TERMINATION OF EMPLOYMENT CONTRACTS AS PER TURKISH AND GERMAN LAW: A GENERAL COMPARATIVE OVERVIEW

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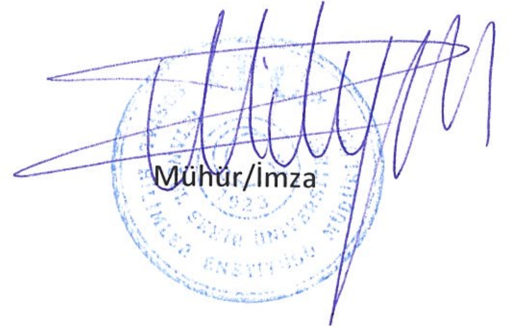

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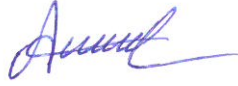
İmza: 

ABSTRACT

TERMINATION OF EMPLOYMENT CONTRACTS AS PER TURKISH AND GERMAN LAW:
A GENERAL COMPARATIVE OVERVIEW

Kara, Adem.
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This thesis “Termination of Employment Contracts as Per Turkish And German Law: A General Comparative Overview” is studied at the thesis stage of the LL.M. programme in “Private Law” at İstanbul Şehir University.

The study comprises of three sections: termination of employment contracts with notice period when the job security provisions are not applied, termination of employment contracts with notice period when the job security provisions are applied, and termination of employment contracts without notice period. Each section explains the legal background and practice of the termination processes in both jurisdictions: Turkish Law and German Law.

The legal arrangements and the practice of termination processes appear to be very similar in both jurisdictions. This must be because the both countries have the civil law system and have adopted many ILO regulations or are in regular interaction with ILO. Turkey has also adopted or implemented many regulations of the EU of which Germany is a founding member. However, broadly speaking, the legal arrangements and the practice of termination processes are more employee-friendly in Germany than Turkey. This can easily be seen at least from the length of notice periods, thresholds for the job security application, requirement of social selection process.

Keywords: employment, contract, termination, notice, valid reason, just/good cause

ÖZ

TERMINATION OF EMPLOYMENT CONTRACTS AS PER TURKISH AND GERMAN LAW:
A GENERAL COMPARATIVE OVERVIEW

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"Termination of Employment Contracts as Per Turkish And German Law: A General Comparative Overview" isimli bu tez, İstanbul Şehir Üniversitesi "Özel Hukuk" tezli yüksek lisans programının tez aşamasında hazırlanmıştır.

Çalışma üç bölümden oluşmaktadır: iş güvenliği hükümlerinin uygulanmadığı durumlarda iş sözleşmelerinin ihbar süresi ile feshi, iş güvenliği hükümlerinin uygulandığı durumlarda iş sözleşmelerinin ihbar süresi ile feshi ve iş sözleşmelerinin ihbar süresi olmaksızın derhal feshi. Her bölüm, her iki ülkedeki (Türk hukuku ve Alman hukuku) fesih süreçlerinin yasal arka planını ve uygulamasını açıklar.

Fesih süreçlerine ilişkin yasal düzenlemeler ve uygulama her iki yargı alanında da gayet benzer görünmektedir. Bunun temel sebepleri, iki ülkenin de kıta Avrupası hukuk sistemine sahip olması ve birçok ILO sözleşmesini kabul etmesi veya ILO ile düzenli olarak etkileşim halinde olması olsa gerektir. Türkiye ayrıca, Almanya'nın kurucu üyesi olduğu AB'nin birçok düzenlemesini kabul etmiştir veya uygulamaktadır. Bununla birlikte, fesih süreçlerine ilişkin yasal düzenlemeler ve uygulama, genel olarak, Türkiye'ye göre Almanya'da daha çalışan dostudur. Bu, en azından ihbar sürelerinin uzunluğundan, iş güvenliği uygulaması için eşik değerlerinden, sosyal seçim sürecinin gerekliliğinden kolayca görülebilir.

Anahtar Kelimeler: iş, sözleşme, fesih, ihbar, geçerli neden, haklı neden

to my Mother

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ABBREVIATIONS

AGG	Allgemeines Gleichbehandlungsgesetz / General Act on Equal Treatment
BAG	Bundesarbeitsgericht / German Federal Labour Court
BGB	Bürgerliches Gesetzbuch / German Civil Code
BIK	5953 sayılı Basın Mesleğinde Çalışanlarla Çalıştıranlar Arasındaki Münasebetlerin Tanzimi Hakkında Kanun / Law on Regulation of Relationships Between Employees and Employers in Press Profession No. 5953
Yarg	Yargıtay / Court of Cassation
DIK	854 sayılı Deniz İş Kanunu / Maritime Labour Law No. 854
EU	European Union
mIK	1475 sayılı mülga İş Kanunu / former Labour Law No. 1475
IK	4857 sayılı İş Kanunu / Labour Law No. 4857
ILO	International Labour Organization
KSchG	Kündigungsschutzgesetz / Act on Protection Against Unfair Dismissal
STISK	6356 sayılı Sendikalar ve Toplu İş Sözleşmesi Kanunu / Law on Trade Unions and Collective Labour Agreements No. 6356
TBK	6098 sayılı Türk Borçlar Kanunu / Turkish Code of Obligation No. 6098
TCA	Türkiye Cumhuriyeti Anayasası / Constitution of the Republic of Turkey
TMK	4721 sayılı Türk Medeni Kanunu / Turkish Civil Code No. 4721

CHAPTER 1
INTRODUCTION

Pursuant to both Turkish and German Law, an employment contract can be ended by mutual understanding of the parties, death of the employee and (in few cases) death of the employer, expiration of the term (if it is for definite period), essential change in working conditions and termination by a party. Termination of an employment contract can come to exist in two different ways: termination with notice period and without notice period. The aim of this thesis is to outline the significant provisions of Turkish[1] and German[2] Law regarding the termination of employment contracts with notice period and without notice period, whether the job security provisions are applied.

In both jurisdictions, while there is an expiration date for the employment contracts for definite period, the parties to the employment contracts for indefinite period are expected to continue the employment relationship except one of the parties wishes the contract be ended for some reason or there is a valid reason which forces the employer to terminate the contract or there is a just/good cause which forces one of the parties to terminate the contract. In order to protect the interests of the other party, the terminating party is obliged to comply with several requirements. Depending on the cases, such requirements could be complying with notice periods,

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[1] In Turkish Law, there are general regulations for service contracts in the TBK and specific regulations for employment contracts in the IK. Under Article 4 of the IK, a few employment relationships such as domestic services, sportsmen, apprentices are excluded from the scope of it. In addition, the employment relationships of the ships' crew fall under the scope of the DIK and the employment relationships of the journalist fall under the scope of BIK. In this study, especially the employment relationships that fall under the scope of IK will be examined. For detailed information, *see* Çelik, Nuri / Canikoğlu Nurşen / Canbolat, Talat. İş Hukuku Dersleri. İstanbul: Beta Yayıncılık, 2018. Page 147-159; Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017. Page 220-234.

[2] In German Law, the employment relationships are regulated under the BGB but in certain cases, KSchG is also applied.

serving termination notice under certain forms or having a valid reason or just/good cause, applying social selection process etc.

As detailed below, as per both Turkish and German Law, the terminating party must at least explicitly inform the other party by serving termination notice and respect to the notice periods. This would allow other party to take necessary measures (*e.g.* finding a new job or employee) in order not to suffer a loss because of the termination. Since the employees are the weaker party of the employment contracts, both jurisdictions introduced restrictions on termination of employment contracts by the employers provided that the job security provisions are applicable. In such cases, the employer must have a valid reason and comply with the principle of *ultima ratio*. In case there is a just/good cause and the party therefore cannot be expected to continue the employment contract any longer, both Turkish and German Law allow the immediate termination of employment contracts without even respecting to any notice period.

CHAPTER 2

TERMINATION OF EMPLOYMENT CONTRACTS WITH NOTICE PERIOD – OUTSIDE THE SCOPE OF JOB SECURITY PROVISIONS

While the employment contracts for definite period end upon the expiration of the fixed term, the employment contracts for indefinite period are not meant to be ended. However, it would not be fair to bind the parties with an endless contract. For this reason, the parties are given rights to terminate the employment contracts in both jurisdictions. In order to outweigh the interests of the parties, the terminating party is bound by specific or certain requirements at the same time.

