, there is no need for finalization of this case[1271]. Indeed, there is no provision in LC regulating that judgments regarding fees for attorneys-at-law and judicial expenses may not be requested with enforcement procedure with judgment without being finalized. With another explanation, the general rule regarding the fact that fees for attorneys-at-law and judicial expenses may not be requested until the case is finalized is not effective for reemployment cases[1272]. The Turkish Court of Appeals previously supported this evaluation with explanations as follows[1273];

> *"In Article 21 of Labour Code numbered 4857, even though there is not a special provision indicating that judgments regarding reemployment cases may not be subject to enforcement procedure with judgment in accordance with this article, it is not appropriate to be decided by the court that the enforcement procedure should be annulled with the reason that the judgment of the labour court may not be requested with enforcement procedure without being finalized".*

Then, the Turkish Court of Appeals changed its evaluation and indicated that the part of the judgment regarding fees for attorneys-at-law and judicial expenses held by the relevant labour court may not have been requested with enforcement procedure with judgment before the relevant reemployment case was finalized[1274].

Also, according to the supporting evaluation in the doctrine, since judgments regarding reemployment may not be requested with enforcement procedure with judgment without being finalized, it shall be considered the same for the parts of judgments regarding

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1270 Manav, Yargılama Usulü, p. 263; Şahlanan, p. 62; Ertürk, Yasal Düzenleme, p. 952.

1271 Yılmaz, Hükmün İcrası, p. 51; Mollamahmutoğlu and others, p. 1109.

1272 Yılmaz, Hükmün İcrası, p. 508.

1273 12th Civil Chamber of the Turkish Court of Appeals' judgment dated 13/03/2007 numbered 2007/1628 E. and 2007/4593 K. (legalbank.com).

1274 12th Civil Chamber of the Turkish Court of Appeals' judgment dated 11/10/2018 numbered 2018/4072 E. and 2018/9696 K. (kazanci.com).

judicial expenses and fees for attorneys-at-law and therefore, they may not be requested with enforcement procedure with judgment without being finalized[1275].

Provided that the employment contract of the employee being in the scope of employment security is terminated by the employer with invalid reason, it is obliged for the employer to reemploy the employee within the period of time specified in LC. Whereas, if the employee is not reemployed within this period of time, it is regulated by LC that the employer shall be responsible for consequences of his/her action.

The reemployment compensation and the payment regarding the duration that the employee is not engaged in work and other rights are two types of legal remedies that may be held in the event that the employee is not reemployed by the employer. In order to consider these consequences, the procedure regulated by LC should be followed without any defect[1276].

Following the finalization of the judgment regarding reemployment, an employer should reemploy the employee within a specific period of time. Following this reemployment procedure, the reemployment of the employee shall not be deemed as another new employment contract[1277]. Even the rule is that an employer should reemploy the employee, an employer may also choose not to reemploy the employee. In one of judgments of the Turkish Court of Appeals, it is indicated that the burden of proof regarding the fact that the employee applied to the employer to be reemployed but s/he was not reemployed by the employer belongs to the employee. In this regard, provided that the employee is not reemployed by the employer, the employee has to prove claims regarding the fact that s/he is not reemployed[1278].

The fact that the employer does not reemploy the employee shall be against provisions of employment security protected by LC and in this circumstance, an employer shall be obliged for some measures such as the reemployment compensation, the payment regarding the duration that the employee is not engaged in work, the severance payment and the payment in lieu of notice. In this part of our study, these credits will be explained in detail.

1275 Özbek, p. 18-19.

1276 Narmanlıoğlu, Hukuki Sonuçlar, p. 19.

1277 Ekmekçi and Yiğit, p. 711.

1278 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 20/03/2012 numbered 2012/1451 E. and 2012/4933 K. (legalbank.com).

1. The Payment Regarding the duration that the employee is not Engaged in Work

As it is indicated in LC, an employee whose employment contract is terminated by the employer without any valid or justified reason and who is protected by provisions of employment security with LC has right to claim for his/her rights from which s/he may not have benefited during the litigation procedure. This credit is called in practice and doctrine as the payment regarding the duration that s/he is not engaged in work and other rights.

As it is explained above explicitly, judgment regarding the reemployment of the employee is not a judgment for performance but it is a declaratory judgment[1279]. As a consequence of this, the Turkish Court of Appeals had decided, before a new regulation came into effect regarding this issue, that the payment regarding the duration that the employee had not been engaged in work and the reemployment compensation should have been detected as a duration.

In accordance with the amendment made by the Code numbered 7036 on 12/10/2017, it is regulated that courts and arbitrator/arbitrators should calculate the reemployment compensation and the payment regarding the duration that the employee is not engaged in work in monetary terms by taking employee's wage at the beginning of the case into consideration. Therefore, LC determines that if it is decided on the invalidity of the termination, these payments and compensations should be calculated in monetary terms. This regulation came into effect in order to prevent the beginning of new litigations as a need of the procedural economy[1280].

Besides, even though it is regulated that the reemployment compensation and the payment regarding the duration that the employee is not engaged in work should be calculated in monetary terms instead of determining as a period of time with an amendment made in LC, as this credit depends on a condition regarding whether the employee applies to the employer and the employer does not reemploy the employee, invalidity of termination shall not change the qualification of reemployment as declaratory judgment and therefore, this judgment which is not a judgment for performance shall not be used for enforcement procedure with

[1279] Özkaraca, Eleştirel Bakış, p. 128.
[1280] Mollamahmutoğlu and others, p. 1112.

judgment[1281]. According to one opinion in the doctrine, even though since the reemployment compensation depends on a condition regarding whether the employee applies to the employer and the employer does not reemploy this employee, it may not be used for enforcement procedure with judgment; judgment about the payment regarding the duration that the employee is not engaged in work is a judgment for performance and it should be used for enforcement procedure with judgment[1282]. According to another opinion in the doctrine, in order that judgment regarding the reemployment compensation may be used for enforcement procedure with judgment, as it is in French Labour Law, the court should invite the employee and employer's representative personally to the hearing and, if the judge evaluates that termination does not depend on any real and serious reason, s/he may suggest the reemployment of the employee to parties of the case. If one of parties of the case objects to reemployment of the employee, the judge shall decide on a compensation whose amount is not less than employee's 6 months wage, without any difference whether there is employee's damage or not[1283].

Provided that an employee initiates enforcement procedure with a judgment against the employer with a judgment regarding reemployment and an execution order is served to the employer, this employer may request for cancellation of the execution order with a complaint manner in accordance with Article 16 of the Enforcement and Bankruptcy Code numbered 2004[1284]. In this circumstance, although the employee who is not reemployed despite judgment regarding the invalidity of the termination should initiate an enforcement procedure without judgment for his/her credits arising from employment relation, if s/he wants to receive these credits with enforcement procedure with judgment, s/he should initiate a new case regarding these credits and after receiving a judgment for performance regarding these credits, s/he may receive his/her credits with enforcement procedure with judgment[1285]. Whereas, the termination reason shall not be examined again in this case, judgment having been held in the reemployment case shall be deemed as certain proof in this case[1286].

1281 Mollamahmutoğlu and others, p. 1114; Süzek, Yargı Kararı, p. 15-16; Astarlı, Değerlendirme, p. 46; For the opposite opinion in the doctrine: Muhammet Özekes. "7036 sayılı Kanunla Yapılan Değişikliklerin İşe İade Davasının Niteliği ve İcrasına Etkisi". *Sicil İş Hukuku Dergisi*, I: 39, (2018): p. 69 ff.

1282 Ertürk, Yasal Düzenleme, p. 958-960.

1283 Süzek; p. 633; Süzek, Yargı Kararı, p. 18; Şahlanan, p. 64; for more information about French Law system regarding the reemployment compensation: Çopuroğlu, p. 175.

1284 Süzek; 630; Süzek, Yargı Kararı, p. 16; Yılmaz, Hükmün İcrası, p. 51.

1285 Süzek and Başterzi, p. 656.

1286 Ekmekçi and Yiğit, p. 718-719.

As it is understood from the explanation of LC, this right is not a compensation but it is a payment regarding employee's wage. It is a rule regarding the fact that wages having occurred during the period of time that the employee was not employed by the employer shall be paid. It demonstrates that the employment relation continues despite the invalid termination of the employment contract. Following deciding on the invalidity of termination and reemployment of the employee, it should be accepted that the employment relation continues without any interruption and it is terminated at the time that the employee is not reemployed[1287]. Indeed, the Turkish Court of Appeals evaluates that the invalidity of the termination is suspended during the judicial procedure[1288].

In accordance with the statutory provision of LC, it is clear that the duration that the employee is not engaged in work is limited employee's wage for 4 months. In this regard, even though the case lasts as long as it is needed, the employee shall only have a right to claim for payment as 4 months' wage at most. With the claim that the payment regarding the duration that the employee is not engaged in work had been against to Turkish Constitution, it had been brought to the Turkish Constitutional Court. However, Turkish Constitutional Court decided with the majority that when the judicial duration predicted by LC and procedure were taken into account, that circumstance did not constitute any unbalance between an employer and an employee regarding rights and obligations that had to be and it did not constitute any circumstance that was against the Turkish Constitution[1289]. This evaluation is criticized by indicating that it may be obliged for an employee to endure negative consequences of long duration of litigation and it would be more proper to regulate that payment was paid for employee's wages regarding all duration that the employee was not engaged in work[1290].

The term as other rights regulated by LC contains rights that may be calculated with money such as bonus, food allowance, allowance for transportation, fuel allowance and transportation service. As a result of this, the amount of the payment regarding the duration that the employee is not engaged in work shall be calculated by taking employee' gross wage into account[1291]. With another explanation, regarding this credit having been mentioned

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1287 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 06/12/2004 numbered 2004/28355 E. and 2004/26161 K. (legalbank.com).

1288 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 15/06/20015 numbered 2014/12857 E. and 2015/20531 K. (legalbank.com).

