Turkey: The Scope Of Job Security Provisions In Turkish Law In The Light Of Precedents Of The Court Of Appeal

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In Turkey, job security provisions were established by the Labor Act dated May 22, 2003 and numbered 4857, (the "Labor Act"). In Turkish law, provisions concerning job security were intended to limit the right of the employer to terminate open-ended employment contracts.

The scope of job security and its limitations are detailed in Article 18 of the Labor Act. The employer is obliged to abide by specific procedures and must give a valid reason when terminating work contracts of employees protected by job security. In the event that the employer cannot prove the existence of a valid reason for termination, the employee is entitled to file a court action for reinstatement in employment. Considering the increase in the number of court actions filed for reinstatement in employment, this subject is of the utmost importance for employers running business in Turkey. Within this study, we will examine establishments and workers falling under job security regulations in the light of precedents of the Court of Appeal.

A. The Scope of Job Security in terms of the Establishments

Article 18 of the Labor Act both regulates the requirement of a valid reason and determines the scope of job security. The first subsection of the article sets a framework for the application of job security regulations in terms of establishment where it is stated that establishments with 30 or more employees are within the scope of job security. According to the Article 18/4, if the employer has more than one establishment operating in the same branch of activity, the threshold will be determined on the basis of the total number of employees in these establishments. This provision was implemented in order to prevent employers circumventing the job security provisions by subdividing their establishment. There is no requirement for these separate establishments to be in the same zone or even the same city; according to the said provision, to be in the same branch of activity is sufficient for these rules to apply[1]. The phrase "branch of activity" in the Code is not clear enough; it has caused serious ambiguities in Turkish labor law practice. Moreover, the term "same branch of activity" has created legal uncertainty since it has different meanings in every jurisdiction. The Court of Appeal in its decisions dated 03.07.2006[2] and 12.02.2007[3], discussed whether or not establishments abroad would be fall within the scope of Article 18/4. We would like to emphasize that, although it was criticized by scholars, the Court of Appeal considers establishments operating in foreign countries to be within the same branch of activity and takes their employees into account when determining the total number of the employees in the establishment. The Court of Appeal also accepted that the job security regulations would apply to establishments with fewer than 30 employees if a collective labor agreement to that effect had been signed[4].

The Labor Act contains no provisions on which employees should be included when determining the number of employees. So, all employees in that workplace, irrespective of whether they have fixed term or open-ended contracts, full time or part time contracts or

continual or seasonal employment contracts [5] have to be taken into account. Employer's representatives and his assistants, who are not within the scope of job security, should also be taken into consideration when determining the number of employees[6]. Apprentices, interns, students in training, workers of sub-contractors who are not the employees of the employer and workers engaged in a temporary work relationship with the employer are not taken into consideration when determining the number of employees.

The timing of when the number of employees should be determined is also of importance, considering the fact that the number of employees might change over time in any establishment. In one of the decisions of the Court of Appeal, dated 08.05.2006, it was stated that the number of the employees has to be 30 on the date of the termination of the contract for an employee to benefit from job security provisions. In the same decision it was explicitly stated that the court is, ex officio, obliged to investigate whether or not the establishment has 30 employees or more. The Court obtains this information by asking the Directorate of Employment and the Social Security Institution to confirm the number of employees. The court may also decide to hear witness testimony if it finds it necessary[7].

B. The Scope of Job Security as it Applies to the Employee

Article 18 of the Labor Act has also set certain requirements for the employees who would benefit from this provision, as well as for the establishment itself. These state that the employees must be working under an open-ended employment contract and must have a minimum seniority of six months. Moreover, senior managers and employees above a certain position cannot benefit from the job security provisions.

1. Working Under an Open-Ended Employment Contract and Be Subject to the Labor Act

Article 18 sets the criteria for the scope of job security and regulates the termination of open-ended employment contracts. Accordingly, the provisions on job security only apply to employees working under an open-ended employment contract, and employees having fixed-term work contracts would not fall under the category[8]. On this note, in the event that such a work contract has been made without the existence of objective criteria or that fixed-term contracts were being signed one after another without valid cause, these employees would be regarded as working under an open-ended employment contract and therefore can benefit from the protection of job security[9].

In principle, employees subject to Labor Act will be able to benefit from the job security provisions contained in 18 through 21. With the amendments made to Labor Act, (Article 116) and the last subsection of Article 6 of "Law Concerning the Regulation of Legal Relations Between Employee and Employer In the Press Branch" (nr.5953), the employees in the press branch will also benefit from job security provisions too.

2. The Requirement To Have Six Months of Length of Service

According to the Labor Act, the employee has to have a minimum seniority of six months in order to benefit from job security provisions. According to Article 18/4 of the Act, six months seniority will be calculated by adding the length of services of the employee in the same or different establishments of the employer. There is no limitation in the Act in relation to the time periods to be combined in the calculation of this six month seniority level. Even if the previous contracts were fixed term contracts, provided that the last contract is an open-ended contract,

these periods may be added. In determination of the six month seniority term, the actual starting date of the employment is taken into consideration.

