



Termination of Employment: Evidential Value of WhatsApp Conversations Among Employees

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1. Introduction

As the means of communication are continuously being evolved and developed in a way that aims to connect the world and people easier, faster, and cheaper; WhatsApp messenger (“**WhatsApp**”) had become an essential to many with its over 2 billion active users Worldwide. Areas of usage of WhatsApp is not only limited to people’s social lives, but extend to business life as well, to the end that business meetings are conducted and work-related topics are discussed over WhatsApp regularly. As a natural result of this ubiquitous use of WhatsApp, the question of whether the conversations over WhatsApp may be submitted to the courts as evidence, and if yes, what is the evidential value of such evidence arises.

This article seeks to shed light on the evidential value of WhatsApp conversations among employees in the event of termination of employment contract under Turkish law. Accordingly, the focus will be maintained on the jurisprudence and legal doctrine in this regard solely.

2. Nature of WhatsApp Conversations Under Turkish Law

In order to make an assessment in regards to the evidential value of WhatsApp conversations, one must first determine the legal nature of the communication realized through WhatsApp. In one of its decision, the 9th Civil Chamber of the High Court of Appeals (the “**High Court**”)

described WhatsApp conversations as “*personal data including privacy*”¹. As per Article 3 (d) of the Law No. 6698 On the Protection of Personal Data (the “**Data Protection Law**”), personal data is defined as “*all the information relating to an identified or identifiable natural person*”. This broad definition embraced by the legislator while enacting the Data Protection Law is exemplified by 12th Criminal Chamber of the High Court of Appeals in one of its recent decision as follows:

*“From the concept of "personal data", one must understand the information that the person did not disclose to unauthorized third persons, person’s birth information (such as Republic of Turkey ID number, name, surname, place and date of birth, mother and father’s name) which is disclosed to other people when desired, but within a limited circle, criminal record, place of residence, educational background, occupation, bank account information, telephone number, e-mail address, blood type, marital status, fingerprint, biological samples such as DNA, hair, saliva, nails, sexual and moral preference, health information, ethnic origin, political, philosophical and religious views, trade union affiliations, and any and all kind of information belonging to a real person which determine or render determinable the identity of a person, distinguish the person from other individuals in the society and suitable for revealing his or her characteristics.”*²

Now that we have established the legal nature of WhatsApp conversations, i.e. personal data including privacy, the question boils down to whether WhatsApp conversations among employees may be submitted to the court as evidence within the scope of termination.

3. Case Law

¹ 9th Civil Chamber of the High Court of Appeals’ decision numbered 2018/10718 E. 2019/559 K. and dated January 10, 2019.

² 12th Criminal Chamber of the High Court of Appeals’ decision numbered 2019/12886 E. 2020/513 K. and dated January 15, 2020.

In principle, all the evidence to be submitted to the court shall be obtained lawfully. In addition, irrespective of existence of an objection by the other party, the court shall *ex officio* consider whether the evidence in question is unlawfully obtained and if the answer is yes, exclude it from the case file (i.e. render inadmissible) as per Article 189(2) of Civil Procedure Code No. 6100 (the “CPC”).

In its decision dated March 7, 2017, 3rd Civil Chamber of the High Court of Appeals set out that, “...posts made on social media accounts may only be used as evidence by the account holder or the persons who are in the same social environment (facebook/WhatsApp).”³ Moreover, with respect to the protection of personal data, Articles 135 and 136 of Turkish Criminal Code prescribe jail sentence for unlawful recording of personal data and unlawful sharing or acquisition of personal data, respectively.