1289 Constitutional Court's judgment dated 18/12/2008 numbered 2005/2 E. and 2008/181 K. published on 07/10/2009 in Official Gazette.

1290 Süzek and Başterzi, p. 677.

1291 Süzek and Başterzi, p. 677; Şakar, p. 132; Kar, p. 483.

before, they should be calculated as if the employee worked during this period of time and all rights that may be calculated with money should be taken into account. Furthermore, payments that should occur only with employee's working such as payment regarding extra work, payment regarding weekly leave, payment regarding general leaves or bonus depending on selling rate may not be considered as credits should be paid in the concept of the payment regarding the duration as 4 months that the employee is not engaged in work[1292]. Indeed, the Turkish Court of Appeals also evaluates that while calculating the duration that the employee is not engaged in work, payments that the employee does not actually benefit from and that s/he does not have to make any additional payment in order to substitute these payments during the period of time that s/he is not engaged in work such as allowance for transportation and allowance for having a home will not be added to the amount of gross wage[1293].

According to one opinion in the doctrine, since the payment regarding the duration that the employee is not engaged in work shall occur and shall be due after the employee was not reemployed by the employer, if there is a written notice regarding the fact that the employer declares that s/he won't reemploy the employee, this payment's amount should be calculated by taking employee's wage at the time this notice is served into account; on the other hand, if there is not any notice, the amount of payment should be calculated in accordance with the employee's wage at the time that period of time as 1 month expires[1294]. However, in accordance with the explicit provision of LC, this payment should be calculated by taking employee's wage at the time of the beginning of the case into account. Besides this regulation is criticized by doctrine with the reason that that causes for the employee not to benefit from increases in wage to be made after the beginning of the litigation procedure[1295].

As the payment regarding the duration that the employee is not engaged in work shall be paid to the employee whether the employee is reemployed by the employer or not, if it is decided on invalidity of termination, this employee's right shall be due following employee's application to the employer in order to be reemployed[1296]. This credit is the consequence of

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1292 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 18/11/2008 numbered 2008/ 32727 E and 2008/ 31214 K. (legalbank.com); 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 03/11/2021 numbered 2021/ 11159 E. and 2021/ 15307 K. (legalbank.com); 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 15/02/2022 numbered 2022/548 E. and 2022/1762 K. (legalbank.com).

1293 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 05/10/2021 numbered 2021/ 9402 E. and 2021/ 13674 K. (legalbank.com).

1294 Mollamahmutoğlu and others, p. 1115.

1295 Mollamahmutoğlu and others, p. 1115; Astarlı, Değerlendirme, p. 47.

1296 Yılmaz, Dava, p. 91.

the reemployment case and there is no need to warn or put the employer in default separately after employee's application for reemployment[1297]. For the payment regarding the duration as 4 months at most that the employee is not engaged in work and other rights determined in the reemployment case, the highest interest applying to deposits regulated under Article 34 of LC shall apply to this payment[1298].

Provided that there is a valid sub-employment relation between sub-employer and primary employer, both employers concluding sub-employment relation shall be responsible for consequences specified for the reemployment case. Even though the Turkish Court of Appeals[1299] decides that sub-employer is responsible for employee's payment regarding the duration that s/he is not engaged in work without examining whether the duration that the employee is not engaged in work happened during sub-employment relation concluded between sub-employer and primary employer, this evaluation is criticized with an evaluation in the doctrine by declaring that credit regarding the duration that the employee is not engaged in work is not a compensation but it is a payment, primary employer's responsibility is restricted with the duration that the employee worked for him/her and his/her work and as a result of this, supposing that duration when the employee is considered to have worked is not in the period of time that sub-employment relation lasts, it should not be deemed that sub-employer is responsible for the payment regarding the duration that the employee is not engaged in work[1300].

According to the explicit provision of LC, provided that an employee is reemployed, the severance payment and the payment in lieu of notice, which were previously paid in cash, shall be deducted from the amount of the payment regarding the duration that the employee is not engaged in work and other rights. On the other hand, it is not possible to deduct these credits from the reemployment compensation[1301]. Since an employee does not repay these credits to the employer, the employer may not laten employee's reemployment and reemployment of the employee shall not be subject to such pre-requirement[1302]. As this deduction to be made is employer's right, there is no need for employee's consent.

1297 Tulukçu, p. 369.

1298 Yiğit, p. 1178; Kar, p. 486-487; Mollamahmutoğlu and others, p. 1134.

1299 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 28/06/2012 numbered 2012/14 E. and 2012/14855 K. (legalbank.com).

1300 Göktaş, Asıl İşveren, p. 64.

1301 Günay, p.141; Süzek and Başterzi, p. 670; Alp, p. 24-25.

1302 Alpagut, Esaslı Değişiklik, p. 103; Günay, Geçerli Fesih, p. 138.

Any interest for payment made in the scope of deduction should not be made and the transaction regarding deduction should be made without interest. Indeed, invalid termination causing the payment of compensation occurs because of employer's fault[1303]. Besides, on the one hand, according to one opinion, employee's severance payment should be repaid with the highest interest applying to deposits[1304]; on the other hand, according to another opinion in the doctrine, by declaring that application of the highest interest applying to deposits is restricted with only not paying the severance payment at the time that it should be paid, an employee is obliged to pay the real amount of money that was paid to him/her as the severance payment, not to pay the severance payment and therefore, interest of delay is legal interest[1305].

Another problem regarding deduction is the remaining of the extra payment from deduction even though an employer deducts the amount of the severance payment and the payment in lieu of notice having been paid before by using his/her legal right. An employer may not make any additional deduction for the remaining amount after the deduction of amount of these credits from the amount of the payment regarding the duration that the employee is not engaged in work. In this circumstance, according to one opinion in doctrine, the employer may take consent from the employee regarding the fact that seizing employee's one to fourth wage in accordance with Article 35 of LC or if s/he may not take consent, s/he may initiate an enforcement procedure or litigation procedure[1306].

The Turkish Court of Appeals, regarding whether expenses will be paid by the employer or not if the employee whose employment contract is terminated with invalid reason and to whom a private health insurance is provided has to make expenses for health during these 4 months, decided that wage and other rights should have been calculated as if the employee had been working during the 4 months passing from the time of invalid termination, scopes of health insurances should have been compared by bringing documents such as hospital records regarding expenses that the employee had made and documents such as proposal directive about the organization of workplace regarding health expenses and following that, it should have been decided on expenses having been made during 4 months period of time starting from the time of invalid termination[1307]. Whereas, the Turkish Court of Appeals' this judgment is criticized with reason that expenses regarding health may not be

[1303] Kar, p. 500; Uysal İbat, p. 128.
[1304] Demir, İş Hukuku Uygulaması, p. 364; Senyen Kaplan, p. 424.
[1305] Mollamahmutoğlu and others, p. 1123; Tulukçu, p. 354.
[1306] Kar, p. 500-501; Uysal İbat, p. 128; Çankaya and others, p. 312-313.
[1307] 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 02/06/2020 numbered 2016/15918 E. and 2020/4682 K. (legalbank.com).

included in the payment regarding the duration that the employee is not engaged in work, this credit is a wage and it may only be claimed as compensation[1308].

The Turkish Court of Appeals evaluates that if it is decided on the invalidity of termination and reemployment of the employee, the employment contract continues without any interruption and if the employee is not reemployed, it shall be deemed that termination is made at the time that the employee is not reemployed, 4 months duration that the employee is not engaged in work and other rights shall be taken into account while calculating the severance payment, the payment in lieu of notice and payment regarding annual paid leave[1309]. In other words, as the employee has right to claim for the amount difference regarding 4 months at most that s/he is not engaged in work by the employer, this period of time should be added to employee's seniority as if s/he worked in this duration[1310]. As an example, since the seniority of the employee working for 2 years and 10 months shall be calculated as 3 years and 2 months, the notice period shall be increased from 42 days to 56 days and payment for annual leave shall be calculated by taking 3 years into account[1311]. Furthermore, according to one opinion in the doctrine that we also support, as there is no time restriction in order to include this period of time in accordance with LC, the whole duration that the employee is not engaged in work should be taken into account while calculating the amount of the severance payment and the payment in lieu of notice[1312].

Even if an employee works for another employer during the period of time that s/he is not engaged in work by the employer, s/he should also benefit from this payment without any deduction. Indeed, if it is accepted that this employee should take the payment regarding the duration as 4 months at most for the whole duration that s/he is not engaged by the employer in work, it should also be excused that the employee works for another employer during this period[1313]. It is also indicated by LC that this payment is not determined for the period of time that the employee does not work, this is regulated for the period of time that the employee is not engaged in work by the employer[1314]. Therefore, the employee shall receive this payment

1308 Çelik and others, p. 605.
1309 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 24/12/2009 numbered 2008/12584 E. And 2009/36995 K. (lexpera.com).
1310 Ekmekçi and Yiğit, p. 710.
1311 Kar, p. 485.
1312 Mollamahmutoğlu and others, p. 1131.
1313 Mollamahmutoğlu and others, p. 1132.
1314 Tulukçu, p. 374.

whether s/he works for another employer or not[1315]. The Turkish Court of Appeals also indicates that employee's work for another employee during the period of time that s/he is not engaged in work shall not affect the payment regarding the duration as 4 months at most that the employee is not engaged in work[1316].

Although an employee takes payment from unemployment insurance within the duration of the reemployment case, an employer is obliged to pay the payment regarding the duration that the employee is not engaged in work engaged in work and his/her other rights[1317]. Regulation as *"holder of the right regarding unemployment insurance benefit shall be detected by considering the last day of bonuses having been paid because of reemployment case in accordance with Article 21 of Labour Code numbered 4857 and bonuses are paid for the duration the employee is not engaged in work"* is added to Article 50 of the Unemployment Insurance Code numbered 4447 with the Code numbered 6552 and dated 10/09/2014. With this regulation, the Turkish Court of Appeals' practice indicating that unemployment insurance benefits having been paid during that period of time should be repaid by the employer if the employee has right to receive the payment regarding the duration as 4 months at most that s/he is not engaged in work is legalized[1318].

