Olgu Özdemir Ertürk

The Judicial Reflections of the Termination Ban and Unpaid Leave as Interim Measures During Covid-19 Pandemic in Turkish Labour Law

1. *Introduction*

In the beginning of the Covid-19 pandemic, one of the pioneer concerns was to protect the labour contracts. Otherwise, the negative impacts of losing jobs would be devastating and millions of people and their families would be affected enormously. Respectively, many countries have taken preventive measures. In this paper, we are evaluating the effects of the interim measures taken by the Turkish Government at the beginning of Covid-19 pandemic, by discussing the judicial decisions[1]. Due to the time-consuming judicial process, the lawsuits regarding these regulations, which expired in July 2021, took quite a long time. As a matter of fact, even decisions dated 2023 are included in our study.

[1] The author would like to express her respect and gratitude to the Presidents of the Antalya 9th and 10th Regional Court of Justice providing access to reach up-to-date decisions via UYAP (National Judiciary Network Server) for this paper.

The main issue that we try to understand while analysing the decisions in this study is whether these regulations were effective in ensuring the continuity of the labour contract. Of course, there may have been disputes that were not subject to judicial proceedings or that the parties resolved through alternative resolution methods such as mediation. Therefore, it will not be possible to determine exactly how many employers have acted in compliance with the restrictions. However, at the outset, it is possible to briefly state that the cases that have been brought to courts have shown us that the existence of these prohibitions alone is not sufficient to protect the employees or to prevent the long-term negative results of Covid-19 pandemic on labour law.

In order to protect the employee, the first concern is to maintain the continuity of the legal relationship. As the first step, the legislation in Türkiye must be shortly clarified for the reader to understand the effects of measures.

In Turkish labour law, the "job-security system" had been adopted in Labour Code no. 4857 in 2002, in the light of Termination of Employment Convention no. 158 and Recommendation no. 119. In view of this Convention, the legislator determined the scope of the application, developed some conditions, and set some criteria, which will be explained when needed.

Firstly, the employee has to be in the scope of Labour Code no. 4857 or Media Labour Code no. 5953. This provision excludes, for instance, pilots or flight attendants, whose labour contracts are concluded according to the Code of Obligations no. 6098, or marine employees belonging to Maritime Labour Code no. 854. Due to this condition, only a group of employees subject to relevant laws can benefit from the job security.

Secondly, the employee has to work in a workplace consisting of at least 30 employees[2]. If the employer has more than one workplace in the same work field, the total amount of employees would be taken into account; for example, most of the branch banks consist less than 30 employees, but in total, the bank itself employs thousands in total throughout the country.

The third condition is the six months waiting period. In order to enjoy the security, the employee must be working for the same employer for at least six months of time, continuously or intermittently.

[2] Thirty-employee barrier had become a major source of criticism in the doctrine and even an application was made to the Constitutional Court for the annulment of phrase "30" but this application was rejected as it was not found to be unconstitutional. Legislator considered that smaller workplaces are not able to handle the economic consequences of the job-security system. So does the Constitutional Court.

The last condition relates to the type of contract. Definite or fixed term labour contracts end by itself, so these also fall out of the scope of protection. This, by nature, can be excluded from the job security and it's also stated in the Art. 2/2-(a) of the Convention no. 158.

If the employee is out of the scope of this job security system, the freedom of contract rule apply, the employee enjoys no protection. Those employees could ask for the severance pay – if deserved – or the compensation for notice period, if notice is not given by employer. Additionally, if the right of termination is not exercised in good faith, the employee may claim compensation for abuse of right to terminate. (Turkish Labour Code art. 17/6, Code of Obligations art. 434, Maritime Labour Code art. 16). The legislator regulated also two special compensations for discriminating termination[3]; one may either claim for general reasons or discrimination on grounds of union rights. Trade Unions and Collective Agreement Code of 6356 Art. 25 bans all terminations which are against union freedom. Union freedom is protected for all the employees, as it is considered a fundamental right within the scope of this Article.

2. *Interim Measures for Coronavirus Period*

After the Coronavirus (Covid-19) outbreak, the first case in Türkiye was announced on March 11, and the first death occurred on March 17, 2020. The Scientific Committee, which was established before these events, convened to take various precautions quickly. According to the precautions, the Turkish Government declared the closure of public and some private workplaces. Cinemas, theatres, concert venues, wedding venues, restaurants, cafes, beerhalls, amusement parks, swimming pools and any kind of spas, massage places, gyms, game venues, malls, children's playgrounds are all closed.

[3] It is important to point out that the type of compensation depends on the action of the employer and the position of the employee. For instance, if the right to terminate is used based on the ground of sexual discrimination and if the employee falls in the scope of the Labour Code 4857, the compensation for discrimination can be applicable (Art. 5/6). But the employees who are not in the scope of this Code, cannot enjoy this compensation. For example, air transportation work is out of the scope because of its own special working conditions. However, as there is no special legislation for this field, flight attendants and pilots are considered as employees within the scope of Code of Obligations. This Code does not contain any special compensation against discrimination.

Although some workplaces were physically closed, another group of workplaces continued their activities remotely or online; such as any level of schools, universities, any type of educational institution, banks... etc. Activity in some sectors significantly reduced or stopped, on the other hand, for instance, the volume of business in online shopping companies or logistics had grown tremendously. Therefore it is not possible to say that the pandemic alone might be the ground for suspending a business relationship. Depending on the nature of the work and workplace, the activity might have decreased or stopped, but on the contrary, in some, it might have increased[4].