From a labor law perspective, High Court of Appeals’ decisions as to the admissibility of WhatsApp conversations as evidence for lawful termination of employment agreement have been inclined to render the evidence inadmissible in recent years. For instance, in a decision rendered by the High Court in 2015, it has been found that the termination of an employment agreement due to the WhatsApp conversations between employees which are immoral and include insults to the employer is unlawful.⁴ This stance of the High Court of Appeals furthered with a decision it rendered in 2017.⁵ In the said case, a number of employees created a WhatsApp group in which they exchanged their thoughts on the harshness of working conditions as well as the negative changes therein, wage policy, and mobbing within their workplace. These correspondences were handed to the employer by an employee in the group and the employer has terminated the employment agreement of the employees in question. In its decision, the High Court started its analysis by stating that:

³ 3rd Civil Chamber of the High Court of Appeals’ decision numbered 2016/14742 E. 2017/2577 K. and dated March 7, 2017.

⁴ 9th Civil Chamber of the High Court of Appeals’ decision numbered 2015/17583 E. 2015/25132 K. and dated September 9, 2015.

⁵ 9th Civil Chamber of the High Court of Appeals’ decision numbered 2016/14205 E. 2017/9526 K. and dated June 1, 2015.

“Whatsapp system, first of all, is a system which enables communication through internet over phone or internet platform. Here, person may enhance communication with persons as well as within the groups by creating group chats. However, this system is in a position which is protected in itself and unavailable to third parties. Thus, it is not forbidden for employees to create a group and communicate therein, as long as it does not disrupt the work flow and affect the work. In this context, the principle is that the communications of the employees here are also protected as personal data.”

Subsequently, the High Court found that the employer obtained the data which supposed to be confidential in a forbidden manner and therefore this could not be a ground for lawful termination of employment and therefore overturned the decision of the Court of First Instance.

In a similar vein, in a case before the High Court, one of the employees sent messages to a WhatsApp group created by the employees to the end that bonuses are insufficient, practices with respect to promotion within the work place and advising *“not to put too much effort as it would be for nothing”* and the employment of that employee was terminated by the employer due to these messages.⁶ In its decision, the High Court found that:

“In the present case, given that WhatsApp conversations are in nature of personal data including privacy, termination of employment solely based on these correspondences that we could not understand how they were obtained, is not righteous.”

On a side note, given that the court is entitled to decide whether the evidence which is submitted to prove a fact is lawful as per Article 189(4) of the CPC, there are decisions of the

⁶ 9th Civil Chamber of the High Court of Appeals’ decision numbered 2018/10718 E. 2019/559 K. and dated January 10, 2019.

High Court of Appeals where the termination of employment has been found righteous as a result of the examination of evidence, including WhatsApp conversations between the employees. For instance, in a case brought before the High Court, an employee sent messages to a WhatsApp group created by the store manager using a strong language that “*could not be written even in a court decision*” and the employment of that employee was terminated by the employer.⁷ In its decision, the High Court emphasized that provided that an employee’s statements against the employer amounts to the level that it disrupts the work order, termination of employment shall be deemed to have been realized with a valid reason. Accordingly, the High Court found that:

“(...) it is established that the employee sent messages with heavy swearing. However, given that the target of the words of the employee could not be determined precisely within the scope of the file, it is evident that the termination is not righteous. Although the termination is not righteous, since it is understood that the actions of the plaintiff caused negativities in the workplace and the termination made was based on a valid reason even if it was not righteous (...)”

4. Conclusion

In light of the afore mentioned jurisprudence of the High Court of Appeals and considering the legal framework concerning the subject matter herein, it is seen that a conclusive determination could not be made on whether the conversations of employees over WhatsApp could be used as evidence against them in a lawsuit. However, it is also seen that while deciding on the admissibility of such evidence, the courts make an evaluation with a case-by-case basis approach and consider the following criteria, (i) whether the termination has been realized duly and in accordance with law, (ii) accuracy and content of the conversation, (iii)

⁷ 9th Civil Chamber of the High Court of Appeals’ decision numbered 2019/7066 E. 2020/357 K. and dated January 15, 2020.



whether the conversation has caused negativities or problems at the workplace and (iv) the means used while obtaining the personal data.

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