Since this right of claim shall be due after employee's application to the employer in order to be reemployed following the finalization of the judgment regarding reemployment, it is not appropriate to apply interest for this credit from the time of the beginning of the reemployment case[1319]. With another explanation, it shall not be possible to apply interest for a credit that has not been due yet[1320]. For this credit, the highest interest applying for deposits determined by Article 34 of LC shall apply. Provided that it is claimed for the payment regarding the duration that the employee is not engaged in work and other rights in the application made in order to be reemployed, it should be accepted that the employee is put in

1315 Eyrenci and others, (2020), p. 220.

1316 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 17/12/2019 numbered 2016/11408 E. and 2019/22589 K.

1317 Şakar, p. 131.

1318 10th Civil Chamber of the Turkish Court of Appeals' judgment dated 05/04/2010 numbered 2009/10508 E. and 2010/4814 K.(lexpera.com).

1319 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 30/10/2003 numbered 2003/ 18346 E and 2003/ 18347 K. (legalbank.com).

1320 Günay, İş Güvencesi, p. 201.

default with the application and provided that this credit is not paid by the employer, interest should apply from the time that the application is served[1321].

In accordance with clear provisions of LC, this regulation about the payment regarding the duration that the employee is not engaged in work is an absolute imperative regulation and it may not be changed with individual employment contracts or collective labour contracts in any way.

In accordance with the Directive of Social Insurances Institution dated 24/04/2006 and with 16/370 Suffix Number; documents about the payment regarding the duration as 4 months at most and payment of other credits that should be subject to bonus to be paid by the employer to the employee requesting for his/her reemployment from the employer within 10 working days with the judgment held by labour courts or private arbitrator/arbitrators in accordance with Article 21 of LC should be submitted to SSI. With this regard, the beginning of the duration regarding documents of monthly bonus and service documents shall be deemed as the time that the employment contract subjected to the case regarding the invalidity of the termination is terminated. Therefore, for the payment regarding the duration as 4 months at most that the employee is not engaged in work and other payment that should be subject to a bonus; monthly bonus and service documents should be submitted from the time of termination date.

2. The Reemployment Compensation

In accordance with the explicit provision of LC, provided that an employee is not reemployed by the employer within 1 month, the employer shall be obliged to pay the compensation whose amount shall be between 4 and 8 months' wage of the employee. This compensation to be paid by the employer is called by doctrine and practice as *"reemployment compensation".*

Since the reemployment compensation does not depend on the existence of employee's damage, it is a lump sum compensation. The duty and authority to calculate the amount of this compensation belong to the relevant court or arbitrator/arbitrators examining concrete cases[1322].

[1321] 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 24/12/2019 numbered 2017/24285 E. and 2019/24240 K. (legalbank.com).

[1322] Savaş Kutsal, p. 286.

Although it is indicated in LC that the amount of this compensation shall be between 4 and 8 months' wage of the employee, difference regarding the application of this provision happened among courts and it was reviewed by the Turkish Court of Appeals General Assembly on the Unification of Judgments. The Assembly decided that every concrete case should have been examined separately by placing with explanations as follows[1323]; *"because termination and unemployment reasons may be changed in every specific case, there is no need to unify of judgments with the reason that it shall not be appropriate to make restriction with Decision on Unification of Judgments, which is binding, when judicial discretion to be made in accordance with the features of every specific case is left by the legislative authority to the judge"* in its judgment .

Furthermore, different opinions among Regional Courts of Appeals occurred and this issue was reviewed by 9th Civil Chamber of the Turkish Court of Appeals in accordance with Article 35/3 of the Code numbered 5235 amended with Article 92 of the Statutory Degree numbered 696 codified by Article 87 of the Code numbered 7079. The Special Chamber by giving place to explanations as follows;

> *"Therefore, reasons such as concrete conditions regarding termination, the seriousness of employer's fault and behavior which becomes certain with invalid termination of employment contract and is against the law, whether employee's rights regarding personality are breached or not, the seriousness of employee's tangible and intangible damages, his/her age, the possibility of finding a new job and termination reason should be considered wholly by taking the reasoning of and aim of LC and the amount of the reemployment compensation should be detected"*

decided that this conflict shall not solved by itself for the reason that the amount of the reemployment compensation should be calculated in accordance with the conditions of every specific case[1324].

Whereas, in one concrete judgment of 9th Civil Chamber of the Turkish Court of Appeals, explanations as follows[1325];

> *"By taking seniority periods determined in Article 53 of LC regarding annul paid leaves, our chamber indicates that for an employee whose seniority is more than 6 months but less than 5 years, employee's 4 months' wage; for an employee whose seniority is more than 5 years but less than 15*

[1323] The Turkish Court of Appeals General Assembly on the Unification of Judgments' judgment dated 13/04/2018 numbered 2017/3 E. and 2018/3 K. (legalbank.com).

[1324] 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 18/03/2021 numbered 2021/1681 E. and 2021/6382 K. (legalbank.com).

[1325] 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 08/02/2010 numbered 2010/1020 E. and 2010/2744 K. (legalbank.com).

years,employee's 5 months' wage of; for an employee whose seniority is more than 15 years, employee's 6 months' wage shall be calculated as the reemployment compensation and this amount may be increased to 8 months' wage of the employee at most by taking termination reasons into account."

are placed and it is indicated that some circumstances such as termination reason and employee's seniority should be taken into account while calculating the reemployment compensation. The fact that seniority periods determined for annual leaves which do not have any legal relation with the reemployment compensation and which have another purpose when compared with the calculation of the reemployment compensation is criticized and it is indicated that even though this issue is an important criterion, it may not be deemed as only criterion and otherwise, this shall remove judges' judicial discretions[1326].

Another criterion that the Turkish Court of Appeals takes into account while determining the amount of the reemployment compensation is termination reason. The Turkish Court of Appeals decided in one of its judgments regarding this issue that for termination of the employment contract of the employee having been worked in the workplace for more than 6 years, since the case initiated by the employee for right to legal remedies was effective for the termination of the employment contract, the reemployment compensation should have been paid to the employee as 7 months' wage of the employee[1327].

Even though retirement of the employee had been shown as a termination reason of employment contract and it had been decided on invalidity of termination, the Turkish Court of Appeals had been evaluating that the reemployment compensation should have been calculated as 4 months' wage of the employee without taking employee's seniority into account[1328] but then, it abandoned this opinion and in its recent judgments, it was indicate that even if employee's employment contract was terminated because of retirement, it was understood that a lot of employees were working in workplace even if they received right to be retired and there was not any general application in workplace regarding retirement; by evaluating that judgment regarding invalidity of termination was appropriate, when employee's seniority and termination reason were taken into consideration, it was decided that

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1326 Süzek and Başterzi, p. 675.

1327 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 24/10/2016 numbered 2016/24821 E. and 2016/23895 K. (Yargıtay Karar Arama).

1328 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 04/02/2013 numbered 2012/28221 E. and 2013/3963 K. (legalbank.com).

it should have been more proper to calculate the reemployment compensation as 6 months' wage of the employee instead of 4 months[1329].

On the other hand, the Turkish Court of Appeals evaluates that even though judicial discretion regarding the amount of reemployment compensation is provided by LC to judges with the condition that lower and upper limits are considered, provided the judge decides on more than the lower limit of the reemployment compensation, the reason of this decision should be demonstrated in the judgment[1330].

The reemployment compensation shall be calculated by taking employee's bare wage into account[1331]. The Turkish Court of Appeals also supports this opinion[1332]. In addition to this, Bursa Regional Court of Appeals placed some explanations as follows[1333]; *"besides, while calculating the reemployment compensation, without adding additional payments (such as food, transportation and fuel) and bonuses, employee's gross bare wage should be taken into account"* in its recent judgment.

Provided that an employee is not reemployed within 1 month, the reemployment compensation shall be due[1334]. However, the reemployment compensation would be subject to interest from the time that the employer is put in default. If the employer had not been put in default before initiating the legal procedure, interest would apply from the time of the beginning of the case initiated for the reemployment compensation following the reemployment case or amendment[1335]. Following the regulation of the mandatory mediation procedure, the reemployment compensation shall be subject to interest from the time that the last mediation minute is issued. The Turkish Court of Appeals indicates that if the employee claims for payment of the reemployment compensation while applying to the employer in order to be reemployed, there is no need to put the employer in default anymore[1336].

1329 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 23/06/2015 numbered 2015/15213 E. and 2015/22816 K. (Yargıtay Karar Arama).

1330 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 01/12/2003 numbered 2003/19181 E. and 2003/19777 K. (legalbank.com).

1331 Mollamahmutoğlu and others, p. 1126; Süzek; p 643; Kar, p. 479; Eyrenci, Değerlendirme, p. 37.

1332 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 01/12/2003 numbered 2003/19181 E. and 2003/19777 K. (legalbank.com).

1333 9th Civil Chamber of Bursa Regional Court of Appeals' judgment dated 30/12/2020 numbered 2020/2564 E. and 2020/2586 K. (lexpera.com).

1334 Yılmaz, Dava, p. 91.

1335 22nd Civil Chamber of the Turkish Court of Appeals' judgment dated 24/12/2019 numbered 2017/24285 E. and 2019/24240 K. (legalbank.com).

1336 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 06/05/2010 numbered 2008/25904 E. and 2010/12431 K. (kazanci.com).

According to one opposite opinion in the doctrine, this credit is detected with a judgment regarding invalidity of termination and provided that an employee applies to the employer in order to be reemployed, default occurs in accordance with Article 107 of TCO and therefore, there is no need for an addition warning for putting the employer in default anymore and from the time that this credit is due, the interest should be applied[1337]. On the other hand, the rate of interest applying for the reemployment compensation is the rate of legal interest[1338].

