GLOBAL LEGAL INSIGHTS

Employment & Labour Law

Third Edition

Contributing Editor: Charles Wynn-Evans
Published by Global Legal Group

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Turkey

Gönenç Gürkaynak & Ayşın Obruk
ELIG, Attorneys-at-Law

General labour market trends and latest/likely trends in employment litigation

In Turkey on May 13, 2014, 301 miners were trapped after an explosion caused by a fire which triggered a collapse at a coal mine in the western Turkish province of Soma, Manisa. Accordingly, occupational accidents became a new trend in litigation related to the employment law.

Occupational accidents are regulated under Social Security Law No.5510 ("Law No.5510") and Occupational Health and Safety Law No. 6331 ("Law No.6331").

As per Article 13 of the Law No.5510, an occupational accident is defined as an accident which occurs when: (i) the employee is at the work place; (ii) the employee is working under an employer, at times when he/she is not carrying out his/her main work due to the reason that he/she is sent on duty to another place out of the workplace; and (iii) the employee is going to or coming from the place where the work is carried out, in a vehicle provided by the employer which is related to the work carried out by the employer, or by the employee working independently on behalf of his/her own name and to account for the employer, and causes immediate or subsequent delayed, physical or mental handicap in the insurance holder.

Under Article 14 of Law No.6331, an employer should keep a list of all occupational accidents and diseases suffered by its workers and draw up reports after required studies are carried out. The employer should also investigate and draw up reports on incidents that might potentially harm the workers, destroy the work place and/or work equipment, or have already damaged the work place and/or equipment despite not resulting in injury or death. The employer should also notify the Social Security Institution of the following situations within a prescribed time − namely, within three working days of the date of the accident, or within three work days after receiving the notification of an occupational disease from health care providers or occupational physicians. Occupational physicians or health care providers should refer workers who have been pre-diagnosed with an occupational disease to health care providers authorised by the Social Security Institution. Furthermore, occupational accidents referred to health care providers should be notified to the Social Security Institution.

It should be noted that the employer should obey the provisions of Law No.6331, in order to ensure the occupational health and security of the employees. The most important regulation within Law No.6331 is that the employer must/should assign a workplace doctor and other healthcare personnel for all places of work in order to avoid occupational risks. *As per* this provision, the previous legislation obliging the employer to assign a workplace doctor in cases where the number of employees is 50 and above is abolished, and the workplace doctor becomes compulsory for all workplaces.

Furthermore, *as per* Article 8 of Law No.6331, the employer is obliged to assign an expert in labour safety who has: (i) a class (A) certificate for workplaces which are classified as very dangerous; (ii) at least a class (B) certificate for workplaces which are classified as dangerous; (iii) at least a class (C) certificate for workplaces which are classified as less dangerous; and (iv) a workplace doctor and other healthcare personnel for all workplaces regardless of which danger classification they fall under. This is in order to avoid occupational risks, and to provide labour health and safety services in the workplace for the protection of employees. Those workplaces which do not employ personnel with these characteristics can fulfil the whole or a part of this obligation by receiving services from common health and security units.

Another new instrument which was introduced by Law No.6331 is the Board of Labour Health and Safety. For workplaces employing 50 or more employees, where work is carried out continuously for longer than six months, the employer is obliged to establish a Board of Labour Health and Safety, and to implement the decisions taken by the Board of Labour Health and Safety in accordance with legislation on labour health and safety.

Law No.6331 also sets forth administrative penalties, including an administrative fine and suspension of business. Article 25 reads: "*In case a matter which may endanger the life of employees is determined in the workplace buildings and extensions, working methods and procedures or equipment of a workplace by labour inspector authorized for inspection with respect to labour health and safety, the operation is suspended until this danger is eliminated. The decision for suspension of business may include a part of the workplace or the whole. The suspended business shall not be continued until the matter endangering the life of employees is eliminated*". Article 26, which stipulates the administrative fines and their enforcement, sets forth various administrative fines ranging from TL 200 – toTL 50,000.

Key case law affecting employers' decision-making over dismissals, redundancies dismissals, etc.

The guidelines surrounding the admissibility of an employer's decision to dismiss varies on the ground on which the dismissal is based. The general outline of those guidelines is explained below and is also illustrated with several instances borne from the precedents of the High Court of Appeals, which, through its decisions, comprise the case law of the Turkish legal system.

Reasons which are considered valid grounds to dismiss an employee are: (i) any act which disrupts the harmony and smooth operation of the workplace; or (ii) lack of performance in carrying out of his/her duties.

Before executing a dismissal based on the conduct of an employee, the employer is expected by law to: (i) analyse the situation which causes dissatisfaction following the employee's relevant conduct; (ii) request the relevant employee's defence regarding his/her actions; (iii) make an objective evaluation by taking into account the employee's defence and the circumstances of the case revealed by the enquiry; and (iv) to serve a written warning to the employee, should it be deemed necessary. This written warning also informs the employee that if such an act is repeated, the employer may resort to terminating the employment agreement. Only if the employee continues with such an act, even after the aforementioned written warning, may the employer then resort to termination. On that note, the mentioned act shall be deemed to have an effect so as to disrupt the harmony and smooth operation of the workplace. Below, derived from various precedents, are examples of actions which are

accepted by the High Court of Appeals in that context to constitute grounds for dismissal:

Incurring pecuniary damage to the employer; performing his/her duties in a manner which causes grievance in the workplace; asking for a loan from a colleague on the condition that it harms the work relation; provoking his/her colleagues against the employer; and/or engaging in long and personal phone calls which halt the smooth flow of work etc.