2.1. In terms of Turkish Law

According to the Turkish Law, the parties are allowed to terminate the employment contract by complying with the requirements for giving termination notice and respecting the notice periods and -in principle- not obliged to present a reason for termination. However, in case the job security provisions of the IK[3] are applicable, the employers also have to present an objective valid reason to terminate the employment contract. At this point, it should be noted that this type of termination is possible only for the employment contracts for indefinite period[4].

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[3] For Turkish version, *see* http://www.mevzuat.gov.tr/MevzuatMetin/1.5.4857.pdf and for English version, *see* http://www.ilo.org/dyn/natlex/docs/SERIAL/64083/63017/F1027431766/TUR64083.PDF or http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/64083/77276/F75317864/TUR64083%20English.pdf.

[4] The TBK provides an exception for the employment contracts for definite period if the period is agreed as more than ten years. As per Article 430/3 of the TBK "*Each party may terminate the employment contract for a period of more than ten years after ten years by complying with 6-month notice period. Termination shall be effective only at the beginning of the month following this period.*". For detailed information, *see* Yürekli, Sabahattin. Türk Borçlar Kanununa Göre Hizmet Sözleşmesinin Sona Ermesi. Ankara: Seçkin Yayıncılık, 2014. Page 133-134; Centel, Tankut. Introduction to Turkish Labour Law. Cham: Springer, 2017. E-book Edition. Page 172.

2.1.1. Notice Periods

As per Article 17/1 of the IK, the party who wishes to terminate an indefinite period employment contract, is required to serve a notice to the other party by respecting to statutory notice periods stated under the same article. The statutory notice periods set forth under Article 17/2 of the IK[5] are as follows:

Table 2.1. Statutory notice periods in Turkish Law

Term of employment	**Notice Periods**
Less than six months	2 weeks
Six months to one and half years	4 weeks
One and half years to three years	6 weeks
More than three years	8 weeks

As it can be inferred from the letter of the article, the above notice periods are regulated for both employers and employees and as per Article 17/3 of the IK, they are the minimum periods which can be increased by contracts. However, since these regulations regarding the notice periods are regulated as relatively mandatory, these cannot be decreased or ignored by the contracts[6]. On the other hand, there is no regulation if the notice periods for the employers and employees can be extended differently and how long the notice periods can be extended. According to the majority doctrinal opinion[7], the parties of the employment contracts can agree on

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[5] These notice periods are only applicable for the employment relationships that fall under the scope of IK. The DIK regulates the same notice periods as the IK. As a general regulation, Article 432/2 of the TBK sets forth the below notice periods:

Term of employment	**Notice Periods**
Less than one year	2 weeks
One year to five years	4 weeks
More than five years	6 weeks

The BIK provides different notice periods. Please *see* Centel, Tankut. Introduction to Turkish Labour Law. Cham: Springer, 2017. E-book Edition. Page 173.

[6] Centel, Tankut. Introduction to Turkish Labour Law. Cham: Springer, 2017. E-book Edition. Page 174.

[7] Özcan, Durmuş. Öğreti ve Uygulamada İş Sözleşmesinin Feshi. Ankara: Adalet Yayınevi, 2015. Page 55-56.

different-length notice periods, but the notice periods determined for the employee cannot be longer than the employer's[8].

As stated above, there is no upper limit for the notice periods but according to the Yarg and doctrine[9], they cannot be determined extremely long because it would be contrary to the freedom of contract[10] as it indirectly almost hinders the use of the right to terminate the employment contract with notice period. In addition, the right to extend the notice periods vested by the legislator should be used within the scope of good faith and not be abused. Otherwise, these extremely long notice periods shall be considered as null and void and the statutory notice periods shall be applied instead[11].

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[8] The opposing doctrinal opinion argues that the notice periods cannot be agreed as different for employers and employees since Article 432/5 of the TBK says that "*The notice periods must be same for both of the parties. In case different-length notice periods are agreed in the contract, the longer notice period shall be applicable for each of the parties.*". However, according to the majority doctrinal opinion, general terms cannot be applied to the employment relationships as they are not suitable for the nature and characteristics of labour law. Thus, this regulation does not apply to the employment relationships which are under the scope of IK. As a result, Article 17/3 of the IK should be interpreted as the parties are free to agree on shorter notice periods for the employees than the employers, but the notice periods stated under Article 17/3 are the shortest ones that the parties can agree on. 9. Civil Chamber of the Yarg ruled in its decision dated 13.12.2018 and numbered 2015/27221 E. 2018/23162 K. that "*… as the regulations regarding the notice periods in Article 17 of the Law no. 4857 are relatively mandatory and the notice periods cannot be abolished or reduced by the parties …*", *see* http://www.kazanci.com/kho2/ibb/giris.html.

[9] Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017. Page 540-542; Centel, Tankut. Introduction to Turkish Labour Law. Cham: Springer, 2017. E-book Edition. Page 173.

[10] This right is guaranteed by Article 48/1 of the TCA. For Turkish version of TCA, *see* https://www.tbmm.gov.tr/anayasa/anayasa_2018.pdf and for English version of TCA, *see* https://global.tbmm.gov.tr/docs/constitution_en.pdf.

[11] In a case where 65-90 weeks' notice periods are agreed for the municipal employees to put the next administration who won the election in a tight spot, the Yarg ruled that the extremely long notice periods should be subjected to reduction based on justice and can be agreed as 4 times of statutory notice periods at most. General Assembly of Civil Chambers of the Yarg ruled in its decision dated 04.04.2018 and numbered 2015/9-2883 E. 2018/675 K. that "*… However, although it is stated that notice periods can be increased, an upper limit is not stipulated in the Law. It is accepted by our Chamber that the upper limit should be determined by the judge and be the sum of the notice pay and bad-faith compensation at the maximum (Court of Cassation 9. CC. dated 21.3.2006 numbered 2006/109 E. 200 6/7052 K., dated 14.7.2008 numbered 2007/24490 E, 2008/20203 K.).*", *see* http://www.kazanci.com/kho2/ibb/giris.html. However, according to the majority doctrinal opinion, a judge cannot discount or determine the notice periods since only the parties can stipulate or alter

Article 17/5 of the IK enables the employers who intend not to cause the employees to work during the statutory notice period, to pay wages corresponding to the notice period in advance[12]. In other words, the employers have a right to terminate employment contracts for indefinite period, immediately, on the condition that the employee is paid the wage corresponding to the notice period in advance[13]. According to Article 17/7 of the IK, in the calculation of the wage which will be paid in advance for the notice period, (i) the wage as defined under Article 32/1 of the IK[14], (ii) all the monetary benefits provided to the employee and (iii) other benefits which are emanated from the contract and the law and can be measured in monetary terms shall be taken into consideration.

As an exception, in case the parties agreed on a probationary period, the parties are free to terminate the employment contract without having to observe the 2-week notice period and pay compensation within the probationary period as per Article 15/2 of the IK. The duration of the probationary period cannot exceed 2 months and can be extended up to 4 months by collective agreements as per Article 15/1 of the IK[15].

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the terms of the collective labour agreement according to Article 53/1 of the TCA. Thus, the Yarg can only rule that the notice periods that are determined extremely long in the collective labour agreement are null and void. Following the decision of the court, the statutory notice periods shall be applied instead.

[12] It should at this point be emphasized that the employer's advance payment corresponding to employee's notice period does not preclude the application of job security provisions. For more details, *see* Chapter 3.

[13] Dereli, Toker. Labour Law in Turkey. Alphen aan den Rijn: Kluwer Law International, 2015. Page 192-193.

[14] As per Article 32/1 of the IK, the wage is -in general terms- the amount to be paid in monetary terms by an employer or by a third party to a person in return for the work performed by him.

[15] Çelik, Nuri / Canikoğlu Nurşen / Canbolat, Talat. İş Hukuku Dersleri. İstanbul: Beta Yayıncılık, 2018. Page 222.

Finally, as per Article 17/4 of the IK, the party who does not abide[16] by the rule to give notice, shall pay a compensation covering the wages corresponding to the notice period[17]. According to Article 17/7 of the IK, in the calculation of the compensation called notice pay, (i) the wage as defined under Article 32/1 of the IK[18], (ii) all the monetary benefits provided to the employee and (iii) other benefits which are emanated from the contract and the law and can be measured in monetary terms shall be taken into consideration[19].