In accordance with the explicit explanation of LC, the provision regarding the reemployment compensation is an absolute imperative provision and it may not be changed either with an individual employment contract or collective labour contract in any way. On the contrary, for an employee who is not in the scope of the employment security system, condition aggravating consequences of unjustified termination, as an example subjecting penalty clause, shall be deemed as valid[1339]. According to the Turkish Court of Appeals, provided that an employee is not in the scope of employment security system, it should be evaluated by taking into consideration whether conditions of the penalty clause occurred or not and provide that it is understood that the line was not followed for decreasing procedure, it should be accepted that penalty clause is valid with the limit of the reemployment compensation that may be claimed by the employer regarding his/her seniority period[1340].

To all these, as it is explained above in detail, because reemployment cases are declaratory cases, it should not be decided on judgment regarding reemployment case as *"collecting"* for the reemployment compensation and the payment regarding the duration that the employee is not engaged in work and other rights. Indeed, it is explained in one of

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1337 Kar, p. 486.

1338 Çankaya and others, p. 307; Abdurrahman Duran. "Yargıtay Kararları Işığında İşe İade Ertesinde Açılan Alacak Davaları". *İş Hukuku ve Sosyal Güvenlik Hukuku Türk Milli Komitesi 30. Yıl Armağanı*, Ankara (2006), p. 342; Ömer Ekmekçi. "Yargıtay'ın İşe İade Davalarına İlişkin Kararlarının Değerlendirilmesi". *Legal İş Hukuku ve Sosyal Güvenlik Hukuku Dergisi*, Issue: 1, (2004), p. 177.

1339 Ekmekçi and Yiğit, p. 712; for the evaluation in the doctrine indicating that absolute imperative provisions regulated under Article 21/last of LC should not be applied strictly, especially when compared with autonomy of collective labour contracts and parties' intentions may not be deemed as an evasion of law: Merve, Akbak and Ramazan, Yücel. " İşverenin Fesih Hakkına İlişkin Toplu İş Sözleşmesinde Düzenlenen Sınırlamalara Uyulmamasının Sonuçları". *Sakarya Üniversitesi Hukuk Fakültesi Dergisi*, V: 10, I: 1: p. 25.

1340 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 09/03/2022 numbered 2022/1282 E. and 2022/3041 K. (legalbank.com); for another judgment indicating that provided that a penalty clause such as the reemployment compensation is determined in a collective labour contract for employees who are not in the scope of employment security, Article 21/1-last of LC shall apply for this penalty clause and the amount of the reemployment compensation shall be between 4 and 8 months' wage of the employee by taking employee's seniority into consideration: 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 21/03/2012 numbered 2010/25818 E. and 2012/9484 K. (legalbank.com).

Istanbul Regional Court of Appeals' judgments[1341] with explanations as follows *"since the payment regarding the duration that the employee is not engaged in work and the reemployment compensation are declaratory judgments depending on the invalidity of termination and being able to apply after the application of claimant and non-reemployment of the employee, they should be held without a judgment regarding collecting of them"*

In this regard, in accordance with our opinion, the judgment should be regulated as follows; *"invalidity of termination of employment contract - .... On the condition that the claimant is not reemployed, declaring that it is needed to collect the compensation whose amount is ... TL as employee's..... months' wage of the employee from the defendant and to pay it to the claimant, declaring that it is needed to pay ..... TL for the payment regarding the durations as 4 months that the employee is not engaged in work and other rights to the claimant, -.... TL for attorney fee and .... TL for legal fees and ... TL for service and post expenses, as a total .... TL judicial expense shall be collected from the defendant and shall be paid to the claimant"*

As a consequence of its qualification as compensation, it is subject to the statue of limitation for 10 years from the time of its maturity in accordance with Article 146 of TCO[1342].

3. Repayments of the Payment in Lieu of Notice and the Severance Payment

Provided that an employee is not reemployed by the employer after his/her application to be reemployed, it shall be deemed that the employment contract is terminated by the employer at the time that it is explained that the employee shall not be reemployed or at the end of period of time as 1 month in order to reemploy the employee. Indeed, following the finalization of the judgment regarding the invalidity of the termination held by the relevant court or arbitrator/arbitrators and application made by the employee within its period of time, termination becomes as invalid and the employment contract continues as if it was not terminated before. In order that this termination occurs in accordance with its procedure, a notice period should be provided for the employee or the payment in lieu of notice should be paid in cash while terminating the employment contract[1343]. If there is a termination with notice period, provided that their conditions occur, the severance payment and the payment in

[1341] 27th Civil Chamber of the Turkish Court of Appeals' judgment dated 10/06/2020 numbered 2018/3470 E. and 2020/1236 K. (Lexpera.com).
[1342] Kar, p. 479.
[1343] Mollamahmutoğlu and others, p. 1127-1128.

lieu of notice should be paid to the employee by the employer. The wage to be taken into account while calculating these credits is employee's last wage at the time that s/he is not reemployed and the maximum limit of the severance payment shall also be determined in this manner. Therefore, the period of time starting from the time of invalid termination to the time that the employee is not reemployed should be added to the working period of the employee and the amount of the severance payment, the payment in lieu of notice and payment regarding annual leaves should be calculated by taking this employee's working duration into account.

Although the severance payment and the payment in lieu of notice were paid before because of invalid termination, the amount difference happening because of adding the period of time that the employee did not work from the time of invalid termination to the time that s/he is not reemployed should be paid to the employee[1344]. However, according to the Turkish Court of Appeals, if it is decided on the invalidity of termination and reemployment of the employee, the employment contract continues without any interruption and if the employee is not reemployed, it shall be deemed that termination is made at the time that the employee is not reemployed, 4 months duration that the employee is not engaged in work and other rights shall be taken into account while calculating the severance payment, the payment in lieu of notice and payment regarding annual paid leave[1345].

On the other hand, employee's severance payment and payment in lieu of notice should be calculated by taking employee's last wage and payments having been paid before should be deducted from this final amount[1346]. Furthermore, while deducting these payments having been paid before, any interest shall not be applied for the severance payment and the payment in lieu of notice[1347].

Besides, according to one opinion in the doctrine, it is not important whether the termination that was deemed as invalid had been made in accordance with its procedure or not, in other words, whether the notice period determined in Article 17 of LC had been

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1344 Eyrenci, Değerlendirme, p. 37-38.

1345 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 24/12/2009 numbered 2008/12584 E. And 2009/36995 K. (lexpera.com); 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 05/06./2014 numbered 2012/14019 E. and 2014/18274 K. (Yargıtay Karar Arama).

1346 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 22/03/2010 numbered 2008/22949 E. and 2010/7943 K. (legalbank.com); 9th Civil Chamber of the Turkish Court of Appeals' judgment dated 05/06./2014 numbered 2012/14019 E. and 2014/18274 K. (Yargıtay Karar Arama); Ekonomi, İhbar Tazminatı, legalbank.com.

1347 Yılmaz, Dava, p. 90.

provided for the employee or not; as termination that had been made by the employer and was deemed as invalid becomes invalid following employee's application to the employer in order to be reemployed, the notice period that was provided for that invalid termination shall not constitute any importance[1348]. Indeed, previously, 9th Civil Chamber of the Turkish Court of Appeals had indicated that even though the employer had terminated the employment contract by providing a notice period, when termination had been deemed as invalid, since the notice period provided for termination having been deemed as invalid would not have been effective and the employee had been called by the employer to be reemployed but s/he had not been worked for his/her previous work would have been deemed as termination of employment contract; the employer should have paid the payment in lieu of notice to the employee. If the payment in lieu of notice had been paid before by the employer, it should have been possible to deduct this amount from the amount that the employee had had right to receive. Yet, if termination issued by providing a notice period to the employee had been deemed as invalid, as the employee had performed his/her duties against the employer during the notice period, it had not been possible to reduce the payment in lieu of notice or to repay it[1349].

The Turkish Court of Appeals abandoned its opinion regarding this issue and it decided that if notice period was provided or the payment in lieu of notice was paid in cash for termination that was deemed as invalid, it was not possible for an employee to claim for the payment in lieu of notice with the reason that an employer did not provide notice period even though s/he did not reemploy the employee[1350]. In another word, even though it shall be accepted that the employment contract is terminated at the time that the employee is not reemployed by the employer in spite of employee's application in order to be reemployed, the payment in lieu of notice shall not occur again on behalf of the employee when s/he is not reemployed in the workplace by the employer[1351].

Termination shall not be effective at the time that the termination notice is served to the employee but it shall be effective at the end of the notice period. As a result of this, the employment contract shall be binding during termination notice, employee's and employer's rights and debts arising from this employment contract shall continue to apply, the employee is deemed as having insurance and insurance bonuses to be paid to SSI should be paid in

[1348] Mollamahmutoğlu and others, p. 1128.

[1349] 9th Civil Chamber of the Turkish Court of Appeals'decision dated 13/05/2008 numbered 2007/42521 E. and 2008/12221 K. (legalbank.com).

[1350] 9th Civil Chamber of the Turkish Court of Appeals'decision dated 16/02/2021 numbered 2019/8192 E. and 2021/3909 K. (legalbank.com).

[1351] Subaşı, p. 626.

conformity with valid employment relation. Therefore, the notice period should be taken into account while calculating aids specified for long and short-term insurance that the employee may benefit from[1352].

[1352] Ekonomi, İhbar Tazminatı, legalbank.

CONCLUSION

An employment contract concluded between an employee and an employer shall constitute a constant and dependent relation. Because of this feature of employment contract, it is obligatory to form a fair balance between parties of employment relation. With this regard, the employment security system, which is one of measures determined by Labour Code numbered 4857, is accepted in order to provide this fair balance. Employment security is a Labour Law establishment that restricts employer's right to terminate an employment contract so as to protect employee's job. However, as the main purpose of employment security to find a fair balance, it may not be deemed that employment security is against employers' benefits.