In addition to the employer's compliance with the process explained above, the Labour Law obliges the employer to serve the employee with a termination notice which explicitly states the reason for the dismissal decision of the employer. In the management of the abovementioned process, the High Court of Appeals fundamentally requires the employer to be moderate and take reasonable measures in face of the employee's actions.

Provided that the employee shows unsatisfactory performance with respect to the standards and expectations of the employer, the employer is entitled to terminate the employee's employment agreement. Nevertheless, the High Court of Appeals presents strict guidelines in order to avoid the misuse of power by the employer. In other words, the employer is bound by certain criteria and duties set out by the High Court of Appeals in its precedents. Below are illustrated examples, derived from various precedents, of insufficient performance which are accepted by the High Court of Appeals in that context:

Performing less efficiently than other employees who undertake the same or similar work; demonstrating a lower performance than expected according to his/her qualifications; losing focus on the job at hand; frequent sick leave; unmotivated; unable to learn and improve his/her capabilities; and/or incapable of adapting to the workplace environment, etc.

On that note, the High Court of Appeals also asserts that an insufficiency has to be determined objectively. That is to say, the employer has to exclude any prejudice or personal preferences when determining and deciding on the insufficient performance of an employee. When the insufficiency of an employee is first detected, the employer has to make sure that the relevant employee undergoes a certain performance evaluation system (a performance improvement plan would qualify as such a performance evaluation system) and the employment agreement of the employee is terminated by taking into consideration the principle of termination being considered as the last resort. Such a performance evaluation system has to include the determination of personal objectives, the measurement of the relevant employee's performance in the light of these objectives, and inform the relevant employee of the result. Should the employee's performance be determined as insufficient after applying the aforementioned system, the employer shall: (i) ask the employee to provide written defence regarding his/her performance; and (ii) serve a written warning to the employee, should it be deemed necessary, which also informs the employee that if his/her performance does not show any progress, the termination of the employment agreement may take place. The High Court of Appeals requires the employer to execute its dismissal decisions as a last resort and prior to termination. The employer is to consider assigning the employee to some other position which may be deemed more suitable for the employee's skills and knowledge.

In cases of dismissal for cause, the High Court of Appeals establishes the following examples as cause in its precedents:

Deceiving the employer by claiming to have qualifications which he/she does not actually possess; insisting on not doing the tasks which are instructed by the employer; abusing the employer's trust; stealing; disclosing employer's trade secrets; sexually harassing other employees; insulting the employer or its family; and/or making false and demeaning allegations about the employer, etc.

In that sense, the employer should be careful to be in a position to be able to prove the existence of the abovementioned cases. The High Court of Appeals underlines the fact that the burden of proof is on the employer with respect to proving such claims to be true.

The High Court of Appeals' admissibility guidelines on redundancy dismissals are as follows: (i) the employer shall resort to dismissal only if the circumstances which affect the employment conditions make redundancy dismissals inevitable; (ii) the employer shall make an operational decision regarding the redundancy; (iii) such a decision shall be executed in a consistent manner; and (iv) the employer shall not act arbitrarily in making the decision that leads to the redundancy. Should those conditions be met, the employer's operational decision is not subject to judicial review. Furthermore, the employer shall not get involved in any practices which contradict the operational decision. The High Court of Appeals adopts the "*dismissal to be considered as last resort*" principle in those cases as well, and obliges the employer to evaluate any other position that the employee may be assigned to, instead of resorting to termination. The following are cases which the High Court of Appeals deems to be the cause of redundancy in the workplace:

Decrease in sales opportunities or demand; energy shortcomings; economic crisis; recession in the market; shortcomings in raw materials; implementation of new technology; closing of certain divisions in the work place; and/or annulment of certain jobs; etc.

With the most prominent and well-established precedents of the High Court of Appeals, a more definitive and elaborate guideline and roadmap are set out for employers to follow and consider prior to making any decision as to dismissals or redundancy dismissals.

Recent statutory or legislative changes

The latest change in legislation which had a great impact on employment relations is Law No.6552. The main intent of Law No.6552 is to protect the rights of the sub-contractor's employees and the working conditions of miners.

Under Article 18 of the Labour Law, an employer who employs at least 30 employees has to state a valid reason when dismissing an employee who has worked for at least six months at a particular workplace, and with whom the employer has signed an indefinite-term agreement. An employee may initiate a lawsuit in case the conditions set forth under Article 18 exist. Within Law No.6552, the condition of having six months of seniority for the miners is not required to be met. In that sense, in case a miner having less than six months of seniority is dismissed based on a valid reason, then such employee may initiate a reinstitution lawsuit under Article 18.