On 26.03.2020, the first Covid-19-reasoned Amendment of Certain Laws No. 7226 ("Law no. 7226") had been adopted. This law had simplified the application process for the short-time work allowance. In order to benefit from the short-time work practice, employers had to keep the employees employed. Because of this indirect result, we chose to call this application an "indirect termination ban". But this application did not stop employers from dismissals. After the adoption of "indirect termination ban", from 26th March until 17th April 2020, there were more than half a million applications to the unemployment fund, according to the reports of the Turkish Employment Agency[5]. This data shows us that after the announcement of compulsory closure, many employers had chosen to terminate the employment agreements even though there was an opportunity to benefit from the short-time work practice. In order to prevent dismissals, it should have become necessary to take more drastic measures.

On 17.04.2020, Turkish Government adopted the Law on Minimizing the Impacts of the New Coronavirus (Covid-19) Outbreak on Economic and Social Life and the Amendment of Certain Laws ("Law no. 7244") published in the Official Gazette. First of all, this Law no 7244 had involved some provisional articles for the Labour Code, Social Security Code and other Codes regarding the labour relations. Although these were provisional articles, the President had the power to prolong the implementation of the provisional articles, with a Presidential Decree. To put it right up front, these articles had been prolonged 7 times until 30.06.2021.

As these rules were adopted in order to control the acute situation, the

[4] Alpagut, *Pandemi'nin İş Sözleşmesine Etkisi: Ücretsiz İzin, Fesih Yasağı, Zorlayıcı Neden*, in Alpagut (ed), *Pandemi Sürecinde İş Hukuku*, On İki Levha, 2020, p. 62.

[5] Www.iskur.gov.tr.

adaptation of the "provisional article" was a suitable choice as they won't be in force after the specific time period[6]. However, the effects on jurisdiction weren't provisional and we see the importance of adapting such articles in the long run.

It is possible to categorize the amendments adopted in two titles; "termination ban"; "unpaid leave and financial aid".

2.1. Termination Ban

The termination ban was adopted with the Provisional Article 10 of the Labour Code, regarding all employees throughout the country. Regardless of the Law he or she belongs to, all of the employees were protected, in all sectors and all workplaces[7]. In the doctrine, the addition of such a broad-applied article to the Labour Code was not found legally correct. Because this Code is not the only Labour Code. There are other Labour Codes such as Media Labour Code and Maritime Labour Code and also there are employees whose employment agreement is subject to the Code of Obligations[8]. Perhaps this Law no. 7244 should have been a separate Code, not an "Amendment Law", and applied as due to its status of *lex posterior*.

Although this name "ban" refers to a legally prohibited area of practice, the real aim of the legislator was never to interdict an employer from terminating the labour contract. It could be regarded as a temporary restriction[9]. It was clearly stated in the Article that an employer can only terminate a labour agreement, based on serious misconduct of the employee, according to the Art. 25/II of the Turkish Labour Code, effective immediately. Termination with a notice was prohibited and sanctioned with an administrative fine (for each employee who faced an illegal termination, the fee was equal to the minimum wage of the day) (Provisional Article 10/3 of Turkish Labour Code).

[6] Nazli, *Covid-19 Salgının Ekonomik ve Sosyal Etkilerinin Azaltılması Hakkında Kanunun İş Hukukuna Yönelik Hükümlerinin Değerlendirilmesi*, in *iMÜHFD*, 2020, vol. 7, p. 254.

[7] Alpagut, *cit.*, p. 91; Yiğit, *Bireysel İş Hukuku Açısından Zorlayıcı ve Zorunlu Sebeplere Bağlı Olarak Ortaya Çıkan Çalışma Koşullarının Yeni Koronavirüs (COVID-19) Nedeniyle Gerçekleştirilen Son Yasal Değişiklikler Bağlamında Değerlendirilmesi*, in *İHM*, 2020, 78/2, p. 292; Çelik, Canikloğlu, Canbolat, Özkaraca, *İş Hukuku Dersleri*, in *ED. 34 Beta Yayıncılık*, 2021, p. 650.

[8] Nazli, *cit.*, p. 253. The author criticize the law-making technique and argues in his article that this provisional article concerning all of the employers should have been formulated differently.

[9] Nazli, *cit.*, pp. 254-255.

2.1.1. Immediate Termination - The Door Left Open for Termination

Article 25/II of the Turkish Labour Code which is regulating immediate termination, has the title "*For immoral, dishonourable or malicious conduct or other similar behaviour*". Under this title, the Legislator formulated some examples of conduct, such as the harassment of the employee towards another employee or the committing of a dishonest act against the employer, or breach of his trust. These examples are indeed not *numerus clausus*.

As the Provisional Article had referred to the Art. 25/II of the Labour Code No. 4857, the question arises; what if the employee is working under the scope of other Labour Codes? In other words, what should be done if there is no Article "25/II" in the Code that employee belongs to?

Immediate termination based on a just cause is a subject which differs from Code to Code in Turkish Labour Law. Legislator had referred to a specific article in a specific code, but this must not be interpreted literally. *Ratio legis* would be taken into account and this reference to the specific Labour Code should be understood and interpreted in a way to protect all of the employers. If the employee is working in the scope of another Labour Code, the regulation of the same nature in the other law should be looked at and evaluated accordingly. In Maritime Labour Code or Media Labour Code, there are other examples of serious misconduct. On the other hand, Code of Obligations has only a general explanation: "Art. 435: All the situations and conditions that are not expected to continue the labour relationship according to the rules of good faith are considered to be just cause". In this case, the criterion for immediate termination for just cause will be determined by the rules of good faith.