In the Turkish Labour Law System, it is not deemed as appropriate to cover all employees within the scope of employment security. Therefore, some conditions are determined in order to be in the scope of employment security system. These conditions are (i) existence of 30 or more employees working within the same working sector in the workplace, (ii) being employed in accordance with provisions of Labour Code numbered 4857 or the Code on Regulation of Relations Between Workers Working in Press Profession and Employers numbered 5953, (iii) having a seniority for a duration as 6 months or more, (iv) not to be appointed as employer's representatives specified in Turkish Labour Code numbered 4857, (v) being employed with an employment contract with indefinite duration and (vi) the existence of the termination issued by the employer. An employee has to meet all of these conditions at the same time in order to be evaluated as being in the scope of employment security.

As the first condition, there has to be 30 or more employees working in employer's workplace. There is no regulation regarding the quality of the employment relation. Therefore, regardless of the fact that there is an employee working part-time or full-time; for a definite or for an indefinite duration or remotely, all employees employed by the employer should be taken into account while determining the number of employees. However, while calculating the number of employees, we are going to take people that may be considered as employee in the account. Apprentices, interns and people taking vocational education may not be deemed as an employee, and therefore, they are not going to be taken into account while determining the number of employees working in the workplace. Sub-employers' employees and employees of the private employment offices may not be added to this number because

they may not be deemed as employees of employers providing these employees from different employers.

The Turkish Court of Appeals has decided in different cases that employees working in workplaces situated abroad should be taken into consideration while detecting 30 employees. Even though this evaluation of the Turkish Court of Appeals may be deemed as on behalf of employees, it has a problematic nature. In which working sector employees working abroad work and whether they may be deemed as employees or not shall be demonstrated as such problems that may occur while detecting this number of employees. However, it should be indicated that should employees submit proofs eliminating all of these doubts, employees working in workplaces situated abroad should be evaluated as being in the scope of the number of employees sought by Labour Code numbered 4857.

In order to evaluate circumstances such that the employee initiated a reemployment case against termination but it has not been finalized yet or it is decided on the invalidity of the termination of the employment contract but the employee has not applied to the employer so as to be reemployed and his/her 10 working days period indicated in Labour Code numbered 4857 has not been expired yet as preliminary issues, these employees should be deemed as being necessary for determining the number of 30 employees. However, if the number of employees working in employer's workplace is 30 or more even without these employees or it does not make any difference to add these employees to the number of employees in order to reach 30 employees, these circumstances should not be deemed as a preliminary issue in the relevant case.

When there is a transfer of a part of the workplace, provided that employees being subject to transferring procedure were in the scope of employment security in transferor's workplace but the number of employees of transferee is less than 30, they are going to be excluded from the scope of employment security. The fact that employees were in the scope of employment security when they were working for transferor does not give them an acquired right to be in the scope of employment security. In the same way, following the transfer of a part of the workplace being in the scope of employment security, provided that the number of employees of transferor falls below 30, employees working in the remained part of the workplace shall be deemed as being excluded from the scope of employment security.

As another condition for employees to be in the scope of employment security, an employee has to be deemed as being in the scope of Labour Code numbered 4857 or the Code on Regulation of Relations Between Workers Working in Press Profession and Employers numbered 5953. Therefore; officers, workers being subject to the Turkish Code of Obligations numbered 6098 and the Maritime Labour Code numbered 854 may not benefit from employment security.

Although it is regulated under Article 8/2 of the Code titled Occupational Safety and Security numbered 6331 that termination of employment contract of workplace doctor and occupational safety professionals made by employers just because of reporting to the Ministry of Labour and Social Security or any other relevant institution is forbidden and these employees won't be deprived from their rights in anyway and otherwise, compensation not being less than the amount of wage as 1 year concluded by the employment contract shall be obliged to the employer; when it is considered that this mentioned compensation to be obliged shall be concerning only with terminations or deprivations of rights to be made just because of reporting to the Ministry of Labour and Social Security or other relevant institutions, workplace doctor and occupational safety professional may be dismissed or discriminated just because of performing their duties; it should be more proper to make specific regulations including circumstances of dismissal of workplace doctors and occupational safety professionals or of their deprivation from their rights due to their duties.

Provisions of employment security shall apply to employees obtaining 6 months or more seniority. While determining the beginning of the duration of the seniority, not the time that the employment contract is concluded but the time that the employee commences working *de facto* shall be taken into consideration. Provided that the employer does not allow him/her to commence working although the employee is ready to commence working and submits his/her workforce to the employer, it shall be appropriate to consider that employee's seniority starts from the time that s/he submits his/her workforce to the employer. In the same way, when parties conclude an employment contract but decide between them that the employee shall commence working at a later date, it should be more appropriate for the essence of the waiting period to take the date that the employee commences working into account, not the date of the signing of the contract. In addition to this, if the employee did not commence working because of a reason arising from his/her fault, it should be deemed that his/her seniority did not start and the time that the employee commenced working *de facto* shall be taken into account while determining the seniority period. Additionally, it should be

indicated that the probation period should also be taken into account while calculating employee's seniority period if it is concluded within the employment contract.

Employee's seniority shall be calculated by summing up times that the employee spent in one or different workplaces of the employer. The important issue in this regard is not spending time in *"same"* workplace but it is important that the employer is the same. It is not important that previous durations to be summed up are concluded with an employment contract with definite duration, as long as the employee performed his/her duties under an employment contract with indefinite duration at the time of his/her last working duration. However, the duration spent as an apprentice and intern shall not be taken into account while determining the seniority period because individuals may not be deemed as employees for this period of time.

As the last day of the working, the time that the employment contract is terminated shall be taken into account. It is not possible for the duration determined for the notice period to be taken into account while determining the seniority period. In addition to this, when an employer terminates employee's employment contract shortly before the fulfillment of employee's seniority period just in order that the employee may not benefit from the protection of employment security, if it is proven that the employment contract is terminated before the expiration of the seniority period as 6 months just for preventing the employee to benefit from the protection of employment security, according to our opinion, employee should be able to benefit from the protection of employment security and may initiate a case for reemployment.

As the need of conditions of employment security, provisions of employment security may apply neither for employer's representatives and employer's deputy representatives managing and administrating the whole enterprise nor employer's representatives managing and administrating the whole workplace and having authority to employ and to dismiss employees. Employees working titles while working in employer's workplace are not sufficient to deem employees as such type of employer's representatives. Also, in order to exclude these employees from the scope of employment security, the real authorities provided by the employer to employer's representatives should be determined by relevant labour courts. On the other hand, conditions specified for employer's representatives managing and administrating the whole workplace are determined as cumulative. Therefore, in order that employer's representatives managing and administrating the whole workplace may be

excluded from the protection of employment security, these representatives should have authority to manage and to administrate the whole workplace and also have authority to employ and to dismiss employees at the same time.

It is regulated explicitly by the legislative authority that provisions regarding employment security only apply to employees working in the scope of employment contracts concluded for indefinite duration. However, just because of the fact there is a contract with definite duration in the case, this reemployment case should not be rejected by the relevant court immediately. The judge should examine whether there is an objective and an essential reason in order to conclude an employment contract with definite duration or not. In order that employees working in the scope of employment contracts with indefinite duration are deemed as being in the scope of the protection of employment security, it does not matter that this contract concluded for part-time or full-time work or it regulates, on-call working on the condition that this contract is concluded for an indefinite duration. Additionally, since seasonal employment contracts are deemed as employment contracts with indefinite duration as a rule, employees working with seasonal employment contract may be deemed as being in the scope of employment security.

An employment contract with minimum duration is not finalized automatically following the expiry of the minimum time. Only with the expiry of this time, parties of the employment contract get their authority again to terminate the employment contract. In this regard, if an employer terminates an employment contract during or after the period of minimum time, employees working with these employment contracts may benefit from the protection of employment security. The reason of this circumstance is that employment contracts for minimum duration shall not be finalized following the expiry of the time automatically and these contracts maintain its effects as employment contracts with indefinite duration. On the other hand, employment contracts with maximum duration are contracts that parties indicate how long the employment contract shall continue the longest and that they preserve their right to terminate. Since the employment contract shall be finalized automatically at the end of the maximum time, it shall not to be possible for employees to benefit from employment security. Yet, if an employment contract with maximum duration is terminated before the expiry of the time by the employer, it may be possible for an employee to apply for the protection of employment security.

In order to consider that an employee may benefit from the protection of the employment security, his/her employment contract should be terminated by the employer. Termination notice is a disruptive formative right to be used unilaterally so that it shall be effective following service of this intention to the counter-party and it may not be taken back unilaterally after the counter-party is acknowledged. Taking termination notice back during the notice period is only possible with the consent of the counter-party to take it back. In this circumstance, employment relation shall be evaluated as if it was not interrupted before. On the contrary, provided that an employee continues working uninterruptedly and an employer does not prevent the employee from working following the termination notice, it may not be evaluated that the employment contract is terminated. After the expiration of the notice period, the employment contract shall finalize. Following this period of time, an employer may not take his/her termination notice back unilaterally and also, the fact that the employer informs the employee that s/he renounces termination and wants him/her to come back to work shall not be binding for the employee. Should an employee accept to come back to work, it should be evaluated that parties conclude a new employment contract.

A mutual rescission contract is a contract which is concluded between parties of an employment contract and finalizes the employment contract binding them in accordance with their consensus. Due to the fact that there is going to be a unity between both employer's and employee's declarations in order to finalize the employment contract concluded between them, it may not be considered anymore that there is a termination made by the employer and because of this, provisions of employment security may not apply anymore. Yet, as it is for every contractual relation, this right may not be used as an evasion of law.

Employment security provides some specific protections for employees. As a first protection provided by employment security, an employer has to demonstrate a valid reason while terminating employment contracts of employees being in the scope of employment security. Valid reasons are not as serious as justified reasons for the employer but they are reasonable for the termination of employment contracts. These valid reasons may depend on employee's incapability or behavior or a reason arising from needs of enterprise, workplace or work. Provided that an employer has one or more valid/ justified reasons to terminate an employment contract, the employer may show one of these reasons just as s/he may submit all of his/her termination reasons at the same time.