2.1.2. Termination Notice

As stated above, Article 17/1 of the IK stipulates that the party who wishes to terminate an indefinite period employment contract, is required to serve a notice to the other party by respecting to statutory notice periods[20]. In other words, the intention of the terminating party should be declared to the other party. Since the termination notice is a formative right and has important legal effects on the other party, the intention should be declared clearly and precisely and cannot be made as contingent[21].

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[16] It should at this point be emphasized that the employer's non-compliance with the statutory notice periods does not preclude the application of job security provisions. For more details, *see* Chapter 3.

[17] For detailed information, *see* Centel, Tankut. Introduction to Turkish Labour Law. Cham: Springer, 2017. E-book Edition. Page 176.

[18] As per Article 32/1 of the IK, the wage is -in general terms- the amount to be paid in monetary terms by an employer or by a third party to a person in return for the work performed by him.

[19] Narter, Sami. İş Güvencesi, İşe İade Davaları ve Tazminatlar. Ankara: Adalet Yayınevi, 2017. Page 641.

[20] Centel, Tankut. Introduction to Turkish Labour Law. Cham: Springer, 2017. E-book Edition. Page 171.

[21] Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017. Page 535. General Assembly of Civil Chambers of the Yarg ruled in its decision dated 04.04.2018 and numbered 2015/9-2883 E. 2018/675 K. that "*The termination notice should be made clearly and explicitly, as it is a formative right and affects the legal rights of the other party. For the same reason, as a rule, conditional termination notice is not valid.*", *see* http://www.kazanci.com/kho2/ibb/giris.html.

In principle, there is no need to state a reason for the termination of the employment contract. However, if the contract to be terminated belongs to an employee who is under the protection of job security provisions, then the employer must state a reason in the termination notice[22]. Besides, as per Article 24/1 of the STISK[23] the contract of a workplace union representative cannot be terminated unless there is a just cause for termination and the just cause is indicated clearly and precisely in the termination notice.

There is no general rule that the termination notice must be served in writing. The terminating party can declare their intention of termination written, oral or even by act. As defined by the Yarg, if an act of a party clearly and precisely means that they wish to terminate the employment contract and their intention of termination is understood or supposed to be understood by the other party, the contract shall be terminated[24]. On the other hand, as per Article 19/1 of the IK, the termination notice shall be given by the employer in written form if the employee is protected by the job security provisions. Otherwise, the termination will be null and void.

While there is no general rule regarding the validity of the termination notice, as regard to the burden of proof, Article 109/1 of the IK stipulates that all the notices envisaged in the IK should be made to the concerned person in written form and upon obtaining their signature. Therefore, it is strongly suggested parties to serve the

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[22] Dismissal of employees who are protected by the job security provisions is examined in the Section 2 in detail.

[23] For Turkish version, *see* http://www.mevzuat.gov.tr/MevzuatMetin/1.5.6356.pdf and for English version, *see* http://www.ilo.org/dyn/natlex/docs/MONOGRAPH/91814/106961/F2018685492/TUR91814%20Eng.pdf.

[24] 9. Civil Chamber of the Yarg ruled in its decision dated 18.12.2018 and numbered 2017/10343 E. 2018/23555 K. that "*It is understood from the details and documents in the case file and the witness statements that the claimant employee who had been dissatisfied with the working conditions in the workplace left the workplace and performed an actual termination and there is no written termination notice. …*", see http://www.kazanci.com/kho2/ibb/giris.html.

termination notice in written form and have the signature of the opposite party confirming that the notice is duly served. Otherwise, it will nearly be impossible to prove the facts relating to termination notice in case of a dispute. Article 109/1 of the IK also states that in case the opposite party to whom the termination notification is served refuses to sign and confirm the delivery, then the situation immediately shall be recorded as a minute at the same place.

The moment when the termination notice starts to bear its legal consequences (*e.g.* triggering the notice period) is a controversial in the doctrine. Some scholars assert that the termination notice shall bear its legal consequences as of the moment when it enters the other party's domination. On the contrary, some scholars assert that the other party must be aware of the termination notice, otherwise it shall not be effective. This different interpretation of the law becomes more of an issue especially when the termination notice is sent by a regular post[25]. However, notification concerns the terminating party rather than the other party and thus, the Yarg accepts that the termination notice shall bear its legal consequences once it arrives to the other party[26]. This decision of the Yarg provides convenience for the burden of proof and prevents other party from avoiding becoming aware of the termination notification.

As another consequence of the above decision of the Yarg, the termination party can back down from the termination notice only until the moment when the other party becomes aware of it[27]. Once the other party becomes aware that the employment contract is terminated, then the terminating party can not back down from the

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[25] Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017. Page 536-537.

[26] General Assembly of Civil Chambers of the Yarg ruled in its decision dated 04.04.2018 and numbered 2015/9-2883 E. 2018/675 K. that "*The termination notice shall bear its consequences as soon as it reaches the other party. Reaching is the moment when it enters the field of domination of the addressee.*", *see* http://www.kazanci.com/kho2/ibb/giris.html.

[27] Centel, Tankut. Introduction to Turkish Labour Law. Cham: Springer, 2017. E-book Edition. Page 173.

termination unless the other party gives consent[28]. Finally, in case the termination notice entered the other party's domination, but they are not aware of it yet, the terminating party can still back down from the termination notice[29].

In case the termination notice cannot be served in person, the terminating party may use registered mail or a courier who again confirms on a copy that they dropped the original termination notice in the mailbox of the other party and the date and time of service. However, it is rather suggested parties to send the termination notice via notary public in practice. The notary public will certify the termination and thus, the terminating party will be able to easily prove the service of the termination notice and the exact date and time of the service[30].

2.1.3. Abusive Exercise of Right to Terminate

Despite the fact that both parties -in principle- have a right to terminate indefinite period employment contracts only by complying with the requirements for serving a notice to the other party and respecting the statutory notice periods, this right shall not be abused. The right to terminate which was automatically originated for the parties to an indefinite period employment contract[31] must be exercised complying with the principle of honesty and objective good-faith principles[32].

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[28] Centel, Tankut. Introduction to Turkish Labour Law. Cham: Springer, 2017. E-book Edition. Page 173.

[29] Çelik, Nuri / Canikoğlu Nurşen / Canbolat, Talat. İş Hukuku Dersleri. İstanbul: Beta Yayıncılık, 2018. Page 444.

[30] Turunç, Noyan / Sur, Melda. Turkish Labour Law. Izmir: Turunç, 2010. Page 85.

[31] In case a definite period employment contract is terminated against principle of honesty or objective good-faith principles, there will not be an abuse of right to terminate but an unjust termination since the parties to a definite period employment contract do not have a right to terminate at the first place: Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017. Page 555.

[32] The Yarg refers to the principle of honesty and objective good-faith principles for the determination of the limits of the right to terminate as suggested by the majority of the doctrine. 9. Civil Chamber of the Yarg ruled in its decision dated 08.01.2019 and numbered 2016/461 E. 2019/294 K. that "*Although it is always possible to terminate an employment contract for indefinite period by giving notice period or paying notice pay by the parties, this right should be used in accordance with the rules of honesty and objective good-faith rules as per Article 2 of the Civil Code. Otherwise, it would be deemed that the right of termination is abused.*", *see* http://www.kazanci.com/kho2/ibb/giris.html.

Pursuant to Article 17/6 of the IK, in case of abusive exercise of the right to terminate an employment contract for indefinite period (which fall outside of the scope of the job security provisions), the employee will be entitled to the so-called bad-faith compensation which is equal to three times the wage corresponding to the notice periods[33]. The employees who can benefit from the job security provisions cannot demand bad-faith compensation asserting that the employer abused their right to terminate since the job security provisions are more privileged[34].

In this category of termination, the termination of the contract is seemingly lawful and regular, but the terminating party is deemed to have had a covert and abusive intention in termination even though they may have abided by the terms of notice and other requirements[35]. Here are some reasons which may constitute an abusive exercise of right to terminate by employer:

- employee's membership to a trade union or trade-union activities[36],

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[33] The Yarg states that the statutory notice periods shall be used as a base for the determination of the amount of the bad-faith compensation even if the notice periods are extended in favour of the employee. 9. Civil Chamber of the Yarg ruled in its decision dated 25.12.2003 and numbered 2003/21909 E. 2003/22733 K. that "*In the Collective Labour Agreement, it is understood that the notice periods have been increased in favour of the employees and that the notice pay has been calculated accordingly. However, it is regulated under paragraph 13/3 of the Labour Law No. 1475, that in the calculation of the bad-faith compensation, the wages corresponding to periods listed in the subparagraph (A) of the same article shall be taken as basis. Accordingly, in determining the bad-faith compensation, a ruling shall be given based on the wage equal to twice the statutory notice periods specified in Article 13. The written decision ruling on the basis of the increased periods stipulated in the Collective Lanour Agreement was inaccurate and required reversal.*", *see* http://www.kazanci.com/kho2/ibb/giris.html. However, this decision is strongly criticized by the doctrine: Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017. Page 560.