However, it is not explained in the Act whether continuous work is required in determination of the six month seniority. In other words, it is not clear from the wording of the Act whether or not intermittent employment periods will be merged in determining the sixth month seniority. The Court of Appeals has ruled that these periods should be merged. In its different precedents, the High Court has stated: "...for the employee to benefit from job security provisions, his or her length of employment –even if it is discontinuous- in one or more establishments of the same employer must have amounted to six months as of the date the employee is notified of the termination[10].

Furthermore, in the said precedents, the Court has decided that the trial (probation) period and any period when the work status is pending should be included in the calculation of the six month seniority. In other words, in determining the six month period, the High Court has ruled that even periods when the employee has not actually been present in the work place but has still been employed by the Company should be included in the calculations. The High Court emphasized in these decisions is that in order to benefit from the job security provisions, the employee must have been employed under a work contract by the same employer within these six months.

According to Article 20, the employee who alleges that no reason was given for termination of his employment contract or who claims that the reason stated was not valid to justify the termination is entitled to file a court action for reinstatement within one month of receiving the notice of termination. If the employee does not meet the criteria required for job security protection as of the date of the termination, the employee will not be able to lodge an appeal for reinstatement. According to the Court of Appeal, for the employee to benefit from job security provisions, he or she must have already completed six months of seniority on the day he or she was notified of the termination notice[11]. The duration of term of notice will not be included in the six month of seniority.

3. Not to be a Representative of the Employer Working Above a Certain Position

Under Turkish Law, persons in managerial positions are excluded from the protection of job security provisions. Article 18/5 of the Act provides two different groups who are excluded from job security arrangements. First group excluded from the job security provisions are the employer's representatives authorized to manage the entire undertaking and their assistants (i.e. general managers and vice general managers). However having these titles does not automatically exclude these persons from the protection of job security. The court has to examine whether or not the employee has such legal responsibility and authority to justify the job title in terms of the entire undertaking.

The Court of Appeal has discussed the matter in its decision dated April 17, 2006 through a case filed by an employee working as a finance director and vice general manager. In the said dispute, the High Court rejected the claimant's appeal for reinstatement on the basis of an expert report and stated that the employee working as head of the financial department and who had the statute of vice general manager would not benefit from job security[12]. In an another decision dated September 19, 2005, the High Court has left a vice chairman out of the scope of job security deciding that he was an assistant of employer's representative authorized to manage the entire enterprise[13].

The second group left out of the scope of job security consists of employer representatives managing the entire establishment and who are also empowered to recruit and terminate employees. For an employee to be left out of the scope of job security, he/she has to fall under both categories, namely the employee has to have managerial rights within the entire establishment and at the same time has to be empowered to hire or terminate employees. The Court of Appeal adopted the same principle, and have stated in its decisions that even if the employee is authorized to manage the entire establishment, if he/she is lacking the authority to hire employees and terminate work contracts then, he/she would still fall under the scope of job security[14].

CONCLUSION

Although the application of job security provisions does not have a long history in Turkish labor law practice, the number of cases arising from job security regulations is increasing every year, and so, a new chamber was established at the Court of Appeal in 2011 for the hearing of these cases. Therefore, human resources departments of the companies, which prefer to avoid the risk of court actions to be lodged by employees for reinstatement, should particularly pay attention to the job security regulations in the Act and monitor the recent decisions of the Court of Appeal regularly.

Footnotes

1. Court of Appeal (CoA), 9. HD. 10.11.2003, 2003/18919 E., 2003/18913 K.

2. CoA, 9. HD., 3.7.2006, 2006/9818 E., 2006/19560 K.

3. CoA, 9. HD., 12.02.2007, 2006/32297 E., 2007/3272 K.

4. CoA, 9. HD., 26.5.2005, 2005/12317 E., 2005/19404 K.

5. CoA, 9. HD., 13.2.2006, 2006/320 E., 2006/3898 K.

6. CoA, 9. HD., 24.03.2008, 2007/27699 E., 2008/6006 K.

7. CoA. 9 HD., 2006/10023 E., 2006/13003 K. ; CoA. 9. HD., 18.1.2006, 2005/37445 E., 2006/502 K.

8. CoA. 9. HD., 17.11.2005, 2005/32531 E., 2005/36422 K.

9. CoA. 9. HD., 3.11.2008, 2008/34683 E., 2008/29854 K.; CoA 9. HD. 17.11.2008, 2008/6334 E., 2008/31025 K.; CoA. 9. HD. 1.12.2008, 2008/6284 E., 2008/32594 K.

10. CoA. 9. HD. 5.5.2008, 2007/33471 E., 2008/11128 K.; CoA. 9. HD. 18.4.2008, 2007/27725 E., 2008/7812 K.; CoA. 9. HD. 23.6.2008, 2007/40991 E., 2008/17075 K.

11. CoA, 9. HD., 18.10.2005, 2005/30929 E., 2005/33949 K.

12. CoA, 9 HD., 17.4.2006, 2006/6657 E., 2006/9954 K.

13. CoA, 9 HD, 19.9.2005, 2005/21058 E., 2005/30347 K.

14. CoA. 9. HD., 23.6.2008, 2007/42736 E.,2008/17112 K.; CoA. 9. HD., 30.6.2008, 2007/42691 E., 2008/18147 K.; CoA. 9. HD., 17.6.2008, 2007/39440 E., 2008/16363 K..; CoA. 9. HD., 27.2.2006, 2006/1704 E., 2006/4748 K.