2.1.2. Qualification of the Forbidden Termination

2.1.2.1. *Can a Termination Be Sanctioned by Nullity?*

The most important concern regarding protection against termination during the pandemic was the sanction of termination. Especially for employees who were not covered by job security, the consequences would be revealed by the judgments.

One of the arguments is that such a termination should be qualified as unjust termination and its' consequences should arise[10]. According to this

[10] ALPAGUT, *cit.*, p. 96; this is also discussed on on-line seminars and conferences; such as

opinion, employees who are under protection of job security system may bring a claim for reinstatement and invalidity of termination[11]. Those who aren't protected should apply for the Turkish Code of Obligations Art. 438 for unjust termination. Technically, none of these claims are a claim for nullity. The articles regarding protection against termination doesn't create a system that excludes the validity of termination, but only a system that holds the employer responsible for it. Therefore, we should act on unjust termination.

According to second view, it has been argued that the notice of termination can only be processed when the prohibition period expires. Pursuant to this opinion, the period in which termination is prohibited by regulation, is considered as the suspension period, as well as the periods during which the employee is on a sick leave[12].

A third view argues that when termination is prohibited, an administrative fine is determined as a sanction[13].

The fourth view supports that the sanction of the forbidden dismissal must be nullity[14], as the termination ban is a caution against dismissals and

CANBOLAT, *Koronavirüs Salgınının Hukukuna Etkisi*, avalaible on https://www.youtube.com/-watch?v=EJnQea2zmVk; Ç L, *7244 Sayılı Kanunun Hukukuna Etkileri ve Zorlayıcı Nedenler*, avalaible on https: //www.youtube.com/watch?v=b-EhknZeaAI.

[11] In general, employee may bring an action against the employer after the dismissal and claim that the reasons for dismissal were not valid. This claim is formulated as the "invalidity of the termination and reinstatement" in the Labour Code. If the decision is in favour of the employee, he has to apply to the employer within 10 working days from the finalization of the decision. The employer, after receiving this application, has to invite him to work in one month. If he doesn't invite the employee to work at the end of one month's time, the termination by the employer considered to be final at this date, and the employer has to pay the compensation of non-reinstatement and idle time fee. As stated in the doctrine, this case has a nature *sui generis*. Although the dismissed employee is demanding reinstatement, after the court decision, the employer has another string in his bow: to pay the compensation and not to reinstate. So, the results of the reinstation and invalidity decision are slightly different from a typical nullity.

Even though this action of invalidity is regulated by the legislator to protect the employee and the employment relationship, it is highly criticized in the doctrine. The employee has two paths to follow. He may demand the invalidity of the termination and reinstatement and apply to the employer when the decision is in favour; or if he does not want to go this way, he can only ask for severance pay and the notice indemnity he deserves. However, these compensations are the consequences of termination, not reinstatement.

[12] ALPAGUT, *cit.*, p. 96.

[13] EKMEKÇI, *Covid-19 Döneminde Fesih Yasağı, Kapsamı ve Yasağa Aykırılığın Sonuçları*, in ÖZEKES (ed), *Covid-19 Salgınının Hukuki Boyutu*, On İki Levha Yayıncılık, 2020, p. 714.

[14] NAZLI, *cit.*, pp. 258-259; GÖKTAŞ, *Covid-19 Salgınının İş Sözleşmesinin Feshine ve Diğer*

the legislator wants the labour contracts "not to be terminated". If the courts make the assessment of nullity, it means that all of the employees throughout the country can be protected from any kind of job loss during this period.

Finally according to a fifth view, keeping the employees were introduced as a prerequisite with Law no. 7226 for applying for short-time working allowance. For this reason, the employer who unlawfully terminates the employment contract during the prohibited period, cannot benefit from the short-time working allowance. The allowance paid for this period should be collected back with interest from the employer[15].

As we have seen in the disputes before some courts of First Instance, it has been decided that the contracts of the workers who are not covered by the job security cannot be deemed invalid with the "invalidity of termination and reinstatement" lawsuit. Before going to the Court of Cassation, Regional Court of Justice[16], which is the secondary court, made a different assessment. According to the Regional Court of Justice, the termination of the employee's contract during the prohibited period should be sanctioned by final nullity. Because the termination made in this period is null and void, according to the termination ban. The request of the employee who is not within the scope of job security, should be considered as a request for determination of final nullity.

After the appeal, the 9th Civil Chamber of the Court of Cassation ("Yargıtay") decided that the employee filed a lawsuit with a clear request for "reinstatement to work", and that no extension could be made through interpretation due to the procedural law rule of "commitment to the request"[17]. However, it should be summarised that, since there is no such type

Sona Erme Nedenlerine Etkisi, in *SİHD*, 2020, n. 43, p. 289. The latter publication and its interpretation slightly has more effect on the jurisdiction as the author himself is the president of the 9th Civil Chamber of the Court of Cassation of Türkiye (*Yargıtay*).

[15] Özkaraca, Ünal Adınır, *Yeni Koronavirüs (Covid-19) Salgını Kapsamında Kısa Çalışma, Ücretsiz İzin ve Fesih Yasağının İşçinin Hizmet Süresine Etkisi*, in *Çimento İşveren*, July 2020, vol. 34, no. 4, p. 34.