[34] Narter, Sami. İş Güvencesi, İşe İade Davaları ve Tazminatlar. Ankara: Adalet Yayınevi, 2017. Page 766.

[35] For detailed information, *see* Dereli, Toker. Labour Law in Turkey. Alphen aan den Rijn: Kluwer Law International, 2015. Page 195; Centel, Tankut. Introduction to Turkish Labour Law. Cham: Springer, 2017. E-book Edition. Page 176.

[36] The legislator regulated a specific form of bad-faith compensation under Article 25/4 of the STISK. This Article says that if an employer discriminates or terminates an employment contract due to any kind of employee's trade-union activities, they shall be liable to pay trade-union compensation which

- filing a grievance or complaint[37],
- testimony against the employer,
- employee's exercise of a right or freedom ensured by the Constitution[38],
- employee's exercise or demand of a right originated from the laws[39],
- termination made in order to prevent the employee being entitled to a right such as severance pay, or
- employee's private life unless it damages the running of the workplace.

On the other hand, abusive exercise of right to terminate by employee occur rarer in practice. For example, mistimed termination by the employee when the employer needs him/her much in order to leave the employer in a more difficult situation can be considered as an abusive exercise of right to terminate by employee[40].

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shall not be less than the employee's annual wage. In addition, according to Article 25/5 of the STISK, in case of a termination of employment contract for reasons of trade-union activities, the employee shall have the right to initiate a reinstatement to work lawsuit even if they cannot meet the requirements to benefit from the job security provisions. If the case is concluded in favour of the employee, a trade-union compensation shall be ruled regardless of the reinstatement application of the employee and (if the employee makes the reinstatement application) the employer's approval or refusal. However, in case the employee's reinstatement application is refused, the reinstatement compensation shall not be paid then. Finally, the employee can still claim trade-union compensation separately even if they did not initiate any reinstatement to work lawsuit. Since this compensation is a specific form of bad-faith compensation, the judge cannot rule both of them. However, if the requirements are met the notice and severance pay can be ruled. For detailed information, *see* Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017. Page 561-563.

[37] The grievance or the complaint do not have to be justified. For detailed information, *see* Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017. Page 558.

[38] For example, no employer can terminate an employment contract on the grounds of exercising religious or political rights, freedom of thought and expression or organising or attending a protest to the extent they damage the operation of the workplace. For detailed information, *see* Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017. Page 558.

[39] The employment contracts cannot be terminated on the grounds that the employee demanded their wage, annual paid leave, the compensation arisen from an occupational accident. For detailed information, *see* Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017. Page 559.

[40] Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017. Page 560.

Even if an employment contract is terminated by abusive exercise of a right to terminate of a party, the termination shall be valid anyway. However, in such cases, the employee can demand bad-faith compensation according to the above article or the employer can demand a compensation based on the general provisions and the principle of honesty ensured by Article 2 of the TMK[41].

The party who claims that the employment contract is terminated by abusive exercise of right to terminate shall have the burden of proof. Although this makes the situation difficult especially for the employees, chronological connection between the events or facts may provide convenience. For instance, a termination made by employer a couple of days after the employee filed a grievance against him/her may make proving process easier for the employee.

In case the terminating party did not comply with the statutory notice periods, the other party shall also be entitled to the compensation for notice period. This situation is stated under Article 17/6 of the IK as well. Furthermore, the party who suffered from abusive exercise of right to terminate can demand material and/or immaterial damages according to the general provisions[42].

According to Article 17/7 of the IK, in the calculation of the compensation called bad-faith compensation, (i) the wage as defined under Article 32/1 of the IK[43], (ii) all the monetary benefits provided to the employee and (iii) other benefits which are

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[41] Centel, Tankut. Introduction to Turkish Labour Law. Cham: Springer, 2017. E-book Edition. Page 176. For Turkish version, *see* http://www.mevzuat.gov.tr/MevzuatMetin/1.5.4721.pdf.

[42] Mollamahmutoğlu, Hamdi / Astarlı, Muhittin / Baysal, Ulaş. İş Hukuku Ders Kitabı Cilt 1: Bireysel İş Hukuku. Ankara: Lykeion Yayınları, 2018. Page 270; Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017. Page 564.

[43] As per Article 32/1 of the IK, the wage is -in general terms- the amount to be paid in monetary terms by an employer or by a third party to a person in return for the work performed by him.

emanated from the contract and the law and can be measured in monetary terms shall be taken into consideration[44].

2.2. In terms of German Law

According to German Law, -in principle- an employment contract for indefinite period can be terminated by its parties without any condition other than the termination notice and required notice periods[45]. However, in cases where the provisions of the KSchG[46] are applied, the termination must be socially justified and compatible.

2.2.1. Notice Periods

While the legislator gives a place to certain notice periods in the BGB[47], the parties to an employment contracts are almost free to agree on a different notice period. Therefore, -in practice- it is common to determine extended notice periods of 3-6 months or even longer for the key employees[48]. However, as per Section 622/6 of the BGB, it is not allowed to be agreed on longer notice periods only for the case of a termination of employment contract by an employee. Therefore, in some cases, the term of notice that is required for the employee to terminate the employment contract can be shorter than the term of notice the employer has to comply with[49]. On the other hand, since employers generally want to avoid the employees who are

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[44] Centel, Tankut. Introduction to Turkish Labour Law. Cham: Springer, 2017. E-book Edition. Page 177.

[45] Zenker, Ilona. Basics of German Labour Law: The Employment Relationship. Norderstedt: Books on Demand, 2014. Kindle Edition. Location 1197-1199.

[46] For German version, *see* https://www.gesetze-im-internet.de/kschg/KSchG.pdf and for English version, *see* http://www.mayr-arbeitsrecht.de/wp-content/uploads/2016/05/Protection-Against-Unfair-Dismissal-Act.pdf.

[47] For German version, *see* https://www.gesetze-im-internet.de/bgb/BGB.pdf and for English version, *see* https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.pdf.

[48] Kirchner, Jen / Kremp, Pascal R. / Magotsch, Michael. Key Aspects of German Employment and Labour Law. Berlin: Springer, 2018. E-book of Second Edition. Page 172.

[49] Zenker, Ilona. Basics of German Labour Law: The Employment Relationship. Norderstedt: Books on Demand, 2014. Kindle Edition. Location 1196-1198.

important for the business, know-how and company, to resign with short notice periods, the employment contracts of such employees often provide the same notice period to each party[50].

As per Section 622/1 of the BGB, notice periods start off with 4 weeks for all employees and employers and 4 weeks' notice period must be given to the fifteenth or to the end of a calendar month. In principle, the 4 weeks' notice period cannot be decreased by individual employment contracts. However, as per Section 622/5 of the BGB, if an employee is employed less than 3 months to help out on a temporary basis[51] or if the employer -as a rule- employs not more than 20 employees[52] with the exception of those employed for their own training, then shorter notice periods than 4 weeks can be agreed.

The notice periods for the employees whose employment relationships lasted more than 2 years are respectively regulated under Section 622/2 of the BGB[53] as follows:

Table 2.2. Statutory notice periods in German Law

Term of employment	**Notice Periods**
After two years	1 month
After five years	2 months

[50] Kirchner, Jen / Kremp, Pascal R. / Magotsch, Michael. Key Aspects of German Employment and Labour Law. Berlin: Springer, 2018. E-book of Second Edition. Page 172.

[51] This does not apply if the employment relationship is extended beyond a period of 3 months.

[52] When the number of employees employed is determined, part-time employees are also included in total number unlike the trainees and apprentices. A part-time employee with a regular working time of not more than 20 hours is counted as a 1/2 full-time employee, and a part-time employee with a regular working time of not more than 30 hours is counted as a 3/4 full-time employee.

