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TERMINATION DUE TO UNION REASONS IN TURKISH LABOR LAW

Abstract:

Most of today's legal system has accepted principle of freedom of contract with the effect of economic liberalism. Despite this, by considering weakness of workers against employer espeecially in working life, the idea that workers should be protected has been accepted and exceptions to the principle of freedom of contract has been introduced. For this reason, workers have been tried to be protectedagainst termination. If it is necessary to describe it briefly, if employer doesn't dismiss worker arbitrarily, this means protection of worker against termination. Protection of workers against termination is among main objectives and issues of labor law.
Union reasons are one of the reasons for employers to dismiss workers. In working life, dismissal of workers because of membership in union or union activities means "Termination due to union reasons", protection of workers against these dismissals means "Protection of workers against termination due to union reasons". Protection of workers against termination due to union reasons is the result of union freedom given to workers. As a result of giving this freedom to workers, employment contract of the worker can't be terminated due to union; in case of termination due to this reason, legal remedies are provided such as returning to work.

Keywords:

Labor law, termination, union reasons

I. ASSURANCE FREEDOM OF UNION

A. TERMINATION DUE TO UNION MEMBERSHIP OR UNION ACTIVITIES

According to Law on Trade Unions and Collective Bargaining Agreements 25/1-2 "Employment of workers shall not depend on condition whether they enter into a particular union or not, whether they maintain their membership in a particular union or they resign from membership, whether they are a member of any union or not. Employer shall not make any discrimination between workers who are members of a union and workers who aren't members of a union or members of other union in terms of working conditions or dismissing. Collective bargaining provisions are reserved in respect of wage, bonus, premium and social aid related to money." Termination due to union membership doesn't only contain termination because of membership of worker in any union, it also contains terminations because of resignation from membership or changing his union [1].

Workers can't be dismissed because they are union members or not or they can't be subjected to a different process. Likewise, it is not possible to terminate employment contracts of workers because they have participated in activities of workers' organizations or they have engaged in union activity outside of working hours or during working hours with permission of employer or they can't be subjected to a different process because of these reasons (Law on Trade Unions and Collective Bargaining Agreements 25/3). Because the term "workers" is used in the law instead of "workers who are members of union", union activities of workers who are not members of any union, are also guaranteed [2]. According to Supreme Court's decisions, terminations made because of participating in union meetings outside of working hours or in his off day, making a propaganda in favor of union and collecting signatures for extraordinary general meeting, participating in a strike and writing for union journal, are termination due to union reasons[3].

B. INVALIDITY OF TERMINATION (REEMPLOYMENT) LAWSUIT

According to Law on Trade Unions and Collective Bargaining Agreements 25/5, worker has a right to open a lawsuit in accordance with provisions 20 and 21 of Labor Law in case of termination of employment contract due to union reasons. In case of determining that employment contract has been terminated due to union reasons, it is

[1] Süzek, 2014, p. 645; Tuncay/Savaş, 2013, p. 92, Sur, 2015, p. 49; Narmanlıoğlu, 2013, p. 156; Çelik /Caniklioğlu/Canbolat, 2016, p. 633; Sümer, 2016, p. 434; Başkan, 2013, p. 91; Mollamahmutoğlu /Astarlı/Baysal, 2014, p. 944; Başer, 2010, p. 55; Terzioğlu, 2007, p. 69.
[2] Süzek,2014, p. 646; Narmanlıoğlu, 2013, p. 161-165; Sur, 2015, p. 52; Başkan, 2013, p. 112-113.
[3] Süzek, 2014, p. 646; Y9HD., 25.6.1998, 9292/10962, Y9HD., 19.9.1996, 5543/17537, Y9HD., 5.3.2007, 32146/5741; Mollamahmutoğlu /Astarlı/Baysal, 2014, p. 744.

decided on union compensation according to provision 21 of Labor Law regardless of worker's application, recruitment by employer or not. However, if worker isn't reemployed, it isn't decided on compensation which is stated in provision 21/1 of Labor Law. Worker may demand compensation without demanding reemployment. The amount of union compensation shall not be less than annual wage of the worker.