[16] In the Turkish legal system, conflicts arising from the labour contracts are evaluated by the Court of First Instance primarily. Afterwards, the parties may apply to Regional Courts of Justice. Request of appeal can be made to 9th Civil Chamber of Court of Cassation. Reinstatement claims aren't subject to the request of appeal since 2017, so Regional Courts of Justice is the place for the absolute judgment about a termination. The criteria and case law developed by the Court of Cassation before 2017 are now implemented by the Regional Courts of Justice.

[17] 9th Civil Chamber of the Court of Cassation, 01 December 2021, Case no. 8048, De-

of lawsuit as "nullity of termination", no result had been obtained in practice in this direction.

In addition to the Court of Cassation judgments mentioned above, as a result of our research, we have seen that there are also decisions of the Regional Courts of Justice where the case was not referred to the Court of Cassation. For example, in a decision of the Ankara Regional Court of Justice[18], while the employee was working as an apartment clerk, his contract was terminated during the prohibition period. The employee has no job protection. Therefore, the court of First Instance rejected the reinstatement claim of the employee due to a "lack of legal interest". Ankara Regional Court of Justice, upheld this decision as correct. As can be seen, whether the employee would be reinstated or whether the termination would be deemed null and void was evaluated differently in each city or district court.

2.1.2.2. *Immediate Termination Without Serious Misconduct*

As stated, only the immediate termination for just cause will be lawful, and all other types would result in invalidity. But the grounds of immediate termination are not limited to Article 25/II. In the article 25, there are other reasons such as "absences due to health reasons exceeding certain periods", "detention exceeding certain periods", and "compelling – *force majeure* – reasons". However, due to the clear statement of the legislator in the Provisional Article about termination ban, any reason other than Art. 25/II was not accepted as a legal ground for termination. Nevertheless, in some cases, employers terminated contracts based on other grounds.

In a decision of the Samsun Regional Court of Justice, the contract of the employee who had an accident in 2019 and received a long rest report extending to 2020, was terminated due to this long rest report. It should be noted that the rest report exceeding a certain period of time is recognized as a reason for immediate termination (without notice) in Article 25/I of the Labour Code. However, as the High Court rightly stated, the legislator limited the reasons for termination during the pandemic period. The reasons in Article 25/I are also within the scope of the prohibi-

cision no. 16025. Another decisions on the same issue were made by the same Chamber, 09 December 2021, Case No. 11212, Decision No. 16369; 20 January 2022, Case No. 12779, Decision No. 738, in *UYAP*, National Judiciary Network Server.

[18] Ankara 7th Regional Court of Justice, 21 September 2021, Case No. 2329, Decision No. 2456, in *UYAP*, National Judiciary Network Server.

tion. Therefore, the reason for termination cannot be considered as a just or valid reason[19].

In a decision given by the Ankara Regional Court of Justice, an employee who has been working since 2018, receives a total of 264 days of rest until July 2020. In this case, there wasn't any long rest report, but many intermittent reports were received. Due to the total reporting period of the employee, the employer terminated the employment contract again on the grounds of Article 25/I of the Labour Code. For the same reason, the High Court draws attention to the fact that termination is within the scope of the prohibition, and decides on re-instatement[20].

The courts have drawn a clear line that the contract cannot be terminated by other grounds for immediate termination.

2.1.2.3. *Valid Reasons - Can Be Valid Anymore?*

In some cases, "the just cause for immediate termination" and "the valid reasons for termination with a notice" may be very close to each other and the issue of which termination right can be exercised may be controversial. The behaviour of the employee can be a valid reason to terminate regularly. If this behaviour is more severe, it may cause a serious misconduct, so immediate termination may arise.

In a dispute before Sakarya Regional Court of Justice, there had been a continuous excess of employment since 2017 due to the contraction in demand at the employer's factories. It had been claimed that with the pandemic, things slowed down considerably, and sometimes even stopped. In this process, the employer terminated the employee's contract based on operational reasons. However, the High Court revealed that termination not for a just cause but a valid reason was prohibited here as well, and accepted the employee's request for re-instatement[21].

In another case evaluated by Ankara Regional Court of Justice, the employment contract was terminated in 05.08.2020 due to "frequent illness",

[19] Samsun 7th Regional Court of Justice, 15 March 2022, Case No. 243, Decision No. 513, in *UYAP*, National Judiciary Network Server.

[20] Ankara 5th Regional Court of Justice, 17 February 2022, Case No. 2158, Decision No. 408, in *UYAP*, National Judiciary Network Server. Actually, intermittent rest reports are not evaluated as a long absence in the meaning of Article 25/I. This issue was not discussed in the decision, it was only stated that the relevant article was within the scope of the ban.

[21] Sakarya 12th Regional Court of Justice, 22 February 2022, Case No. 2553, Decision No. 387, in *UYAP*, National Judiciary Network Server.

which may only be used as a valid reason. Regional Court of Justice evidently stated that this had fallen in the scope of the ban and the employee must be re-instated[22].

Retirement age is also a controversial issue when it comes to termination. In a case, the claimant was an employee in a municipality and his employment was based on a special legislation as he was working as an employee in a public institution. The employment contract was terminated due to retirement during the prohibition period on the grounds that the law under which the claimant was employed contained the phrase "cannot be employed after the retirement date". The Regional Court of Justice found the employer's termination to be lawful. However, one of the judges wrote a dissenting opinion and stated that the prohibition of termination was contrary to its purpose[23]. In our opinion, the decision is not correct and we agree with the dissenting opinion which clearly states that this termination must be null and void.