[53] These notice periods are regulated for the employment contracts, *see* Özcan, Durmuş. Öğreti ve Uygulamada İş Sözleşmesinin Feshi. Ankara: Adalet Yayınevi, 2015. Page 54. However, Section 621 sets forth different notice periods for the service relationships which is not an employment relationship within the meaning of Section 622, based on the frequency of the assessment of the remuneration.

Term of employment	Notice Periods
After eight years	3 months
After ten years	4 months
After twelve years	5 months
After fifteen years	6 months
After twenty years	7 months

The above notice periods are regulated only for employers and must be given to the end of a calendar month and the periods prior to completion of the twenty-fifth year of life of the employee are not taken into account in calculating of the employment term. This means the system of extending the notice periods does not start until the employee has reached the age of 25. At this point, it should be clarified that the term of employment is calculated in terms of how long it legally existed with the same employer. In cases where employment is terminated and then immediately recommenced with the same employer, it is assumed that the continuity of service is not broken and the whole term of employment with the employer should be taken into account while determining the length of the notice period.

While Turkish Law enables the employers, who intend not to cause the employees to work during the statutory notice period, to pay wages corresponding to the notice period in advance, payment in lieu of notice period is not allowed by Germany Law.

In practice, the employment contracts commonly include a probationary period[54]. Pursuant to Section 622/3 of the BGB, the employment contract can be terminated with a notice period of 2 weeks if a probationary period is agreed between the parties and probationary period cannot exceed 6 months. However, the parties -of course- can agree on an extended notice period provided that the term of notice the

[54] Kirchner, Jen / Kremp, Pascal R. / Magotsch, Michael. Key Aspects of German Employment and Labour Law. Berlin: Springer, 2018. E-book of Second Edition. Page 173.

employee has to comply with is not longer than the term of notice the employer has to comply with.

Pursuant to Section 622/4 of the BGB, the parties can agree on different (even shorter) notice periods from those stated above in collective labour agreements. The parties can also make an individual contract of longer notice periods than those stated above. However, extremely long notice periods stipulated for the employees are considered null and void by the BAG[55]. Finally, it should be again clearly stated that the notice periods indicated in the above chart as regulated under Section 622/2 of the BGB are the minimum periods for the employers and the notice periods for the employees can be agreed shorter than these periods.

2.2.2. Termination Notice

The terminating party should give a notice to the other party to inform him/her with their intention on termination of the contract and to initiate the notice period. Pursuant to Section 623 of the BGB, the termination notice must be in written form and the electronic form is excluded. In other words, all kind of notices for termination of an employment contract has to be in writing. Otherwise, the termination is null and void, and the employment relationship continues.

It should be noted that the legislator explicitly excludes all the electronic forms such as copies, faxes, emails, electronic signatures and necessitates the terminating party to sign the termination notice and serve to the other party in original form with the

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[55] The BAG considered that the stipulation of extremely long notice periods for an employee is against the rule of good faith as it is significantly to the detriment of such employee even if the notice period is shorter than the employer's and ruled in its decision dated 26.10.2017 and numbered 6 AZR 158/16 that "*The Land Labour Court has accepted without any legal error that after weighing up all the circumstances of the individual case, the extension of the notice period unfairly disadvantages the defendant, contrary to the order of good faith in the sense of Section 307/1/1 of the BGB.*", *see* http://juris.bundesarbeitsgericht.de/zweitesformat/bag/2018/2018-02-14/6_AZR_158-16.pdf.

original signature[56]. Another important point that might cause the termination notice as null and void is authorised signatory. From the side of the employee, there is no such a risk since the employee is a natural person and is authorised to sign the termination notice on their own. On the other side, since the employer can be a legal person, there might be a risk whether the termination notice is signed and served by the authorised persons or the representatives of the authorised body of the legal person employer. Therefore, the employers should assure the dismissed employees that the termination notice is signed by an individual who is registered in the commercial register (e.g. managing director, proxy holder). Otherwise, the employee can object to the termination notice without undue delay[57] and argue that they are not informed whether the person signed the termination notice is duly authorised. In such case, the dismissal would again be null and void and the termination process and -of course- the notice period must be reinitiated[58].

Once the termination notice is served to the other party, it becomes effective and triggers the commencement of notice period. In case of a termination by the employer, since they have the burden of proof that the termination notice is duly served to the employee, it is strongly suggested the employers ask employees to confirm the receipt of the original written termination notice on a copy of -again- the original letter. In case the employee refuses to give confirmation that the termination notice is duly served, then it is suggested the employers ask a third person who witnesses the duly service of termination notice, to confirm the receipt of the original written termination notice by the employee on a copy of -again- the original letter. However, the confirmation of receipt given by the legal representatives of the

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[56] Kirchner, Jen / Kremp, Pascal R. / Magotsch, Michael. Key Aspects of German Employment and Labour Law. Berlin: Springer, 2018. E-book of Second Edition. Page 173.

[57] In practice, this period is usually 1–2 weeks.

[58] Kirchner, Jen / Kremp, Pascal R. / Magotsch, Michael. Key Aspects of German Employment and Labour Law. Berlin: Springer, 2018. E-book of Second Edition. Page 173.

employer such as managing directors, board members as a witness will not suffice to prove duly service of notice before the court in case of a dispute[59].

The termination notice can also be served to the residence of the employee. However, because of the burden of proof with regard to the service and its timing, the employers are well advised to use courier who confirms the service and the time of service to the sender. The notice period starts when the termination notice is served to the employee.

Finally, termination notices served by employees do not have to state any reason for the termination and likewise, -in principle- employers do not have to include any reason for the termination in termination notices provided that the employees who will be dismissed are not within the scope of job security provisions[60]. However, there are certain exceptions for termination of employees on maternity leave and for apprentices[61].

2.2.3. Termination in Violation of Public Policy

Even though the parties should be allowed to terminate the employment contracts for indefinite period by only complying with the above requirements unless the job security provisions are applied[62], the termination cannot be in violation of public policy anyway. The termination would then be deemed null and void[63].

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[59] Kirchner, Jen / Kremp, Pascal R. / Magotsch, Michael. Key Aspects of German Employment and Labour Law. Berlin: Springer, 2018. E-book of Second Edition. Page 173.

[60] Dismissal of employees who are within the scope of job security provisions is examined in the Section 2.2 in detail.

[61] Kirchner, Jen / Kremp, Pascal R. / Magotsch, Michael. Key Aspects of German Employment and Labour Law. Berlin: Springer, 2018. E-book of Second Edition. Page 173.

[62] *See* Section 3.2.

[63] Kirchner, Jen / Kremp, Pascal R. / Magotsch, Michael. Key Aspects of German Employment and Labour Law. Berlin: Springer, 2018. E-book of Second Edition. Page 175.

The most common way of termination of employment contract in violation of public policy is termination based on discriminatory grounds. As per Section 2/1 of the AGG[64], it does not apply to dismissals which fall under the scope of KSchG which provides general and special employment protection laws. However, the AGG shall prevail especially when the reason for termination is actually based on a discriminatory ground and the KSchG cannot be applied[65].

[64] For German version, *see* https://www.gesetze-im-internet.de/agg/AGG.pdf and for English version, *see* https://www.gesetze-im-internet.de/englisch_agg/englisch_agg.pdf.

[65] Kirchner, Jen / Kremp, Pascal R. / Magotsch, Michael. Key Aspects of German Employment and Labour Law. Berlin: Springer, 2018. E-book of Second Edition. Page 126.

CHAPTER 3

TERMINATION OF EMPLOYMENT CONTRACTS WITH NOTICE PERIOD – WITHIN THE SCOPE OF JOB SECURITY PROVISIONS

According to the basic principles of modern labour law, the employees should be provided with a warranty that they will continuously have their wages that are probably the only means of living of them and their dependants and not worry about their job, future etc. Therefore, they should be protected against the termination and this is ensured by the job security which was firstly regulated at international level by the Termination of Employment Convention No. 158[66] of ILO that was adapted on 22.06.1982 and entered into force on 23.11.1985.

In case the employees do not have job security, they will waver to demand their rights arising from the laws or their contracts such as employment receivables and not be able to avail themselves of the rights arising from collective labour law such as being a member to a trade union, strike. Therefore, the job security provisions increase the efficiency and productivity and ensure the labour peace at the workplace[67].

3.1. In terms of Turkish Law

Turkey ratified the Termination of Employment Convention No. 158 on 04.01.1995[68] and the job security provisions were firstly introduced to the Turkish Law by making

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[66] For English version, *see* http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C158.