Valid reasons arising from employee's incapability are reasons arising from employee's incapability to perform his/her duties properly. The distinctive factor is that employee's talents and features are not in conformity with the performance of duties undertaken with the employment contract. It is not important that the employee had talents and features regarding the performance of his/her duties before. The important issue is that the employee is deprived of his/her talents and features for the future. At the time of the termination, employee's incapability should cause disruptions and errors in the normal process of the work and producing errors arising from employee's incapability should not be fixed without precautions giving rise to additional expenses.

It is possible for an employer to terminate employee's employment contract by demonstrating a valid reason arising from employee's behaviors. Even though, as a principle, there is not an employer's right to terminate an employment contract depending on employee's behavior without employee's faulty behavior, as this fault may exist as a consequence of employee's malice, it may also occur as a consequence of employee's negligence or a breach of the duty of care. Provided that an employee does not act differently, even though it is possible, and s/he acts against provisions of the employment contract, then this behavior may be deemed as being faulty. However, since it is not possible to consider that an employee is responsible for his/her behaviors which do not arise from his/her malice or negligence, a termination with a valid reason arising from employee's behavior shall not be taken into consideration. In other words, employee's slight faults that do not damage employer's trust objectively or that do not affect the enterprise or the working process shall not be shown as a valid reason.

Lastly, some circumstances may be deemed as valid reasons arising from needs of enterprise, workplace or work. As a difference from terminations depending on employee's incapability or behaviors, valid reasons arising from needs of enterprise, workplace or work occur in employer's field. Every termination reason arising from needs of enterprise, workplace or work depends on an employer's operational decision. Operational decisions are decisions taken by employers in order to organize and to manage an enterprise and/or a workplace. Operational decision may not be subject to the review of expediency. On the other hand, an employer has to use his/her freedom to take operation decision in conformity with the good faith. The termination of the employment contract may arise from employer's operational decision or it may be the consequence of employer's operational decision but the reason and the subject of employer's operational decision may not only be to terminate the

employment relation. There has to be a casual relation between termination and reason arising from needs of enterprise, workplace or work. In order to determine whether the employer uses his/her right to terminate the employment contract in accordance with good faith and whether or not there is a casual relation between termination and needs of enterprise, workplace or work, due to the fact that an employer is limited on behalf of the employee by employment security system while taking operational decision for terminating employment contract, termination made by the employer by depending on operational decision shall be subject to judicial examination in certain respects even though this operational decision shall not be subject to the review of expediency.

As another protection provided by employment security to employees, termination issued against employees being in the scope of employment security must be issued in written form. This condition is regarding the validity of the termination and if this condition is not fulfilled by employers, terminations issued by employers without fulfilling this condition shall be deemed as invalid just because of the absence of the written form requirement. According to our opinion, provided that an employee informs the employer about his/her own e-mail address or phone number shown in the employment contract and accepts that the notice may be sent to this number or e-mail address, it should be accepted that notices issued in this manner are valid. However, the phone number or e-mail to which the termination notice will be sent should belong to the employee and provided that the phone number or e-mail address to which the termination notice will be sent does not belong to the employee himself/herself, the termination shall be deemed as invalid. Additionally, according to our opinion, while terminating employment contracts of employees collectively, publishing in the workplace may not be deemed as a termination notice, it is obliged to issue termination notices for each employee separately and even though it is collective dismissal, this obligation shall not disappear.

As a need of explicit provision of Labour Code numbered 4857, an employer is obliged to show termination reason explicitly and certainly while terminating employment contracts of employees being in the scope of employment security. On the contrary, there is no need to explain all of details and the process of the issue causing the termination of the employment contract in the termination notice. The important issue is to be able to understand that employee’s employment contract is terminated with which reason explicitly from the termination notice. An employer terminating the employment contract shall be binding with this termination reason having been shown while terminating the employment contract and

s/he may not change this termination reason or may not show any other termination reason anymore during the reemployment procedure. As an employer may not change the termination reason that s/he shown before, provided that the employer has more than one reason for terminating the employment contract but s/he showed only one of them, the employer may not depend on other reasons anymore. Besides, an employer who did not show any termination reason may not show a termination reason despite its reality and acceptability.

As an employer may not change the termination reason indicated in the termination notice after this termination notice was served to the employee, regardless of whether the notice period continues or expires; if an employer learns a new termination reason or a new termination reason occurs after the previous termination notice was served to the employee, the employer may only issue a new termination notice within the notice period in order to demonstrate this reason for termination before relevant labour court.

In accordance with the explicit provision of Labour Code numbered 4857, without taking employee's defence about an allegation regarding him/her, employee's employment contract with indefinite duration shall not be terminated with reasons arising from employee's incapability and behavior. Yet, as it may be understood from the explicit explanation of Labour Code numbered 4857, for termination with reasons arising from needs of enterprise, workplace or work, there is no obligation to take employee's defence because reasons causing termination are not related to the employee.

As it is understood from the explicit explanation of Labour Code numbered 4857, it is obliged to take employee's defence before termination. The fact that employee's defence is taken after termination shall not be deemed as being in conformity with the procedure. In addition to this, employer's obligation to take defence is obliged just before the termination of the employment contract and there is no obligation to take defence while issuing a warning. Therefore, not taking employee's defence while issuing a warning regarding his/her behaviors to the employee shall not cause the invalidity of the warning. Even though defence has not been received yet, an employer may issue a warning against the employee.

A warning has to be issued before terminating emloyee's employment contract with reasons arising from employee's behaviors and incapability. In the event of termination with valid reason arising from employee's behaviors and incapability, a warning is an opportunity provided in order that an employee may act in conformity with the employment contract.

Warning shall only be evaluated as mandatory in case of breach of the employment contract that the employee may fix or change. Because of this, in the event of the existence of termination reasons arising from enterprise, workplace or work and arising from employee's incapability that the employee may not change or fix, a warning may not be deemed as being mandatory. Indeed, in such circumstances, there will not be any positive effect of a warning on the concrete termination reason, and this reason may not be eliminated with any effort of the employer even with any warning to be issued. Besides, provided that an employee declares explicitly that s/he will continue to act against the employment contract, there will not be any need of a warning anymore.

There is no specific period of time in Labour Code numbered 4857 for an employer to use his/her right to terminate employment contract with a valid reason. Whereas, it is not appropriate to consider that an employer may terminate employee's employment contract anytime s/he wants. An employer has to use his/her right to terminate an employment contract with a valid reason in a reasonable period of time. The issue that should be understood from a reasonable period of time is the time that the concrete subject causing the termination of the employment contract may be deemed as a valid reason to terminate the employment contract. With another explanation, it is the period of time that the concrete subject, which termination with duration depends on, makes termination necessary both subjectively and objectively.

It is not sufficient for an employer to issue a termination depending on a valid reason by fulfilling these conditions specified in Labour Code numbered 4857. An employer must also follow some principles in order to issue a termination depending on valid reason. These principles are the principle of last resort (ultima ratio), the principle of proportionality, the principle of comparison of benefits, the principle of prediction (negative estimation) and the principle of equal treatment. However, even though the principle of social (objective) selection does not apply currently, since it was accepted by the Turkish Court of Appeals for a while with its previous practice, this principle was also examined in this thesis.

In accordance with the principle of last resort (ultima ratio), measures which are less serious than termination and may prevent termination should be sought in every specific case and provided that these measures are not sufficient, termination should be issued as a last resort. According to the reasoning of Labour Code numbered 4857, the principle of ultimo ratio shall be taken into account while examining valid reasons arising from needs of enterprise, workplace or work. According to our opinion, this principle should also be taken

into account for terminations arising from employee's behaviors and incapability. Indeed, it is possible that there is another available working position for the employee to be employed in the workplace. Even though it is not possible for an employer to employ this employee in his/her working position that s/he has been working for and employment relation regarding this employee's working position is not endurable for an employer to continue because of employee's incapability, it should be considered that the employee may be employed for another working position which is suitable for his/her capacity and which is beneficial for the employer. Additionally, we think that if it is possible for an employer to continue to employ his/her employee in the workplace with another work even if the employee gives rise to any termination reason arising from his/her behavior, it should be also examined whether the employer complies with the principle of last resort or not as a need of employment security's main purpose to protect the employee against the employer. Yet, if employee's behavior is so serious that the employer may not continue to employ this employee for any position in the workplace or that it is not possible for employer to continue employment relation by issuing disciplinary punishment, a valid termination shall be deemed to be dully performed.

The principle of social selection, as a difference from the principle of last resort, is a principle to be considered for the individualization of terminations for terminations depending on needs of enterprise, workplace or work. This principle means employer's obligation to select the employee whose employment contract will be terminated via some specific criteria with an aim to protect employees being in weaker positions for termination depending on needs of the enterprise, workplace or work. Even though this principle had applied previously, the Turkish Court of Appeals abandoned the application of this principle. However, the Turkish Court of Appeals accepts selection criteria regulated by collective labour contracts or employment contracts concluded between an employee and an employer and regulating some criteria regarding termination of the employment contract as valid.

The principle of proportionality means that a manner used in order to reach an aim should be effective and necessary for reaching this aim or that there should not be an inappropriate proportion between the aim and the manner. Since termination as a disruptive formal right affects employee's legal scope seriously and it is not restricted by Labour Code numbered 4857, the principle of proportionality should apply and thus, it should be examined whether termination is appropriate and necessary for reaching the aim and whether there is an inappropriate proportion between the termination and the aim or not. Additionally, for

determining the *"unexpectedness",* the principle of proportionality shall be important while detecting the difference between a justified and a valid reason.

The principle of comparison of benefits shall not be deemed as a general comparison of employee's and employer's benefits, it means deciding whether the employment contract should be terminated or employment relation should continue with a comparison between employee's benefits regarding the workplace and employee's financial and social benefits to be gained with the continuance of the employment contract by taking the concrete case into consideration in accordance with the benefit that should be protected.