2.1.3. Unjust Immediate Termination

It is the employer (or HR department) that processes the data on why the employment contract ended into the National Social Security System. The employer can therefore write whatever he wishes.

It was possible to terminate effective immediately, but what if an employer had used the article 25/II as a reason to break the termination ban? This immediate termination might be the result of fraudulent behaviour.

In a case evaluated by the Sakarya Regional Court of Justice, the employee worked as a quality control employee in tire production. It had been claimed that the employee made some mistakes in quality control and he was warned several times during the total period of employment and his last action recorded in January 2020. But the contract of the employee was terminated on the 29th of December 2020. In addition, the employer marked the option "behaviours that do not comply with integrity and loyalty" (Art. 25/II) as the reason for dismissal while processing the exit record into the social security system and generated a false report. The court stated that 11 months have passed since the last action, it is no longer possible to talk about

[22] Ankara 5th Regional Court of Justice 2158/2022.

[23] Diyarbakir 8th Regional Court of Justice, 22 April 2021, Case No. 304, Decision No. 779, in *UYAP*, National Judiciary Network Server.

just cause, and there is a 6-working-day period to assert the just cause. High Court has ruled that the termination is invalid and the employee should be re-instated[24].

As we understand from this case, employers may enter erroneous information into the system, in order to issue the employee's dismissal, even though they have to make the termination for just cause within a certain period of time. The accuracy of the information entered into the system is not checked unless a lawsuit is filed, and there is no authorized person other than the employer in this regard. For this reason, they have the opportunity to act against the employee as if he acted contrary to the contract (Art. 25/II).

In another dispute that is the subject of Bursa Regional Court of Justice, the employee works as a driver and the employment contract was terminated by the employer for just cause on the grounds of absenteeism (Art. 25/II-g). According to the employee's claim, the absenteeism records kept at the workplace are not due to the employee's absence from work, but to the employer's refusal to accept him to the workplace. As a matter of fact, one of the witnesses, who was a security guard at the workplace, stated that he was instructed not to allow the plaintiff to be admitted to the workplace, and that he even wrote this instruction as a note to convey to the other security guards. Here, too, the court decided to reinstate the employee[25].

2.1.4. Resignation Re-evaluated as Employer Termination

In a decision of Sakarya Regional Court of Justice, there is a document stating that the employee resigned. Two weeks after this declaration, severance and notice payments were paid to the employee. However, the witnesses of the employee declared during the trials that, the employer terminated the contract. The witnesses of the employee claimed that the personnel service used by the employee was cancelled and everyone living in that area was dismissed. In addition, these compensations are not paid to the employee who resigns in the ordinary course of life. The employer, on the other hand, declared that the employee needed money and therefore he wanted to help. For this reason, the High Court considered the incident as an employer ter-

[24] Sakarya 12th Regional Court of Justice, 16 March 2022, Case No. 361, Decision No. 572, in *UYAP*, National Judiciary Network Server.

[25] Bursa 3rd Regional Court of Justice, 05 April 2022, Case No. 499, Decision No.650, in *UYAP*, National Judiciary Network Server.

mination and decided to accept re-instatement[26]. It should be noted that even before the pandemic period, employers had forced employees to sign "resignation statements", and these statements were carefully evaluated by the courts.

2.2. Unpaid Leave and Financial Aid

The legislator adopted an exceptional regulation for the Covid-19 period and give permission to the employer to coerce unpaid leave and change the conditions of the agreement all by himself[27]. Following this change, the employee may terminate the contract, but the reasoning of the termination cannot be counted on the ground of "just cause" or "serious breach of the employer". As a result, he isn't able to apply to the protective norms. This was a major change and this regulation had effected thousands of employees' rights.

This unilateral legal act of the employer has both advantages and disadvantages for the employee. On one hand, if there was no option to provide work because of governmental decisions or a protective measure, the employment agreement was suspended and kept until the circumstances allow. On the other hand, the employee was stuck in this suspended agreement without his consent and if he or she wanted to break free from it, the only way out was to resign. This was of course, not favourable, because the employee lost his severance pay by resignation.

According to the provisional article, the period of unpaid leave might be up to 3 months, but this article could be extended by a Presidential Decree. Yet it is prolonged 7 times until 30.06.2021. The aim was to lead employers towards short-time work practice. However, as this pe-

[26] Sakarya 12th Regional Court of Justice, 02 March 2022, Case No. 94, Decision No. 476, in *UYAP*, National Judiciary Network Server.

[27] If one of the parties wants or needs to amend the conditions substantially, the other must provide his consent. Otherwise, the substantial alterations are not applicable for the uncomplying party (Turkish Labour Code Art. 22). In general, the suspension of the contract is a substantial alteration and both parties must come to an agreement. If the employer coerces the employee to take unpaid leave, this would be a typical default of the creditor and give the debtor the right to withdraw from the contract. For the Labour Agreement, as it is an infinite contract, the right to withdraw would translate to the right to terminate. The employee has the right to terminate labour contract immediately and earn his severance pay (Turkish Labour Code Art. 24/II).

riod was extended by Decrees, employers also extended the period of unpaid leave.