[67] Özcan, Durmuş. Öğreti ve Uygulamada İş Sözleşmesinin Feshi. Ankara: Adalet Yayınevi, 2015. Page 70.

[68] For detailed information, *see* http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:34854192827214::::P11300_INSTRUMENT_SORT:1.

a comprehensive amendment[69] in the mIK[70] by way of the Law[71] numbered 4773 and dated 09.08.2002. Thereafter, they all included in the IK which was enacted almost one year later. After all of the amendments, these provisions are now contained within the Articles 18-21 of the IK[72].

In addition, Article 17 of the IK shall also be applied to those who fall under the scope of job security provisions except the bad-faith compensation[73] which is regulated under Article 17/6 of the IK. This means the employer shall comply with the notice periods[74] and be required to serve termination notice[75] anyway.

It is worth stating here again that the termination notice shall be given by the employer in written form involving the reason for termination which must be specified in clear and precise terms as per Article 19/1 of the IK[76]. In addition to this requirement, as per Article 19/2 of the IK, the employment contract cannot be terminated before the employee is provided an opportunity to defend themselves against the allegations made especially if the objective valid cause is based on the

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[69] By this amendment, Article 13 was amended, and Articles 13/A, 13/B, 13/C, 13/D and 13/E were added to mIK for purposes of introducing the job security to Turkish Law. Several other articles were also amended and adapted to job security.

[70] For Turkish version, *see* http://www.mevzuat.gov.tr/MevzuatMetin/1.5.1475.pdf.

[71] For Turkish version, *see* http://www.resmigazete.gov.tr/eskiler/2002/08/20020815.htm#1.

[72] Çelik, Nuri / Canikoğlu Nurşen / Canbolat, Talat. İş Hukuku Dersleri. İstanbul: Beta Yayıncılık, 2018. Page 471-472; Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017. Page 567.

[73] *See* Section 2.1.3.

[74] *See* Section 2.1.1.

[75] *See* Section 2.1.2.

[76] For detailed information, *see* Turunç, Noyan / Sur, Melda. Turkish Labour Law. Izmir: Turunç, 2010. Page 86; Centel, Tankut. Introduction to Turkish Labour Law. Cham: Springer, 2017. E-book Edition. Page 181. For a relevant precedent, *see* the decision of 22. Civil Chamber of the Yarg dated 12.06.2017 and numbered 2017/35431 E. 2017/13936 K., https://emsal.yargitay.gov.tr/BilgiBankasiIstemciWeb/yeniTasarim/index.jsp.

efficiency or behaviour of the employee. Otherwise, the termination would be deemed invalid even if the other conditions are met[77].

3.1.1. Scope of Job Security

As it is regulated under Article 18/1 of the IK, an employer can only terminate indefinite period employment contract of an employee on an objective valid cause as to efficiency or behaviour of such employee or necessities (requirements) of the enterprise, the workplace or the work, provided such employee has been employed for a minimum of 6 months at the workplace where 30 or more employees are employed[78]. In addition to this, Article 18/5 of the IK states that the employer's representatives authorised to manage the entire establishment and their assistants and the employers' representatives managing the workplace but who are also authorised to hire and dismiss employees shall not benefit from the job security provisions[79].

In this regard, only the employees who (i) fall under the scope of the IK and (ii) have been employed for a minimum of 6 months at the workplace where (iii) at least 30 employees are employed and (iv) are not employer's representatives and their assistants as stated in the IK and (v) are party to an indefinite period employment contract, can benefit from the job security provisions. In all reasons, these provisions can only be applied in case the employment contract is terminated by the employer.

For application of the job security provisions, the below conditions must concurrently be met.

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[77] Çelik, Nuri / Canikoğlu Nurşen / Canbolat, Talat. İş Hukuku Dersleri. İstanbul: Beta Yayıncılık, 2018. Page 529.

[78] Dereli, Toker. Labour Law in Turkey. Alphen aan den Rijn: Kluwer Law International, 2015. Page 198-200.

[79] Çelik, Nuri / Canikoğlu Nurşen / Canbolat, Talat. İş Hukuku Dersleri. İstanbul: Beta Yayıncılık, 2018. Page 485.

3.1.1.1. Employees party to indefinite period employment contract

It is understood from the explicit letter of Article 18/1 of the IK that the job security provisions shall be applied only if the employment contract that will be terminated by the employer is for indefinite period.

Definite period employment contracts can be entered into in exceptional circumstances as regulated under Article 11 of the IK. In practice, some employers enter into definite period employment contracts, even when the conditions stated under Article 11 of the IK are not met, to get around the liabilities imposed by the law, the job security provisions being a prime example[80]. However, in such cases, the employment contract shall be deemed as for indefinite period and the employee shall benefit from the provisions for indefinite period employment contracts including the ones for job security.

3.1.1.2. Employees subject to IK

The job security is regulated under the IK and thus, only the employees whose employment contracts fall under the scope of the IK can benefit from these provisions.

Article 1/2 of the IK determines the scope of the law and states that it "*shall apply for all the workplaces, other than the exceptions given in Article 4, employers, employer representatives and employees, regardless of their subject of activity.*". Under Article 4 of the IK[81], some employment relationships such as domestic services, sportsmen, apprentices are listed for purposes of excluding them from the scope of the IK.

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[80] Centel, Tankut. Introduction to Turkish Labour Law. Cham: Springer, 2017. E-book Edition. Page 179.

[81] Article 4 of the IK is titled as "*Exceptions*" and read as:
"*The provisions of this Law shall not apply for the below specified activities and employment relationships.*
a. Sea and air transport activities,
b. In workplaces and enterprises employing a minimum of 50 employees (including 50) where agricultural and forestry work is carried out,

Article 6/10 of the BIK[82] refers to Articles 18, 19, 20, 21 and 29 of the IK. Therefore, the job security provisions shall be applied for the employees whose employment contract fall under the scope of the Law No. 5953 via analogy. However, the doctrine criticizes the fact that the employees whose employment contract fall under the scope of TBK[83] or DIK[84] cannot benefit from the job security provisions as this contradicts with the Termination of Employment Convention No. 158 of ILO which Turkey is party to[85].

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c. Any construction work related to agriculture which falls within the scope of family economy,
d. In handicraft works performed in the home among the members of the family or close relatives up to 3rd degree (3rd degree included) without participation of any external person,
e. Domestic services,
f. Apprentices,
g. Sportsmen,
h. Those being rehabilitated,
i. Workplaces where three employees work in accordance with the definition given in Article 2 of the Tradesmen and Small Handicrafts Act,
However,
a. Loading and unloading activities from ships to shore and from shore to ships at the landing stages or ports and quays,
b. Activities performed at all ground facilities od aviation,
c. Activities performed at the workshops and factories where agricultural crafts and agricultural tools, machinery and spare parts are manufactured,
d. Construction works performed at agricultural establishments,
e. Works related to parks and gardens open to the public use or annexed to workplace,
f. Works related to producers of aquacultural resources working at the seas and whose activities are not covered by the DIK and not considered as agricultural works,
shall be subject to the provisions of this Law.".

[82] For Turkish version, *see* http://www.mevzuat.gov.tr/Metin.Aspx?MevzuatKod=1.3.5953&MevzuatIliski=0&sourceXmlSearch=.

[83] For Turkish version, *see* http://www.mevzuat.gov.tr/MevzuatMetin/1.5.6098.pdf.

[84] For Turkish version, *see* http://www.mevzuat.gov.tr/MevzuatMetin/1.5.854.pdf and for English version, *see* https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=18772.

[85] Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017. Page 573.

3.1.1.3. Threshold of 30-employee

The other condition is that there must be at least 30 employees[86] working at the same workplace. The employees who work at a workplace where 29 or less employees are employed cannot benefit from the job security provisions[87].

As per Article 18/4 of the IK, in the event the employer has more than one workplace in the same branch of activity, in terms of the threshold of 30-employee, the number of employees shall be determined by the total number of employees employed at these workplaces[88]. This regulation prevents employers dividing all employees to workplaces so as to employ less than 30 employees at each workplace. It should be noted that the employees employed at different workplaces which operate in different branch of activities shall not be counted together.

