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Turkey

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

Mobbing is a fairly new subject, the number and claims for which are likely to increase. The relevant concept is not yet stipulated in Labour Law number 4857 ("Labour Law") or in relevant legislation. This being the case, it is evaluated through the decisions of the Turkish High Court of Appeals ("High Court of Appeals"). *As per* the relevant decisions, mobbing is defined as the systematic derogatory conduct, threat or violence realised against employees by their seniors, co-workers or juniors, at the workplace. Within this scope, the employees are protected against both their employers and co-workers.

The High Court of Appeals seeks consistency in the acts/events which comprise mobbing and any strong indication of its existence. Each case is examined individually to determine whether acts/events which comprise mobbing were, indeed, of a continuing nature and whether mobbing really took place.

In case an employee succeeds in proving that continuing psychological pressure against him/her did indeed take place through "strong indication", the employee will be able to terminate the employment agreement for cause and request the employer to pay: (i) the salary for the term when she/he was employed; (ii) severance pay, in case the employment term was over a year; (iii) pay for work on holidays, if any; (iv) overtime pay, if any; (v) pay for unused annual leave, if any; and (vi) premiums, bonuses, etc., if any. The employees may use e-mail correspondence or witness statements to demonstrate to the court "strong indication" of mobbing.

In light of the above, although in cases of resignation, no severance pay is paid to the employee; in those cases where an employee succeeds in proving that she/he resigned because of mobbing, she/he would most probably be entitled to severance pay since the relevant termination would be deemed to be executed by the employee for cause.

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

The guidelines surrounding the admissibility of an employer's decision to dismiss vary 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) serve a written warning to the employee, should it be deemed necessary, which also informs the employee that if such an act is to be 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, the employer may 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 work place. Below, derived from various precedents, are illustrations of 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; engaging in long and personal phone calls which halt the smooth flow of work etc.

In addition to the employer's compliance to 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 by his/her qualifications; losing focus on the job at hand; getting sick leave frequently; not to be keen on the job; unable to learn and improve his/her capabilities; incapable of adapting to the workplace's environment etc.

On that note, the High Court of Appeals also asserts that the insufficiency has to be determined objectively. That is to say, the employer has to exclude any prejudice and/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), in line with 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 informing 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 another employee; insulting the employer or its family, making false and demeaning allegations about the employer, etc.

In that sense, the employer shall 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 with 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 in which the High Court of Appeals deem 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; 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 the employers to follow and consider prior to making any decision as to the dismissals or redundancy dismissals.

Recent statutory or legislative changes

The latest change in legislation which had a great impact on employment relations is the new Turkish Law of Obligations number 6098, which came into force at the beginning of July 2012, i.e., July 1st, 2012 ("Law of Obligations"). The Law of Obligations is the most general law to apply to all contractual relations, including employment relations. In case the Labour Law does not contain a specific provision regarding a specific subject matter, the provisions of the Law of Obligations shall apply. One of the most prominent effects the Law of Obligations had on employment relations are on release letters.

With respect to the Labour law, a release is often granted by the employee regarding one or many receivables which she/he is entitled to collect from the employer.

Before the Law of Obligations came into effect, there was no specific provision under Turkish legislation which regulated release. This being the case, Turkish legal opinion and precedents of the High Court of Appeals accepted the existence of these without doubt. Release was defined as an agreement between two parties through which the creditor waived his/her receivables, released the debtor and the debtor showed consent to the creditor's act. The consent of the debtor for such a relation to be established did not necessarily have to be explicit; it could also be implicit. As for the formal requirements of a release; a release would only be valid where it was in writing. Nevertheless, such a requirement was not a validity requirement; it was solely a proof requirement. That is to say, even if the release were to be made orally, it would still be deemed valid. However, the party, which tried to rely on the relevant release, could not prove the existence of an oral release if the counter-party were to claim that no such release exists. Thus, it was recommended that the release be made in writing.

Listed below are precedents developed by the High Court of Appeals which had a great impact on the handling of release letters in employment law and which were consequently reflected within the Law of Obligations too:

1. The precedents of the High Court of Appeals suggested what the release letters should contain explicitly for the creditors to release debtors. General remarks stating that one party does not have any receivables to collect from the counter-party were and are deemed invalid by the High Court of Appeals. Accordingly, the items for which the creditor releases the debtor should be specifically mentioned within the release letter. In practice, most of the release letters which are in use by employers mention explicitly that the employees release the employers with respect to their severance pay, payment in lieu of notice, unused paid annual leave, etc. Such release letters are deemed valid by the High Court of Appeals.
2. Release letters, which contain an amount as to the items listed within, are deemed to be official

documents that prove that the relevant payments are indeed made. This is to say the explicit statement of each item for which the creditor releases the debtor and which specifies the amount due for each item, vests in the relevant document the quality of a receipt. It should be noted that the High Court of Appeals established the need to specify each item explicitly, for which the creditor releases the debtor, as a formal requirement for validity. Showing the amount of the relevant items, on the other hand, does not affect the validity of a release letter, it only vests in the relevant document the quality of a receipt with respect to the amount mentioned therein. In case it is found that the amounts mentioned within a release letter are less than what they ought to be, the amount exceeding the amount mentioned in the relevant release letter should be paid to the employee.