The principle of prediction (negative estimation) means making predictions for the future by evaluating employee's previous behavior and circumstances. This principle is used to demonstrate that it is quite possible that employment relation will be damaged and therefore, it is not possible to continue the employment relation. In accordance with this principle of negative estimation, termination is not a measure to punish a behavior having been shown in the past and having damaged the workflow, it is a measure for an employer from whom it may not be waited to continue to the employment relation to terminate this employment relation. Negative estimation needs to issue a warning to the employee regarding these situations. In fact, warning helps to make negative estimation objective. Provided that an employee acts in the same manner in spite of a warning issued in accordance with its procedure, it shall be proven that an employee will also continue to cause similar negative effects in the workplace in the future unless his/her employment contract is terminated.

In accordance with Article 20 of Labour Code numbered 4857, an employee whose employment contract is terminated may apply for a mandatory mediation procedure with a reemployment request within 1 month from the time that termination notice is served with allegations that termination reason was not demonstrated or demonstrated termination reason is not a valid reason in accordance with provisions of Labour Code numbered 4857. Supposing that a termination notice is not issued in written form despite clear provision of Labour Code numbered 4857, the period of prescription as 1 month shall commence passing from the time that oral or actual termination happens. This period of time specified for applying mediation procedure is deemed as the period of prescription and therefore, this period of time shall be taken into consideration by the judge *ex officio*.

Even though it is re-regulated regarding applying to the mediation procedure, the process of the legal procedure and consequences of reemployment claims with provisions of

the Labour Courts Code numbered 7036; any change on Article 24 of the Code on Trade Unions and Collective Labour Contract numbered 6356 specified for reemployment cases to be initiated by union representatives and amateur union managers about their rights arising from Article 24 of the Code on Trade Unions and Collective Labour Contract numbered 6356 is not made. This issue makes it think whether these cases shall be subject to the mediation procedure or not. Since the mediation procedure shall be accepted as a case condition for reemployment cases initiated in order to be reemployed and that these cases were not excluded explicitly such as cases regarding compensation and recourse arising from occupational illness and accident, these cases should also be deemed as being in this scope.

It is possible for parties to compromise in mediation meetings. In accordance with Labour Code numbered 4857, provided that parties of employment contract compromise in mediation procedure; (i) the beginning of being employed, (ii) the monetary amount of the payment regarding the duration that the employee is not engaged in work and other rights and (iii) provided that the employee won't be reemployed, the monetary amount of the reemployment compensation should be determined in the last mediation minute. Otherwise, it should be considered that parties could not compromise and the last mediation minute shall be issued in accordance with this.

Even though an employer claims that s/he invited the employee to continue to work after the mediation minute had been prepared but the employee did not accept the offer so that the employee should not benefit from consequences of a reemployment case, we think that the employee has a right to reject this offer and may want to benefit from effects of *res judicata* so that s/he may apply to another legal procedure with this certain proof if there is any problem regarding his/her reemployment. In this regard, unless the employee has bad faith, the employer may not claim that the employee should not benefit from consequences of a reemployment case because s/he rejected the offer and the relevant labour court should examine the validity of the termination as if the offer had never been made by the employer.

Provided that parties may not reach any consensus regarding termination before the mediator following the mandatory mediation procedure having been tried by parties, it should be possible to initiate a case before labor courts within 2 weeks from the time that the last mediation minute is issued. If parties agree that disputes arising from employment contract shall be resolved by the arbitration procedure, the employee should apply to arbitrator/arbitrators within 2 weeks from the time that the last mediation minute is prepared.

As the beginning of this period of time to initiate a case, the date of issuing of the last mediation minute is determined. On the other hand, this period of time should commence passing from the time that the last mediation minute is served to the employee if this minute is issued in the absence of the employee.

There is a procedural mandatory joinder of parties between sub-employer and primary employer for cases initiated with the claim of reemployment. Therefore, both sub-employer and primary employer should be demonstrated as defendants in the reemployment case initiated by the employee. The issue is understood from the explanation of the Labour Courts Code numbered 7036, even though an employee working for sub-employer claims that there is a collusive transaction between sub-employer and primary employer or this transaction is invalid, this employee should apply to the mediation procedure for both of employers. There is no difference regarding whether the transaction concluded between sub-employer and primary employer is invalid or collusive, if mediation meetings are not finalized with consensus, it is not possible to consider that it is sufficient for the employee to apply to the mediation procedure only against sub-employer. Unless the employee who is the claimant of the case does not apply to the mediation procedure against both sub-employer and primary employer at the same time, it is not possible to consider that one of the procedural mandatory joinder of parties may be participated in the case during pending judicial procedure. Therefore, the case may not be continued with this manner. On the condition that there is a sub-employment relation with its conditions specified in Labour Code numbered 4857, unless it is applied to the mediation procedure against both sub-employer and primary employer, it shall not be considered that the mandatory case requirement is fulfilled and therefore, the case should be rejected on the procedural ground because of the absence of the case condition.

Although an employee may waive from his/her reemployment case at any time s/he wants to in accordance with Article 307 of the Civil Procedural Code numbered 6100, a declaration taken from the employee during the process of the employment relation regarding the fact that s/he will not initiate reemployment case will be deemed as invalid. In fact, even though there is no regulation regarding the fact that employee's waive from the regulation of employment security is invalid in Labour Code numbered 4857, by taking consideration that the employee may not know his/her rights arising from employment security, s/he may be anxious about being unemployed and the termination of the employment contract, there may be pressure on the employee or employee's discretion is distorted, the acceptance regarding

the fact that waives taken from the employee during the process of the employment contract are invalid shall be more proper for the aim of employment security.

In the case regarding the invalidity of the termination, an employee shall claim invalidity of termination of employment contract and request for his/her credits arising from invalid termination. When the feature of Turkish Labour Law which is in the scope of both Public and Civil Law is considered, it is seen that the principle of *ex officio* examination applies more especially for cases regarding the invalidity of the termination and the reemployment of the employee. With this regard, in reemployment cases and cases regarding the invalidity of the termination initiated within the scope of Article 18. ff. of LC, whether the period of time as 1 month specified by LC in order to apply mediation procedure and whether the employee is in the scope of employment security or not should be examined *ex officio*. On the other hand, in accordance with the explicit regulation of Labour Code numbered 4857, the burden of proof regarding the fact that termination depends on a valid reason belongs to the employer and if the employee claims that termination depends on a different reason, s/he has to prove it. An employer shall also be obliged to prove that the termination notice is issued in written form, that the termination reason is indicated in this notice explicitly and certainly, for terminations with valid reasons arising from employee's behavior or incapability, that employee's defence was taken before termination or s/he tried to take this defence and that s/he terminated employment contract in conformity with the principle of last resort.

It is controversial in the doctrine what will happen if an employee accepts employer's offer regarding reemployment when a reemployment case is pending. The Turkish Court of Appeals accepts that reemployment of the employee during the process of judicial examination processed by the court should be deemed that an employer who was a defendant of the case accepts the invalidity of the termination. In accordance with Articles 21/3 and 21/5 of Labour Code numbered 4857, the payment regarding the duration that the employee is not engaged in work depends on conditions as the existence of the judgment regarding the invalidity of the termination and employee's application to the employer in order to be reemployed. It should be considered that these conditions occur in the concrete case from the time that the employee is reemployed during the process of judicial examination.

Provided that the workplace is closed during the process of legal procedure, it is not accurate to consider that it is not possible to apply to the employer in order to commence working again because of the absence of the workplace. The right to close his/her workplace

which is given to the employer in order that s/he may use any time s/he wants and which depends on the Constitution may not be shown as a reason in order to avoid employees' rights arising from their own employment relations. With this regard, even though the workplace is closed, if the invalidity of the termination is detected by the court or arbitrator/arbitrators, an employer should be liable for consequences of the invalidity of the termination. Initially, if it is decided on reemployment of the employee because of the invalidity of the termination and if the employer has another workplace that the employee may be reemployed in, following employee's application within its period of time, the employer has to offer to the employee so that the employee may commence working in this workplace or the employer has to pay the payment regarding the duration that the employee is not engaged in work and the reemployment compensation. The employee may commence working in this workplace by accepting employer's offer or, without accepting this offer, s/he may request for his/her payment regarding the duration that s/he is not engaged in work and the reemployment compensation. On the other hand, even though the court or arbitrator should decide on reemployment with the conditions having occurred at the time of the termination and this circumstance should not be affected by closing of the workplace, if an employer has only one workplace and this workplace is closed during the reemployment case, it is not possible anymore to decide on employee's reemployment. In this circumstance the court or arbitrator, if its conditions occur, should decide on the invalidity of the termination and the payment regarding the duration that the employee is not engaged in work. Yet, the employer should not be obliged to pay the reemployment compensation.

The right to initiate a reemployment case belongs to the person himself/herself and if an employee dies before initiating a legal procedure, it is not possible for employee's heirs to initiate the legal procedure by replacing with the employee. Additionally, according to recent judgments of the Turkish Court of Appeals, if an employee dies during the process of the reemployment case, it should be decided on employee's payment regarding the duration that the employee is not engaged in work and other rights arising from the employment relation.

When the workplace is transferred to another employer during the reemployment case, the court should *ex offico* give a certain duration for the claimant to make transferee participate in the pending reemployment case and if the claimant wants transferee to participate in the case, the defendant side of the case should be changed with transferee and the organization of parties of the reemployment case should be concluded with this manner.

If the workplace is transferred after reemployment judgment becomes certain, even though an employee has a *res judicata* regulated against transferor, it should be evaluated that this judgment may also be used against transferee in accordance with Article 6 of Labour Code numbered 4857 regulating the transfer of the workplace.

The fact that an employee works for someone or works on something shall not prevent the employee from benefiting from provisions of employment security. Indeed, the employee has been working during reemployment cases and at the time that employee applied to the employer in order to be reemployed following judgment indicating that termination made by the employer is invalid, whether the employee shall be ready to be reemployed or not may not be known in this part of the jurisdiction. Provided that the court decides on the invalidity of the termination or, in other words, it accepts the case, the provision regulating that the employee has to apply to the employer for the performance of this decision shall not be deemed as an obstacle for the employee to work for another job.