In addition, it is not possible to differentiate between indefinite and definite period, full- and part-time, permanent and seasonal employees in regard to calculation of 30 employees. The only requirement is the continuation of the employment contract of such employees at the date of the termination[89]. They do not have to be actually

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[86] This threshold is substantially high compared to European countries as this is criticized by the doctrine. *See* Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017. Page 573-574; Çelik, Nuri / Canikoğlu Nurşen / Canbolat, Talat. İş Hukuku Dersleri. İstanbul: Beta Yayıncılık, 2018. Page 476.

[87] Centel, Tankut. Introduction to Turkish Labour Law. Cham: Springer, 2017. E-book Edition. Page 177.

[88] The employees employed in a workplace abroad that operates in the same branch of activity shall also be included in the calculation of 30-employee. As per the recent precedents of the Yarg, in the presence of certain conditions, the employees of the companies established abroad, who are in the same company group with the Turkish employer, will also be taken into consideration while determining the threshold of 30 employees, even if the Turkish company has a separate legal entity. Within this framework in case; there exists an organic relationship between the Turkish Company and the Foreign Company, the Turkish company does not have an independent management in Turkey and is being managed by the Foreign Company, and Turkish company and the Foreign Company are in the same business line and the reporting line the employees of the Foreign Company shall also be taken into account while determining the 30 employees' threshold. Please *see* Centel, Tankut. Introduction to Turkish Labour Law. Cham: Springer, 2017. E-book Edition. Page 178.

[89] Çelik, Nuri / Canikoğlu Nurşen / Canbolat, Talat. İş Hukuku Dersleri. İstanbul: Beta Yayıncılık, 2018. Page 479.

working at the date of the termination in order to be included in the calculation of 30-employee. Finally, the employees who are within the scope of IK but cannot benefit from the job security provisions such as certain employer's representatives and his assistants shall also be counted.

On the other hand, trainees and apprentices, temporary employees and the employees of subcontractor are not included in the number of employees in terms of the threshold of 30-employee [90]. Moreover, it is not possible to consider all employees of a holding company for the threshold of 30-employee if the employees are working for different legal entities of the holding company. However, if there are employees working for more than one group company, then such employees must be counted as well[91].

3.1.1.4. Threshold of 6-month seniority

Another condition is that the employee whose employment contract would be terminated by the employer must have at least 6-month seniority by the time they receive the termination notice. The employees who have worked less than 6 months cannot benefit from the job security provisions even if the other conditions are met. However, as per Article 18/1 of the IK, employees working in underground works are not required to meet seniority requirement. As per Article 18/4 of the IK, the 6-month seniority of the employee shall be calculated by merging the periods of their employments in one or different workplaces of the same employer.

In case a probationary period is agreed between the parties, this period shall also be included in the calculation of seniority period[92]. The employee, save for this

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[90] Dereli, Toker. Labour Law in Turkey. Alphen aan den Rijn: Kluwer Law International, 2015. Page 199-200.

[91] Baysal, Ulaş. The Scope of Employment Security Regulations for Workplaces Under Turkish Labor Law. Research Journal of Business and Management, 5 (4), 245-249. 2018. Page 247.

[92] Özcan, Durmuş. Öğreti ve Uygulamada İş Sözleşmesinin Feshi. Ankara: Adalet Yayınevi, 2015. Page 88.

condition, does not have to be continuously covered with the job security provisions during this 6-month period. For example, even if there were less than 30 employees during a period of 2 months, this 2-month period shall also be counted. In addition, the employee has to neither work actually nor in the same branch of activity during this period[93]. The periods when the contract is suspended, or the employees has worked in a different branch of activity shall also be counted.

As per Article 6/2 of the IK, in case of a transfer of a workplace, the transferee employer is obliged to proceed according the commencement date of the employee's employment with the transferor employer for the calculation of all the entitlements taking the employee's length of service as a basis. Therefore, in case of a transfer of a workplace, the period with the previous employer shall also be taken into account for the calculation of 6-month period. However, if an employee is employed by a number of legal entities of a holding company, the periods spent with each legal entity do not add up in terms of the threshold of 6-month seniority.

Since there is not any provision to the contrary and Article 18/4 of the IK allows merging different period of employments, the majority opinion in the doctrine asserts that intermittent works of an employee for the same employer should be added up for the calculation of 6-month seniority[94]. The rationale behind this opinion comply with the purpose of the law. The requirement of 6-month seniority is regulated to give employers time to familiarize with the employee and decide whether a reliable employment relationship can be established. Even though the employee has not worked continuously, the employer would have enough time to familiarize with the employee anyway. Therefore, while the employer can dismiss

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[93] Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017. Page 578.

[94] Çelik, Nuri / Canikoğlu Nurşen / Canbolat, Talat. İş Hukuku Dersleri. İstanbul: Beta Yayıncılık, 2018. Page 483; Centel, Tankut. Introduction to Turkish Labour Law. Cham: Springer, 2017. E-book Edition. Page 178.

without basing on any reason during the first 6-month service of the employee (regardless of being intermittent), the employee will start enjoying the job security provisions afterwards.

Sometimes the employers terminate the employment contracts just before the completion of 6-month period in order to avoid employees benefitting from the job security provisions. According to an opinion in the doctrine, this is considered as abuse of the right to terminate and thus, the employees should be protected by the job security provisions even though the 6-month seniority condition is not met[95]. This opinion had also been supported by the Yarg but the Yarg changed its judgment in such cases later[96].

While it cannot be denied that the employers may abuse 6-month threshold and dismiss the employees just before the completion of 6-month period to avoid burden of job security, it is extremely difficult to understand the real reason behind the employer's termination unless there is a concrete evidence. Therefore, the recent precedents of the Yarg are in point and prevent decisions based on presumptions of employers' intention. In addition, there is no certainty on when such termination would be considered as abuse of the right. In other words, if, *e.g.*, Yarg says that a termination 3 days before the completion of 6-month period is considered as abuse

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[95] Çelik, Nuri / Canikoğlu Nurşen / Canbolat, Talat. İş Hukuku Dersleri. İstanbul: Beta Yayıncılık, 2018. Page 482.

[96] 22. Civil Chamber of the Yarg ruled in its decision dated 10.04.2018 and numbered 2018/76 E. 2018/8482 K. that "*The claimant started working on 04.09.2016 and the employment contract was terminated on 03.03.2017. … While the case should have been rejected since it had been understood that the claimant's working period were 5 months and 29 days, the decision of the Regional Courts of Justice is wrong, and it is therefore ruled this decision be reversed.*", see http://www.kazanci.com/kho2/ibb/giris.html; 9. Civil Chamber of the Yarg ruled in its decision dated 24.05.2018 and numbered 2018/26467 E. 2018/11713 K. that "*… as it is understood that the claimant started working on 12.07.2016, the 6-months seniority has expired on 12/01/2017 and that the employment contract was terminated two days before this date, on 10/01/2017 and the 6-month seniority had not been fulfilled as required for filing reinstatement to work lawsuit, the reversal of the decision of the Court of First Instance and the acceptance of the case by the Civil Chamber of the Regional Courts of Justice is wrong.*", see http://www.kazanci.com/kho2/ibb/giris.html.

of the right, then the employers would start to dismiss the employees 4 days before the completion of 6-month period or earlier. In such case, the employees would then start claiming that such termination should be considered as abuse of the right.

3.1.1.5. Certain employer's representatives and their assistants

As per Article 18/5 of the IK, Articles 18, 19, 21 and 25/2 shall not apply for the employer's representatives authorised to manage the entire enterprise and their assistants as well as the employers' representatives managing the entire workplace but who are also authorised to hire and dismiss employees. This means these certain employees cannot benefit from the job security provisions[97].

These certain employees are excluded from the scope of job security because their employment relationship with the employer is based on trust and the employers should be able to terminate their employment contracts without having to base on an objective valid cause once their confidence is shaken[98].

3.1.2. Valid Reasons

An objective valid cause can be the inefficiency/poor performance or behaviour of the employee or necessities (requirements) of the enterprise, the workplace or the work[99]. These are adopted from Article 4 of the Termination of Employment Convention No. 158 like other countries where the employees are protected by job security provisions.

According to the legislative intention of Article 18 of the IK, "*while the efficiency or behaviour of the employee are related to the employee's own personality, the reasons*

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[97] Centel, Tankut. Introduction to Turkish Labour Law. Cham: Springer, 2017. E-book Edition. Page 178.

[98] Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017. Page 582.