During the period of unpaid leave, if the employer applied for the short-time work practice, employees might benefit from the allowance. In accordance with the Article 50 the Code No. 4447 (Unemployment Fund Code), employees must had been entitled to unemployment allowance in terms of their employment period and the amount of days of unemployment insurance payment by the date of the commencement of short-time work[28].

However, it should be noted that there were strict conditions for unemployment allowance and only those who had been working for the last 120 days and a certain amount of unemployment insurance premium for at least the last 3 years must be notified to be able to benefit from the short-time working allowance. In other words, if the employee did not fulfil the conditions for the application of unemployment fund, he cannot enjoy the short-time work allowance. Employees who were able to benefit the allowance, could earn 60% of the last twelve months' daily average gross earnings. Also, the sum of monthly wage cannot exceed the %150 of the minimum monthly wage (gross amount). According to the reports of Turkish Employment Agency, the amount paid as short-work allowance is TRY 25.5 billion in 2020 and TRY 11.2 billion in 2021[29]. It is important to state that the employers didn't have to apply for the short-work allowance, this was an option offered to them[30].

Short-work allowance application process was simplified and the major aim was to steer the employers towards the application, but it wasn't a necessity. If the firm carried on a business that was effected by social distance precautions, the employer was able to shut the firm down for a period of three months, and this duration is prolonged many times – as cited above. It is obvious that this regulation, which causes the contract conditions to be changed unilaterally without requiring the employee's consent, restricts the

[28] Short-time work practice is an exceptional provision for crisis situations and it is also a unilateral legal act of employer to shorten the working time. For more information, see KESER, *Korona Virüs (Covid 19) Özelinde Bir Salgın Durumunda İş Mevzuatı Kapsamında İşçi ve İşverenin Kullanabileceği İzin, Esnek Çalışma Süreleri ve Fesih Hakları Üzerine Bir Değerlendirme*, in *Legal SGHD*, 2020, vol. 17, no. 65, p. 54.

[29] Unemployment Fund Bulletin of January 2022, avalaible on https://-media.iskur.gov.tr/52881/01_ocak-2022-bulten.pdf.

[30] YIĞIT, *cit.*, p. 284.

employee's right to terminate. However, as stated in the doctrine, it is not a desired outcome for all employees to terminate their contracts at once due to this change[31]. The financial burden on the business should also be alleviated so that a sustainable job and employment opportunity can be found after when the pandemic is over or the restrictions are lifted.

The other group of employees, who cannot benefit from the short-time work allowance, would be paid 39,24 TL per day from the Unemployment Fund. This was called "Financial Aid" and it's an exceptional reimbursement. According to the reports of Turkish Employment Agency, the amount paid as financial aid was TRY 7.2 billion in 2020 and TRY 6.7 billion in 2021[32].

2.2.1. Effect of Unpaid Leave to the Period of Service

According to the Labour Code, during this period of unpaid leave, although there was no regulation regarding that, the employee considered to be off-work and faced the consequences. The nature of the suspension of the contract leads us to this conclusion. The fact that the period of unpaid leave arises from the law requires that it be included in the duration based on seniority[33]. It should be noted that contrary to this view, the Court of Cassation hadn't been including unpaid leave periods – before the pandemic – into the period of service.

It would not be a fair result to expose the worker to both his wage, job and seniority-related rights that will occur in the future during the mandatory unpaid leave periods created by the pandemic. As it is discussed in the doctrine[34], this Covid-19-related compulsory unpaid leave period had to be considered as a part of service period. As seen in the decisions in this process, compulsory unpaid leave is included in seniority[35].

[31] Başterz , *Kısa Çalışma (Kovid 19 Pandemisinde Yeni Yaklaşımlar*, in *Pandemi Sürecinde İş Hukuku, On İki Levha Yayıncılık*, 2020, p. 41.

[32] Unemployment Fund Bulletin of January 2022, avaliable on https://media.iskur.gov.tr/52881/01_ocak-2022-bulten.pdf.

[33] Özkaraca, Ünal Adinir, *cit.*, pp. 24-25.

[34] It is unanimously accepted that the short-work time must be included in the period of service; Özkaraca, Ünal Adinir, *cit.*, pp. 25-26.

[35] Sakarya 11th Regional Court of Justice, 23 March 2022, Case No. 542, Decision No. 693, in *UYAP*, National Judiciary Network Server; Antalya 9th Regional Court of Justice, 07 March 2023, Case No. 280, Decision No. 690; Antalya 9th Regional Court of Justice, 07 March 2023, Case No. 239, Decision No. 689; Antalya 9th Regional Court of Justice, 07 March 2023, Case No. 264, Decision No. 686.

2.2.2. Qualification of an Unpaid Leave

2.2.2.1. *Unpaid Leave Re-evaluated as Employer Termination*

In Türkiye, as in many countries in the world, some workplaces were closed for months or curfews were imposed when the number of cases peaked. The unilateral unpaid leave, which is a specific practice to the period when these very exceptional situations are experienced, can also be abused by the employer. Although the provisional articles have created a legal basis that the employer can coerce unilateral unpaid leave during the pandemic period, it is debatable that the employer can apply unpaid leave in any situation and condition. In a case where the employer claimed that the employee was sent to unpaid leave due to organizational reasons, the Istanbul Regional Court of Justice decided that, it was necessary to investigate how the unpaid leave procedure is used and whether it was an objective practice[36].

