

## **SURVIVAL OF PARTIES' WILL FOR PENALTY CLAUSES IN EMPLOYMENT CONTRACTS**

**Penalty clauses agreed for unjust termination of a fixed term employment contract before its expiry are valid and enforceable even if the contract is deemed as an indefinite term employment contract by law due to lack of conditions required to conclude fixed term contracts.**

With its decision dated 8 March 2019 and numbered 2017/10 E., 2019/1 K., the Supreme Court General Assembly on the Unification of Judgments ("General Assembly") concluded that penalty clauses agreed for unjust termination of a fixed term employment contract before its expiry are valid and enforceable even if the contract is accepted to be of indefinite term from the beginning due to lack of objective conditions required by law.

Fixed term employment contracts, which are regulated under Article 11 of the Turkish Labor Act ("TLA"), are of exceptional nature and they can only be executed in the presence of objective conditions which are exemplified by the TLA as cases where the term of the work to be performed is certain or it is for completion of a certain project or where extraordinary circumstances (such as an employee's temporary absence for military service or maternity leave) arise. In a fixed term employment contract, it is possible to determine a penalty clause in case of unjust termination of the contract before the expiry of the contract's term, provided that this is agreed to be applicable both for employer and employee. The conclusion drawn by the TLA to a fixed term employment contract which lacks the objective conditions is to deem such contract as of indefinite term from the beginning. Even parties define the contract as a fixed term contract, this will not be binding and the type will be determined on the basis of the objective condition.

In terms of indefinite term employment contract, which is considered to be the principal type of employment contract due to the protections it provides to employees, there is no concept of termination before a specified term since there is naturally no specific term of employment. As a consequence, this type of contracts generally does not include penalty clauses with regards to unjust termination before a certain period. That being the case, also in an indefinite term contract parties may mutually agree on a minimum period in which the contract cannot be terminated. This type of contracts is regarded as contract with minimum term of employment and until the expiry of the agreed minimum term, it is subject to the terms and principles applicable to fixed term contracts. Therefore, in this type of contracts, it is also possible to determine a penalty clause for unjust termination before the expiry of the minimum period. However, one should always keep in mind that contracts with minimum term of employment are also of atypical nature. Therefore, to assume such nature to an employment contract, there must be an explicit, written agreement that the contract includes a minimum term for employment.

The difference of opinion which leads to unification of judgments stems from conversion of fixed term employment contracts which include a penalty clause for unjust termination before expiry of the term into indefinite term contracts by law due to absence of objective conditions. According to

the opinion of those supporting that the penalty clause will be invalid in such case, the condition of working for a certain period of time cannot be realized in an indefinite term employment contract and thus, a penalty cannot be applied for non-realization of such condition. Supporters of this view, on one hand, accepts that parties may agree on penalty clauses also in an indefinite term employment contract if it is a contract with minimum term; whereas on the other hand, they object to the interpretation of the term in the fixed term contract as minimum term after its conversion into an indefinite term contract, due to lack of explicit agreement of parties.

In the decision of the General Assembly, this issue has been dealt with on the most basic principles of the Turkish Code of Obligations that are freedom of will and contract. In this respect, the General Assembly first concluded that deeming a fixed term employment contract as of indefinite term due to lack of objective condition concerns the nature of the contract only. It further stated that where an employment contract is concluded with fixed term and with a penalty clause agreed for unjust termination before the expiry of the contract's term, the mutual will of the employer and employee is to provide job protection to the employee and to provide assurance to the employer on employee's performance of its work during the period specified in the contract. On this basis, the General Assembly opined that conversion of the fixed term contract into an indefinite term one shall not prevent survival of the parties' concurrent wills.

Due to the binding nature of decisions on unification of judgments, from this decision forth, penalty clauses agreed for unjust termination of a fixed term employment contract before its expiry shall be valid and enforceable even if the contract is deemed as of indefinite term due to lack of conditions required for fixed term contracts.