It is further stipulated that the miners may not over-work, unless the circumstances set forth under Article 42 and 43 of the Labour Law exist, i.e. compulsory and extraordinary circumstances. In case such circumstances exist, then the salary to be paid for every hour exceeding the 36-hour week should be calculated by increasing 50% of the hourly salary of the miners. Law No.6552 also stipulates that the maximum working hours of the miners should be 36 hours and the daily working hours should not exceed six hours. With respect to the miners it is also proposed to add four days for each legal annual leave stipulated under Article 53, since the working conditions of those employees are significantly difficult in comparison to other jobs.

Law No.6552 also includes new provisions with respect to the rights of the sub-contractors as follows:

- In case there is a sub-contractor relation between the parties, then upon request of the employees or *ex officio*, employers are obliged to put in place monthly control as to whether the employee's salaries are paid to the employees' bank accounts through retention of progress payment.
- The duration of the sub-contractor employees' paid annual leave is calculated by taking into consideration the duration of their service in the same working place, regardless of whether they work for the same sub-contractor or not.
- In the event that the subcontracting is practised contrary to Article 8 of the Labour Law, the administrative fine for each employee shall be imposed separately on the employer and sub-contractor or their representatives.

Likely or impending reforms to employment legislation and enforcement procedures

The Turkish government is currently working on a new regulation pertaining to severance pay. This regulation involves major amendments compared to the current regulation. The most prominent changes presented with this new regulation are as follows:

- The form of payment of the severance pay will be changed. The severance pay will be paid by a retirement company (which is selected by the employee for his/her social premiums to be deposited to) upon request of the employee.
- *As per* the new regulation, the severance pay will be paid as 4% of the employee's gross salary to the retirement company's relevant account, while the current regulation suggests that one month of the employee's gross salary shall be paid for each year of seniority.
- The employees who resigned or left work due to any other reason will also be entitled to severance pay. The current regulation does not provide for the payment of severance pay to employees who have resigned or left work for any reason other than being dismissed without cause or without valid reason by the employer.
- The new regulation also suggests that employees of any seniority will be entitled to severance pay, while the current regulation stipulates that the employee should have at least one year of seniority in order to be entitled to the payment of severance pay.
- The conditions for the request of severance pay have also changed. The employee shall have 15 years of insurance period and premium payment in lieu of 3,600 days in order to be able to demand the payment of severance pay. Nevertheless, the employee may still be entitled to such payment in case he/she will use that money to invest in the purchase of a house. The current litigation does not involve such an exception for payment.
- The new regulation suggests that the statute of limitations for the request of severance pay will be 10 years as of the date on which the employee is deemed entitled to request such payment.
- The said regulation has yet not passed the parliament reading; hence it is subject to further amendments which will be held in the legislation commission.

Gönenç Gürkaynak
Tel: +90 212 327 1724 / Email: gonenc.gurkaynak@elig.com

Mr. Gönenç Gürkaynak is the managing partner of ELIG, Attorneys-at-Law, which is a leading law firm in Istanbul, Turkey. Mr. Gürkaynak graduated from Ankara University, Faculty of Law in 1997, and was called to the Istanbul Bar in 1998. He holds an LL.M. degree from Harvard Law School, and he is qualified to practise in Istanbul, New York and Brussels. Mr. Gürkaynak also became a solicitor of the Law Society of England and Wales (currently non-practising) after passing the QLTT. Prior to joining ELIG, Attorneys-at-Law as a partner more than nine years ago, Mr. Gürkaynak worked as an attorney at the Istanbul, New York, Brussels and again in Istanbul offices of a global law firm for more than eight years.

Mr. Gürkaynak heads the "Regulatory and Compliance" department of ELIG, Attorneys-at-Law. He also holds a teaching position at undergraduate and graduate levels at three different universities in the fields of law and economics, competition law and Anglo-American law.

He has a total of more than 100 international and local articles published in English and in Turkish, and two books, one published on "A Discussion on the Prime Objective of the Turkish Competition Law From a Law & Economics Perspective" by the Turkish Competition Authority, and the other on "Fundamental Concepts of Anglo-American Law" by Legal Publishing.

Ayşın Obruk
Tel: +90 212 327 1724 / Email: aysin.obruk@elig.com

Ms. Ayşın Obruk is a senior associate at ELIG, Attorneys-at-Law. Following her graduation from Marmara University School of Law in 2005, Ms. Obruk began practising civil law by handling various high-profile litigation cases as a member of the Istanbul Bar Association. Ms. Obruk attended civil law courses at the University of Ghent in Belgium for a semester in 2007 and completed her LL.M. in Business Law at the Institute of Social Sciences at Bilgi University School of Law. Ms. Obruk provides legal counselling in civil law matters along with litigation services, and has diverse legal expertise and practice in employment law. She is also specialised as a litigator in intellectual property law, media law and commercial law matters. Ms. Obruk is fluent in English.

ELIG, Attorneys-at-Law

Çitlenbik Sokak No: 12 Yıldız Mahallesi Beşiktaş 34349 İstanbul, Turkey
Tel: +90 212 327 1724 / Fax: +90 212 327 1725 / URL: http://www.elig.com

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