C. UNION COMPENSATION

If court decides that termination has been made due to union reason as a result of reemployment lawsuit, as well as worker can be entitled to union compensation without requiring to be employed by employer, he can also be entitled to this right in case of discrimination made due to union reason while employment contract continues[4]. With these aspects, union compensation is different from job security compensation to which worker is entitled only when worker isn't reemployed. Also, in case of termination due to union reasons, workers who are not included by job security provisions and who can't open reemployment lawsuit because of other reason, can open reemployment lawsuit and go back to their works just like workers who are covered by job security. These workers can open only union compensation lawsuit without opening reemployment lawsuit. In brief, lawmaker significantly equalized workers covered by job security and workers who are not covered in case of termination due to union reason [5].

It is possible to request for union compensation in case of discriminations other than termination. If employer acts contrary to Law on Trade Unions and Collective Bargaining Agreements 25/1-2-3, union compensation not less than annual wage of the worker can be decided in accordance with Law on Trade Unions and Collective Bargaining Agreements 25/4. According to this provision, all workers who are covered or not covered by job security, can request for union compensation if they are subjected to discrimination when employment contract is established, continues and ends[6].

Union compensation's other difference from job security compensation is its amount. While amount of job security compensation is at the amount of 4-8 months' wage, amount of union compensation can't be less than annual wage. Union compensation is in the nature of disadvantage, in other words, worker has a right to request for union compensation from discriminatory behavior even if he doesn't get any harm because of it. The upper limit of union compensation is decided by judge by considering unjust

[4] Süzek, 2014, p. 647; Mollamahmutoğlu/Astarlı/Baysal, 2014, p. 745; Sümer, 2016, p. 435; Terzioğlu, 2007, p. 129.
[5] Sümer, İş Hukuku, 2016, p. 215; Sümer, 2016, p. 435.
[6] Süzek, 2014, p. 648; Narmanlıoğlu, 2013, p. 157; Şahlanan, 2013, p. 4; Başkan, 2013, p. 60.

suffering. Union compensation is calculated over gross wage in the termination date of contract [7].

If worker request for union compensation less than annual wage in the lawsuit opened by him, it should be doctrinally negotiated whether court should decide to give what worker requests or to give compensation at the amount which is at least an annual wage. Although Supreme Court and some view in doctrine think that it should be decided to give compensation at the amount which worker requests in accordance with ultra petita prohibition[8], the dominant view in doctrine is in the direction of deciding to give compensation at the amount which is at least an annual wage even if minimum is requested against the mandatory nature of Law on Trade Unions and Collective Bargaining Agreements 25/4[9]. When the court is convinced that termination has been made due to union reasons, it also determines the amount of union compensation. The court should consider severity of unlawful act and seniority of the worker when deciding the amount of union compensation.

Being different from job security compensation, decision made in action for performance to be taken because of termination due to union reason, isn't declaratory judgment, it is executive decision. Because of this reason, when judge decides on union compensation, he also needs to decide to calculate numerical amount of it as well as deciding on amount of compensation in terms of month. This amount is in the nature of performance provision that can be followed by moderate execution[10].

According to Law on Trade Unions and Collective Bargaining Agreements 25/8, collective bargaining agreement and employment contract provisions which are contrary to provisions in this article, are invalid. According to this provision, union compensation is mandatory as well as job security compensation; therefore, parties can't change the amount even if it is in favor of the worker. However, as we mentioned earlier, a lower limit related to union compensation is a year and judge has the authority to decide on a compensation more than this.

D. RELATIONSHIP OF UNION COMPENSATION WITH OTHER RIGHTS

According to Law on Trade Unions and Collective Bargaining Agreements 25/9, "Worker's right that he obtained according to labor laws and other laws, are reserved."

[7] Süzek, 2014, p. 648; Narmanlıoğlu, 2013, p. 167; Y9HD., 8.7.2003, 12442/13123; Mollamahmutoğlu/Astarlı/Baysal, 2014, p. 950; Usta, 1998, p. 956; Şahlanan, 2013, p. 10; Sümer, 2016, p. 438; Terzioğlu, 2007, p. 135.
[8] Y9HD., 24.5.2004, 5027/12427; Y9HD., 29.7.2004, 5523/19994 (www.kazanci.com e.t: 3.10.2016); Terzioğlu, 2007, p. 134.
[9] Süzek, 2014, p. 649; Akyiğit, 2007, p. 328.
[10] Süzek, 2014, p. 649; Mollamahmutoğlu/Astarlı/Baysal, 2014, p. 950; Şahlanan, 2013, p. 10.