While a reemployment case initiated by the employee against the employer within the period of time specified for the notice period is in progress, if an employer terminates employee's employment contract with justified reason, there is going to be a problem regarding the continuance of the reemployment case. Although an issue occurring after the termination of the employment contract may not be shown as a termination reason and it may not amend the first termination reason, the fact that the employer used his right to terminate the employment contract with a valid reason may not be deemed as an obstacle for the employer to terminate the employment contract with justified reason immediately. In this scenario, an employer does not change his/her previous termination reason but s/he uses his/her right to terminate the employment contract with justified reason before the employment contract is terminated due to termination with duration having been issued by him/her because of circumstances that are figured out afterward.

On the other hand, the judge should decide in accordance with conditions that happen at the time of initiating the case, new developments that occur during the process of the litigation should not be effective for the pending case, instead of some exceptions. In addition to this, if employee's faulty behaviors making it impossible to wait from an employer to continue the employment relation and being against provisions, employment contract or the principle of good faith occur during the process of reemployment case, this issue may be declared by the employer only with a new termination notice. Therefore, if the employer

terminates the employment contract with justified reason while a reemployment case regarding employer's termination with valid reason is pending, the employee has to initiate another reemployment case against termination with justified reason and relevant court examining termination with valid reason should deem this case as a preliminary issue. If it is accepted that termination depends on a justified reason, the case regarding the termination with a notice period should be rejected because of the absence of the legal interest. On the other hand, if it is decided that the termination does not depend on a justified reason, the case regarding the termination with a notice period should continue to be reviewed by the relevant court.

In accordance with provisions of Labour Code numbered 4857, an employer and an employee may decide that reemployment cases should be examined with the arbitration procedure by concluding an arbitration clause or agreement. The arbitration clause or agreement concluded in the employment contract or during the continuance of the employment relation shall be deemed as invalid. Yet, the arbitration clause or agreement concluded following the termination of the employment contract shall be deemed as valid. In fact, in order to conclude this clause or agreement, there has to be free and mutual intentions of both parties. Accepting employee's intention to confirm the arbitration agreement or arbitration clause as valid when the employee is in a weak position against the employer may confront the employee with negative circumstances.

During reemployment cases, an employee shall namely request from the relevant labour court to decide on reemployment and the invalidity of the termination. With this regard, the reemployment compensation, which shall be between 4 and 8 months' wage of the employee, and the payment regarding the duration as 4 months at most that the employee is not engaged in work may be requested by the employee on the condition that the employee applies to the employer in order to be reemployed within a specific period of time regulated by Labour Code numbered 4857 but the employer does not reemploy the employee in the workplace. Even though the employee does not request explicitly for the reemployment compensation and the payment regarding the duration that the employee is not engaged in work with a litigation petition issued for a reemployment case, the relevant court should decide *ex officio* on the reemployment compensation and the payment regarding the duration that the employee is not engaged in work in reemployment case.

A judgment regarding the reemployment of the employee should be deemed as a declaratory judgment. The judgment declares that termination is invalid and employment relation having been interrupted with this termination should continue. The occurrence of other consequences of employment security and being able to request them will not occur in accordance with the judgment to be issued by the relevant court regarding the invalidity of the termination but whether they will occur or not shall be determined in accordance with parties' behaviors to be performed following the judgment regarding the invalidity of the termination.

In accordance with the explicit provision in Labour Code numbered 4857, an employee is obliged to apply to the employer within 10 working days, from the time that the judgment held by the relevant labour court or arbitrator/arbitrators regarding reemployment is served, so as to be reemployed. If an employee does not apply to the employer within this period of time, termination made by the employer shall be deemed as a valid termination and the employer shall be responsible only for consequences of a valid termination. Since there is no regulation regarding the form of the application, an employee may apply to the employer orally or with a written form. Additionally, as the right to apply to the employer is not a right that strictly binding with an individual's personality, employee's representative may also make this application without needing special authority.

Although the main principle is that an employee applies to the employer within 10 working days, this employee shall not be responsible for delays occurring during shipping. Yet, it should be indicated immediately that the responsibility regarding the delay occurring during shipping because the employee sends a notary warning on the last day, although s/he knows that there will be able to be a delay for shipping, shall belong to the employee because of his/her fault and it shall not be deemed that employee is in the good faith and that application is made within its period of time and also employee's behavior which is against the good faith shall not be protected. Even though it is possible that the employee may figure out the finalized judgment regarding reemployment by himself/herself, this period of time as 10 working days shall start to pass from the time that this finalized judgment is served to the employee. On the other hand, an application to be made before the finalization of the judgment shall not be deemed as valid. In this case, following the finalization of the judgment, the employee should re-apply to the employer. An employer is not obliged to reemploy the employee before the finalization of the judgment.

When it is decided by the court or arbitrators that employer did not demonstrate any valid reason for the termination or the reason demonstrated by the employer is not valid, the employer has to reemploy the employee within 1 month following employee's application to the employer. This regulation is an absolute imperative provision. Besides, his/her period of time is not provided for the employer to re-invite the employee to commence working, this is regulated for the employer to reemploy the employee within this period of time.

As an employer may choose to reemploy the employee in accordance with his/her right to choose, s/he may also choose to pay the reemployment compensation instead of reemployment of the employee. It is possible that an employer shows his/her intention regarding the fact that s/he does not want to reemploy the employee explicitly or implicitly. As this period of time may expire without any declaration of the employer regarding the reemployment of the employee, the employer may serve his/her negative decision to the employee regarding this issue. On the other hand, after the employer declares his/her intention regarding whether s/he would reemploy the employee or not, s/he may not take this declaration back anymore. With another explanation, after the employer declared that s/he would not reemploy the employee, even though it is within 1 month, the employer may not request from the employee to commence working again by abandoning his/her previous declaration.

An employer should be sincere and serious about reemploying the employee. With this regard, in order to consider that an employee is reemployed by an employer, reemployment of the employee should not be subject to any condition. Provided that an employer makes condition on reemployment of the employee, this invitation may not be deemed as being issued in accordance with its procedure and this employer shall be responsible for consequences of non-reemployment of the employee.

When an employee applies to the employer in order to be reemployed following the finalized judgment regarding reemployment and the employer declares that s/he will reemploy the employee but this employee does not give a positive response to this invitation; it should be considered that consequences of the valid termination occur by accepting as if the employee had never applied to the employer.

There are two types of legal remedies as the reemployment compensation and the payment regarding the duration that the employee is not engaged in work and other rights as consequences of non-reemployment of the employee within its specific period of time. In

order to consider these consequences, the procedure regulated by Labour Code numbered 4857 should be followed without any defect. Even though it is indicated in Labour Code numbered 4857 that these payments and compensation should be calculated in judgment in monetary terms by taking employee's last wage at the beginning of the reemployment case into consideration, it is not possible to consider judgment regarding reemployment as judgments for performance. Indeed, these payment and compensation depend on a condition whether the employee applies to the employer and whether the employer shall reemploy the employee. Therefore, judgments regarding reemployment should be deemed as declaratory judgments.

One of the legal remedies regulated for employment security is the payment regarding the duration that the employee is not engaged in work and other rights. This payment's amount is restricted with a specific provision with employee's wage for 4 months at most. Therefore, even though the employee is not employed by the employer because of the invalid termination, this payment shall not be calculated in conformity with real duration but it shall be determined by taking employee's wage for 4 months at most into consideration. The amount of the payment regarding the duration that the employee is not engaged in work shall be calculated by taking employee' gross wage into account. This payment shall be calculated in accordance with employee's last wage at the beginning of the reemployment case. Due to the fact that the payment regarding the duration that the employee is not engaged in work shall be paid to the employee whether the employee is reemployed by the employer or not, if it is decided on the invalidity of the termination, this employee's right shall be due following employee's application to the employer in order to be reemployed. This credit is the consequence of the reemployment case and there is no need to warn or put the employer in default separately after employee's application for reemployment. For the payment regarding the duration as 4 months at most that the employee is not engaged in work and other rights determined in reemployment case, the highest interest applying to deposits regulated under Article 34 of Labour Code numbered 4857 shall be applied.

Another legal remedy regulated for employment security is the reemployment compensation. The amount of this compensation shall be between 4 and 8 months' wage of the employee. The Turkish Court of Appeals indicates that for an employee whose seniority is more than 6 months but less than 5 years, employee's 4 months' wage; for an employee whose seniority is more than 5 years but less than 15 years, employee's 5 months' wage; for an employee whose seniority is more than 15 years, employee's 6 months' wage shall be

calculated as the reemployment compensation and this amount may be increased to employee's 8 months' wage at most by taking termination reasons into account. The reemployment compensation shall be calculated by taking employee's gross bare wage into account.

These amounts specified for the reemployment compensation and the payment regarding the duration that the employee is not engaged in work and other rights are absolute imperative provisions. Therefore, even though it is on behalf of the employee, it is not possible to change these amounts with employment contracts, collective labour contracts or any other manner.

Regarding the calculation of the severance payment and the payment in lieu of notice, wages to be taken into account while calculating these payments are employee's last wage at the time that s/he is not reemployed. The maximum limit of the severance payment shall also be determined in this manner. Therefore, in accordance with an evaluation in doctrine that we also support, the period of time starting from the time of the invalid termination to the time that the employee is not reemployed should be added to the working period of the employee and the amount of the severance payment and the payment in lieu of notice should be calculated by taking this employee's working duration into account. However, according to the Turksih Court of Appeals only the 4 months duration specified for the payment regarding the duration that the employee is not engaged in work should be added to employee's seniority period. Although the severance payment and the payment in lieu of notice were paid before, because of the invalid termination, the amount difference happening because of adding the period of time that the employee did not work from the time of invalid termination to the time that s/he is not reemployed should be paid to the employee. While deducting these payments having been paid before, any interest shall not be applied.

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