In an incident assessed by the Antalya Regional Court of Justice, the employee started to work in the barn section of the hotel in 2018. The employee was sent on unpaid leave in January 2021, during the termination ban continued. During this period, the employer's business continued at the same pace. However, in this process, he was replaced by another employee and it was verbally stated that he would no longer be working here. For this reason, the employee filed a lawsuit for reinstatement. The defendant hotel stated that, in fact, unpaid leave was applied and the contract is not terminated, and therefore the case should be dismissed. On the other hand, according to the testimonies of witnesses, the same number of employees work at the workplace. In the light of all these examinations, the Court of Cassation concluded that the employer's action was in fact termination[37].

In another case employees were forced to take unpaid leave before the right to unilateral unpaid leave was recognised. In the case at hand, the workers were called to the workplace in February 2020 and were asked to sign papers stating that they had consented to unpaid leave. They were intimidated that those who did not sign would be dismissed. The plaintiff worker claimed that he was dismissed because he refused and filed a lawsuit for the payment of unpaid labour receivables. The employer defended itself in the lawsuit on

[36] Istanbul 26th Regional Court of Justice, 16 November 2021, Case No. 2773, Decision No. 2217, in *UYAP*, National Judiciary Network Server.

[37] Antalya 9th Regional Court of Justice, 28 October 2021, Case No. 2774, Decision No. 2669, in *UYAP*, National Judiciary Network Server.

the grounds that "the effects of the pandemic were seen early due to the customers and therefore wanted to put the workers on unpaid leave". However, he did not present anything that shows and proves how it affected the workplace. The court accepted the employee's claim here[38].

In one case before Antalya Regional Court, the employee was founded inadequate for work but as there is a termination ban, the company decided to take him to "unpaid leave" instead. The plaintiff argued that this unpaid leave decision wasn't a result of pandemic precaution but a way of hiding the will to terminate the labour contract. The Regional Court stressed in the decision that an this measure of coercing unpaid leave must be used in good faith to prevent the risks of the illness in the workplace, not to discipline the employees[39].

On the other hand in a case dated 2021 at the Trabzon Regional Court of Justice, the employee was put on unpaid leave in October 2020, not at the beginning of the pandemic and he claimed that no one in his department had been given unpaid leave. The High Court ruled that the unpaid leave in question could not be considered as an act of termination and rejected the employee's re-instatement lawsuit[40].

2.2.2.2. *Alteration in Working Conditions During the Unpaid Leave*

As stated before, unilateral unpaid leave application is a substantial alteration in the working conditions, because wage payment and work, which are the main obligations of the contract, are suspended. During the pandemic period, this unilateral change has become exceptionally coercible by the employer. However, the employer was not given the opportunity to unilaterally make other fundamental changes. Making a change in the employee's job is also a change that must be made by agreement of the parties. Changing the place of duty of the employee during the pandemic period should also be evaluated in this context.

In a case before the Konya Regional Court of Justice, the employee has been working in the bank branch for 15 years. With the mention that this

[38] Antalya 9th Regional Court of Justice, 21 October 2021, Case No. 2470, Decision No. 2555, in *UYAP*, National Judiciary Network Server.

[39] Antalya 9th Regional Court of Justice, 20 October 2022, Case No. 2417, Decision No. 2800, in *UYAP*, National Judiciary Network Server.

[40] Trabzon 5th Regional Court of Justice, 29 September 2021, Case No. 1478, Decision No. 1469, in *UYAP*, National Judiciary Network Server.

employee has a chronic illness, unilateral mandatory leave was applied by the employer between the period from April 2020 to July 2020. When she returned to her workplace on 20.07.2020 and wanted to turn on her computer, she realized that her account was not working. It was not possible for her to start work in this way. The plaintiff employee sent a warning from the notary public the next day and reminded the employer to take necessary actions so that she could actually start working. After the warning, she was kept at the branch for two days in a row without the screen being opened. When she went on the third day, she was not taken to the office and was told that she had to send an e-mail to be assigned to another branch.

In response to the lawsuit, the defendant employer stated that the workplace was changed and the employee was transferred to the Customer Communication Centre as of 01.07.2020. The employer had assigned remote employees to this unit, which is more needed, during the pandemic period. Although the employee was transferred to this unit, she did not come and start work. According to the employer, the employee did not do the job despite being reminded. For this reason, the employment contract was terminated immediately for just cause (Article 25/II-h) and this termination is in accordance with the law.

Leaving aside the other details in the decision, it is seen that the transfer documentation was sent one hour after the notary notice sent by the employee. The employee wasn't notified of the change of duty in accordance with good faith. The employee is prevented from returning to her original job. Thus the employer is deemed to have terminated the contract indirectly; the court accepts that the employer actually terminated the contract[41].

In a dispute that is the subject of the Istanbul Regional Court of Justice, the employee works in airline ground handling services. The employment contract was terminated on the grounds that he did not accept the change in working conditions during the termination prohibition period. According to the employer, the aviation sector is one of the most negatively affected sectors during the pandemic period, and ground handling activities have completely stopped. In this process, the employer wanted to remove the regularly paid bonuses as it could no longer pay the bonuses. Since the workers did not accept this change, there was no solution other than the termination

[41] Konya 9th Regional Court of Justice, 15 December 2021, Case No. 2948, Decision No. 485, in *UYAP*, National Judiciary Network Server.

of the employment contract and the parties went to the mediator together. However, the worker claims that the mediator is the mediator determined by the employer himself.