Therefore, all workers who are covered or not covered by job security are eligible for severance and notice pay[11].

There is no need to show any reason for terminating employment contracts of workers who are not covered by job security. However, probability of termination of contract without showing any reason doesn't mean that termination right can be used contrary to goodwill rules. When employment contract of a worker who is not covered by job security is terminated contrary to goodwill rules, employer is obliged to pay compensation for bad faith damages to worker at the amount which is three times more than amount related to notice period[12]. It is not possible for worker who is not covered by job security and whose employment contract is terminated due to union reason to request for both union compensation and compensation for bad faith damages [13].

When employment contract of a worker who is covered by job security is terminated due to union reasons, worker can't be entitled to receive both job security compensation and union compensation together. Because, according to Law on Trade Unions and Collective Bargaining Agreements 25/5. "...In case of determining that employment contract has been terminated due to union reasons, it is decided on union compensation according to article21 of Law number 4857 regardless of worker's application, reemployed by employer or not. However, if worker isn't reemployed, it isn't decided on compensation which is stated in first paragraph of article 21 of Law number 4857. If worker doesn't open lawsuit according to above mentioned provisions of Law number 4857, it doesn't mean that he can't demand union compensation." This provision is not considered appropriate; because employer who know that he will pay union compensation in any case whether he employs the worker or not, generally would prefer not to employ the worker. We believe that it would be appropriate if Law is amended as follows: "...In case of determining that employment contract has been terminated due to union reasons, it is decided on union compensation according to article 21 of Law number 4857 regardless of worker's application, reemployment by employer or not. However, if worker isn't reemployed, it is also decided on compensation which is stated in first paragraph of article 21 of Law number 4857. If worker doesn't open lawsuit according to above mentioned provisions of Law number 4857, it doesn't mean that he can't demand union compensation".

According to Labor Law 5, discrimination based on language, race, color, gender, disability, political opinion, philosophical belief, religion and etc. is prohibited. Unless there is an essential reason, it is not possible to treat full-time worker and part time worker, worker of indefinite period and worker of definite duration differently. Unless

[11] Süzek, 2014, p. 650; Mollamahmutoğlu/Astarlı/Baysal, 2014, p. 949.
[12] Sümer, 2014, p. 107; Mollamahmutoğlu/Astarlı/Baysal, 2014, p. 940.
[13] Süzek, 2014, p. 650; Çelik/Caniklioğlu/Canbolat, 2016, p. 372; Sümer, 2016, p. 438; Terzioğlu, 2007, p. 168.

biological reasons or reasons related to the nature of the work necessitate, employer can't discriminate against worker directly or indirectly because of gender or pregnancy during establishment of employment contract, creation of its provisions, its implementation and ending. Lower wage can't be determined for the same or equal job because of gender. Implementation of special protective provisions because of the employee's sex - such as maternity and breast feeding leave- does not justify the application of a lower wage. In case of action contrary to these prohibitions, worker can claim for rights from which the worker has been debarred in addition to a proper compensation in the amount of worker's four months' wage in accordance with Labor Law 5/6. Because termination due to union reasons is a type of discriminatory behavior, it is thought that worker may be entitled to discrimination compensation at the amount of worker's four months' wage in addition to union compensation. However, there is a clear provision stating that this is not possible in Labor Law 5/6, it is not possible for worker to be entitled to both union compensation and discrimination compensation together[14].

E. BURDEN OF PROOF

According to Law on Trade Unions and Collective Bargaining Agreements 25/6, "In the case of lawsuit to be opened with the claim of termination due to union reason, employer is obliged to prove the reason of termination. Worker claiming that the termination isn't based on the reasons alleged by the employer, is obliged to prove that termination is based on union reason."