3. In case the release letters contain a remark so as to state that the employee waives his/her right to resort to judicial proceedings, such a remark will not be deemed valid.
4. Standarised release letters, the blanks of which are filled in later, are not deemed valid by the High Court of Appeals. This is to ensure that the principle of protection of the employee is preserved. An average employee might be led to think that it is appropriate to sign the relevant document since it is a standard text, used probably several times and signed by many. Having thought so, the relevant employee will not question much the content of what she/he is signing. Thus, each release letter must be tailored to meet the facts and circumstances of the case.
5. The most important precedent which directly went into the wording of the Law of Obligations was regarding the date on which the release letters were signed by the employee. In practice, it was noted that most of the employers obtain release letters from employees prior to termination of the employment agreements; in fact, even at the beginning of the employment. The High Court of Appeals found it not to be possible for a document, in which the employee states that she/he received his/her employment rights before she/he was paid them, to be deemed valid.

In light of the above, Article 420 of the Law of Obligations introduced the conditions of a release letter for the first time within Turkish legislation. Accordingly: (i) a release letter should be in writing; (ii) a term of at least one month should exist between the date of termination of an agreement and the release date; (iii) the amount and the subject of the release should be explicitly regulated; and (iv) the payment should be made in full and via bank account. *As per* the Law of Obligations, those release letters which do not comply with the aforementioned conditions, are definitely invalid.

What is regulated within the Law of Obligations has combined principles that were already adopted through doctrine and the precedents of the High Court of Appeals, and it, taking one additional step, extended the term to take place between termination and release, to at least one month. The ideal situation envisaged by the Law of Obligations is that the agreement is terminated first, then a payment will be made through a bank, and then the release letter is signed at least a month after the date on which the agreement was terminated.

One important amendment adopted by the Law of Obligations is with regard to non-compete obligations, which could be imposed on the employees. *As per* both the previous Law of Obligations and the current Law of Obligations, the non-compete obligation to be imposed on the employee shall be so that the economic independence of the employee is not hindered. This was/is achieved through imposing reasonable limitations as to the place, term and subject on the non-compete obligation. The relevant amendment is regarding the term of the said obligation. Previously, there was no explicit provision of law on the matter and the precedents of the High Court of Appeals provided guidance on the issue. *As per* the Law of Obligations, the term is limited to two years, subject to exceptions.

Another change is the Law on Employment Health and Safety ("Health and Safety Law") number 6331.

The purpose of the Health and Safety Law is to regulate employers' and employees' assignments, authorities, responsibilities, rights and obligations in order to provide labour safety and health at the workplace and to improve present health and safety conditions. The Health and Safety Law shall apply to all businesses and workplaces belonging to the public and private sector, to the employers of these workplaces and to all employees including employer's representatives, apprentices and interns, irrespective of the subject matter of their activities.

The most important regulation within the Health and Safety Law is that the employer will have to assign a workplace doctor and other healthcare personnel for all the places of work, in order to avoid occupational risks. *As per* this provision, the previous legislation which obliges 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 the Health and Safety Law, the employer is obliged to assign an expert in labour safety, who has: (i) a class (A) certificate for the workplace which is classified as very dangerous; (ii) at least a class (B) certificate for the workplace which is classified as dangerous; (iii) at least a class (C) certificate for the workplace which is classified as less dangerous; and (iv) a workplace doctor and other healthcare personnel for all the workplaces regardless of which danger classification they fall under, in order to avoid occupational risks and to provide labour health and safety services involving the workplace in order to protect employees from these risks. Those workplaces which do not employ personnel with these characteristics can fulfil the whole or a part of this service by receiving services from common health and security units.

The assignments and authorities, operating rules and procedures and qualifications of the workplace doctor and labour safety expert will be determined through the regulation issued by the relevant ministry following the publication of law.

Another new instrument which was introduced by the Health and Safety Law is the Board of Labour Health and Safety. Under the Health and Safety Law, for workplaces employing 50 and more employees, where work is carried out continuously for longer than six months, the employer is obligated 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. The composition, assignments and authorities, operating rules and procedures of the Board of Labour Health and Safety are determined through a regulation issued by the relevant ministry.

The Health and Safety Law 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 carried on until the matter endangering the life of employees is eliminated"*. Article 26, which stipulates the administrative fines and their enforcement, set forth various administrative fines between TL 200 – TL 50,000.

As per Article 38 of the Health and Safety Law, the date of entry into force varies between workplaces according to the number of their employees.

Likely or impending reforms to employment legislation and enforcement procedures

The Turkish government is currently working on a new regulation pertaining to severance pay. The said regulation involves major amendments compared to the current regulation as to that matter. 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 the employee's one month of 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 the severance pay. The current regulation does not oblige 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 the employees of any seniority will be entitled to the

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 not yet passed the parliament reading, hence it is subject to further amendments which will be held in the legislation commission as to that regulation.

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