The court of first instance rejected the worker's case on the grounds that a lawsuit could not be filed since an agreement was reached at the mediation stage. In the application for appeal made to the Regional Court of Justice, the worker claimed that his will was injured and demanded that his request be accepted. Yet, as a matter of fact, the High Court decided in the direction of the worker's request[42].

2.2.2.3. *Using the Unpaid Leave to Prevent Trade Union Activity in the Workplace*

The last day of the period that could be taken unpaid leave in the pandemic was 30 June 2021. As of 1 July 2021, employers were required to reinstate workers. However, some employees were not reinstated, and some of them who thought that this was "employer termination" filed a lawsuit.

In a case before the Istanbul 29th Regional Court of Justice, the employee and other employees are coerced into unpaid leave during the pandemic, but right after 5 days started back to work, they had received a "performance-related termination". Before the pandemic hit, the plaintiff and other employees were in trade union activity in the workplace. The court evaluated the situation and decided that the employee was a pioneer in trade union activity before the unpaid leave period and the employer could not prove that the legal ground of termination was real. So the court reinstated employee[43]. Similarly, in other decisions, it is seen that similar terminations are made as soon as the unpaid leave ends.

3. *Conclusion*

The prohibition of termination, unpaid leave, and short-time working and financial aid benefits implemented in Türkiye were introduced with the aim of protecting working relations, as stated at the beginning. However, during the pandemic, which is a very exceptional and extraordinary period,

[42] Istanbul 52nd Regional Court of Justice, 16 March 2022, Case No. 287, Decision No. 415, in *UYAP*, National Judiciary Network Server.

[43] Istanbul 29th Regional Court of Justice, 07 February 2023, Case No. 3525, Decision No. 259, in *UYAP*, National Judiciary Network Server.

every business has experienced a unique process. While the need for labour increased for some employers, others had to close their workplaces. For this reason, it is impossible to come up with a single and definitive solution that can be generalized. The aftermath of the measures can be understood by the evaluation of jurisprudence by specific situations. In this paper, we tried to include different events as much as possible. As seen, the practice of a termination ban did not prevent employers from terminating contracts. Some employers have portrayed the action as the resignation of the employee, while others have terminated the contract as if they had a just cause, although, in reality, there weren't any.

In some cases, the employer abused the right to take the employee on unpaid leave. Although other employees are not given unpaid leave in the workplace, unilateral leave has been applied to keep the employee away from the workplace for a long time. As a matter of fact, the High Court, which determined these situations, evaluated this as termination made by the employer.

In some disputes that are brought to the court, it is shown as if there is a mutual agreement between the employee and the employer to end the employment relationship. In these cases, a report was prepared as if the parties had gone to a mediator, but in fact, the employees were only forced to sign the papers against their will. Thus, the prohibition of termination was tried to be circumvented in the technical sense.

As far as we can see from the decisions we have accessed, employees who are covered by job security, have been protected accordingly. In terms of those who do not enjoy job security, it has been stated in a few decisions that the nullity of termination can be asserted. It is very pleasing that this view in the doctrine is recognized by the Court of Cassation. However, our analyses showed us two negative results. The first one is that due to the interpretation of the rule of "conformity with the request", the invalidity of termination lawsuits did not apply to workers outside the scope of job security, and the lawsuits were dismissed. Thus, it was impossible to reinstate these workers or invalidate the termination. Secondly, the fact that the Regional Court of Justice in each province rendered different judgments from each other and the final judgments, especially against the employee, have led to the lack of a uniform practice. Local differences prejudiced the principle of legal predictability. Therefore, the worker in a similar situation who filed a lawsuit in city A faced a different result than the

worker who filed a lawsuit in city B. As seen, those who suffered the most from this situation were those who worked in small enterprises that are not covered by job security.

Abstract

In order to align with the ILO Termination on Employment Convention no. 158, Turkish Labour Law has adopted job security system. This system protects certain workers against unfair and invalid terminations. Employers have to use the right of termination, which must be based on a valid reason either resulting from the employee or the enterprise. This usage of right should be in good faith, non-arbitrary; so Turkish Court of Cassation has developed some principles to assess this termination over the last decades. Although there are a great number of employees who are outside the scope of this protective norms, there are some other protective measures like severance pay, which is considered in the large-scale job security.

After the coronavirus outbreak, Turkish Government has adopted the Law on Minimizing the Impacts of the New Coronavirus (Covid-19) Outbreak on Economic and Social Life and the Amendment of Certain Laws (7244) ("the Amendment Law") published in the Official Gazette (31102) on 17 April 2020. This law included transitional provisions for the Labour Law no. 4857 and adopted an interim termination ban for all of the employers. On the other hand, employers forced to close down their workplaces had the opportunity to propose unpaid leave and employees were able to apply for the short-time allowance. Even though the unpaid leave proposal is a substantial alteration in the labour agreement, this measure was considered as a principal way for the agreements to continue. Generally, these interim measures were based on balancing mind-set and both parties of labour agreement were sharing the negative results.

This paper would like to discuss the effects of these interim measures. In order to pursue this aim, firstly we briefly explain the general job security tools provided in Turkish Labour Law. Following this explanation, we will try to understand the preventive measures' effects by examining the cases. Finally, we would like to address our view regarding the results and current and upcoming jurisprudential problems.

Keywords

Labour law in Covid-19, Turkish job security, Termination ban, Short-time work, Interim measures.