According to this provision, in lawsuits to be opened by claiming that employment contract has been terminated due to union reason in all business relationships covered or not covered by job security, employer is obliged to prove the reason of termination. In this case, employer won't prove that termination isn't based on union reason, he will prove that it is based on "good" or "justified" cause in business relationships covered by job security and he will prove that it is based on reasonable and legitimate cause in business relationships not covered by job security[15]. However, worker claiming that the termination isn't based on the reason alleged by the employer and it is based on union reason, is obliged to prove that claim. In other words, the burden of proof changes place in this case.

According to Supreme Court decisions, when employer proves that there is one of "good" or "justified" causes or (for ones which is not covered by job security) reasonable and legitimate causes, it is not possible to talk about termination due union

[14] Süzek, 2014, p. 651.
[15] Süzek, 2014, p. 651; Sümer, 2016, p. 438.

reasons[16]. However, according to the dominant view in the doctrine, it should be decided in favor of the one that is closer to prove by evaluating claims and proofs of both parties together. For example; when employer terminating the employment contract claims that he did this because of business requirements and even if he proves this claim, if all employees have membership in union, termination due to union reason should be able to be mentioned[17]. As workers can request for reemployment by opening lawsuit related to invalidity of termination, they can also request for union compensation.

Worker claiming that his employment contract has been terminated due to union reason, can prove this claim with any evidence. In this context, worker can call witnesses. However, if the only evidence is witness statement, Supreme Court decides that termination of employment contract isn't based on union reason [18]. In contrast with this, Supreme Court decides that employer can't prove that termination is valid on the basis of testimonies of his employees only[19].

According to Law on Trade Unions and Collective Bargaining Agreements 25/7, worker is responsible for proving whether employer has made discrimination outside termination. However, when worker puts forward a condition indicating strongly that there is discrimination due to union reason, burden of proof changes place. In this case, the employer is obliged to prove the reason of his behavior. This provision was arranged for only discriminations due to union reasons except termination inappropriately, it excluded termination due to union reasons. However, is possible to achieve this result with presumption of termination due to union reason which is adopted by Supreme Court and doctrine [20]. Presumption of termination due to union reason means mitigation of burden of proof and leaving burden of proving that there is no union reason to employer provided that worker proves objective events or chronological relationship between events.

CONCLUSION

In our study, we have examined the rights owned by the worker in termination of employment contract due to union reason. In case of termination due to union reason, opportunity of reemployment for all workers who are covered and not covered by job security and significant equalization of all workers who are covered and not covered by job security are positive developments. However, failure of workers who are covered by job security provisions to receive also job security compensation is inappropriate in

[16] Süzek, 2014, p. 652; Y9HD., 3.11.2008, 34518/29843, Y9HD., 22.6.2009, 34144/17161
[17] Süzek,2014, p. 652; Güzel, 2004, p. 97; Centel, 2012, p. 142.
[18] Süzek, 2014, p. 652; Y9HD., 25.2.2008, 23417/2244; Terzioğlu, 2007, p. 140.
[19] Süzek, 2014, p. 653; Y9HD., 18.12.2003, 20315/22148.
[20] Süzek, 2014, p. 653; Sümer, 1997, p. 1643-1644; Başkan, 2013, p. 214.

our opinion. Because job security compensation is only paid when worker is not reemployed. In this case, employer who know that he will have to pay union compensation in any case whether he employs the worker or not but he won't have to pay job security compensation, generally would prefer not to reemploy the worker. This does not provide effective protection expected from job security provisions.

In addition to this, union compensation isn't an alternative to reemployment of worker, in other words, worker may open lawsuit only for union compensation or together with reemployment lawsuit and this is an appropriate provision. Because workers may not choose to return back to the same job due to different reasons. In this case, it is right to not be forced to renounce union compensation. In our opinion, it would be more accurate to regulate job security compensation as a chosen right given to worker instead of giving it to worker if employer doesn't reemploy worker who wins reemployment lawsuit. Namely, if worker had opened a lawsuit for whether reemployment or job security compensation, provision of law would have achieved its goal more. As worker may not want to return back to his old job due to different reasons, he may also choose not to return because of finding a new job in the course of time. In this case, being destitute of job security compensation is contrary to equity.

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