[99] Çelik, Nuri / Canikoğlu Nurşen / Canbolat, Talat. İş Hukuku Dersleri. İstanbul: Beta Yayıncılık, 2018. Page 488; Centel, Tankut. Introduction to Turkish Labour Law. Cham: Springer, 2017. E-book Edition. Page 179.

arising from the requirements of the enterprise, the workplace or the work are related to the workplace. The fact that these reasons are stated in the article concretizes the concept of valid reasons to some extent."[100].

Employers are entitled to terminate the employment contracts for just cause in the event that any of the situations stated under Article 25 of the IK occurs. However, in cases where the situation regarding the inefficiency/poor performance or behaviour of the employee is not as serious as the ones stated under Article 25 of the IK, the employer may only terminate the employment contract for valid cause. For this reason, some of the situations relating to inefficiency/poor performance or behaviour of the employee will be reviewed comparatively below.

3.1.2.1. Inefficiency/Poor performance of the employee

The inefficiency/poor performance of the employee either disrupts the normal workflow or operation at the workplace or affect the concord at the workplace in a negative way or prevents employee from duly providing service[101].

The legislative intention of Article 18 of the IK gives a number of examples to the inefficiency/poor performance of the employee which may constitute a valid reason; "*working less productive than the average employees who provides the similar service; having lower performance than committed or expected, gradual decrease of concentration on work; not being capable to work; lack of learning and self-development; being sick frequently; a disease that does not make [the employee] incapable to work but continuously affects [the employee] in terms of duly providing service, lack of adaptation, getting to retirement age when the reason for termination*

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[100] *See* https://www.tisk.org.tr/tr/e-yayinlar/is_kanunu_yenilenmis_4__baski/pdf_is_kanunu_yenilenmis_4__baski.pdf.

[101] Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017. Page 586; Centel, Tankut. Introduction to Turkish Labour Law. Cham: Springer, 2017. E-book Edition. Page 179.

is arising from workplace."[102]. Obviously, the valid reasons relating to the inefficiency/poor performance of the employee are not limited to the examples listed here.

As stated, the inefficiency of the employee that may constitute a valid reason can be either physical inefficiency or occupational inefficiency (*i.e.* poor performance). In neither of the cases relating to employee's inefficiency, the employee does have to be faulty; while in case of a valid reason relating to employee's behaviour, there must be fault of the employee for termination.[103]

Physical inefficiency: The physical inefficiency occurs especially when the employee gets a disease or has an accident. However, the physical inefficiency does not suffice alone for termination of the employment contract. It must also cause disruption in the normal workflow at the workplace and prevention of employee from duly providing service[104]. Similar situations are regulated as a just cause under Article 25/I of the IK, but further strict conditions are defined for such a termination[105]. Unless these conditions are not met, the employer may terminate the employment contract only with notice period. In case the employee gets often sick and this disrupts the normal workflow the workplace and prevents employee from duly providing service, the employer may still exercise their right to termination with notice period.

Again, the old age or being entitled to old age pension do not constitute a valid reason alone. However, if such situations also affect the efficiency of the employee and cause disruption in the normal workflow at the workplace and prevention of

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[102] *See* https://www.tisk.org.tr/tr/e-yayinlar/is_kanunu_yenilenmis_4__baski/pdf_is_kanunu_yenilenmis_4__baski.pdf.

[103] Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017. Page 587.

[104] Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017. Page 587.

[105] *See* Section 4.1.1.

employee from duly providing service, then the employer may terminate the employment contract with notice period[106]. However, at some workplaces, the personnel policies regulate an upper limit for age of the employees. While some scholars consider such regulations appropriate, the others contend that they are void because they are in contradiction of the imperative Article 18/1 of the IK and what is more is that they discriminate the employees based on age[107]. The Yarg accepts the former[108]. In case the old age causes inefficiency anyway because of the characteristics of the profession (*e.g.* pilots, models, sportsmen), then upper limits for age of the employees can be set or agreed.

Poor performance: Performance is the quality and level of the employee's labour that they spent during their service and contributed to the generation of work[109]. Efficiency is the level and amount of the generation produced per unit of labour spent by the employee[110].

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[106] Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017. Page 588.

[107] Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017. Page 590.

[108] 22. Civil Chamber of the Yarg ruled in its decision dated 24.09.2018 and numbered 2017/14256 E. 2018/19828 K. that "*In the case at hand, the employment contract of the claimant was terminated for a valid reason and without paying notice pay as per the regulation "The employment contract shall end at the end of the respective year of the completion of age 60 for the male employees and age 58 for the female employees. This shall be notified to the employee in writing 6 months in advance. In such cases, the statutory severance payment shall be paid to the dismissed employee, but the notice pay shall not be paid." under Article 49 of the TÜPRAŞ Personnel Regulation which was in force at the date of the termination. As Article 17 of the Labour Law regarding notice periods is of a relative mandatory norm, it is clear that the 6-month period specified in the relevant regulation is a notice period in favour of the claimant. According to the contents of the file, it is understood that the claimant's employment contract has been terminated without giving the said notice period and the dismissal of the case with the written grounds is wrong and requires reversal since the notice pay must be calculated by considering that the notice period is 6 months.*", see http://www.kazanci.com/kho2/ibb/giris.html.

[109] Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017. Page 591.

[110] Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017. Page 591.

The occupational inefficiency (*i.e.* poor performance) is principally a valid reason as the legislative intention of Article 18 of the IK clearly lists the "*working less productive than the average employees who provides the similar service; having lower performance than committed or expected, gradual decrease of concentration on work; lack of learning and self-development*" among the examples of valid reason. However, occasional poor performance cannot be a ground for termination with notice periods. It must be continuous[111].

The educational and professional background may not be sufficient. The employees must work efficiently and show performance. The employees must also open to change and comply with the new methods and technological changes.

According to the settled precedents of the Yarg, in order to be able to terminate the employment contract for valid reason due to poor performance of an employee, there must be an objective performance evaluation system regularly applied at the workplace, and the employee should be guided to improve their performance[112]. This performance evaluation system must be suited for the workplace and the work. Similarly, the performance and efficiency standards must be realistic and reasonable and be determined native to the workplace and the work[113]. In some cases, these

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[111] *See* https://www.tisk.org.tr/tr/e-yayinlar/is_kanunu_yenilenmis_4__baski/pdf_is_kanunu_yenilenmis_4__baski.pdf.

[112] 22. Civil Chamber of the Yarg ruled in its decision dated 19.11.2018 and numbered 2018/14692 E. 2018/24703 K. that "*On the other hand, in order to be objective in the performance evaluation and to accept the valid reason, the performance evaluation criteria should be determined in advance, communicated to the employee and these criteria should be taken into consideration for the competencies such as knowledge, skills, experience required by the work, behaviours suitable for the workplace and the work expected from the employee and the personal development targets. In other words, the quality, behaviours and the achieved target of the employee bear importance. These criteria should be put forward objectively and concretely in accordance with the job description and efficiency of the employee, corporate principles of the employer and workplace rules needed to be complied with and performance evaluation forms should be prepared accordingly. The Performance Evaluation System should be developed and implemented in order to evaluate the performance of employees specific to the workplace. (The decision of our Chamber dated 24.09.2007 and numbered 2007/13994 E., 2007/27720 K.).*", see http://www.kazanci.com/kho2/ibb/giris.html.

[113] Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017. Page 592.

standards can even be determined peculiar to the employee. For example, the performance of a disabled employee must be assessed according to their disability.

The employees must be served with the performance evaluation criteria in advance. Moreover, according to the settled precedents of the Yarg, the employee must be provided with warnings to improve their performance and is also given a reasonable period of time (which is accepted as minimum 6 months in general) between the warnings to be able to improve their performance[114].

Another valid reason based on the employee's occupational inefficiency is no longer having the required license or work permit for performance of the work. Another one is the termination based on distrust which happens when the employee does not provide the required trust to the employer for the continuation of the employment relationship[115]. This type of termination is also related with the inefficiency of the employee. However, the distrust must obviously be supported with strong and objective facts and indications.

Finally, as per Article 19/2 of the IK, the employment contracts for indefinite period of an employee cannot be terminated for valid reason due to behaviour or efficiency of that employee without receiving their defence against such claims[116]. Accordingly, pursuant to the settled precedents of the Yarg, in order to be able to terminate the employment contract for valid cause due to inefficiency or poor performance of the employee, the employee must be provided with warnings to improve their efficiency

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[114] For a relevant precedent, *see* the decision of 9. Civil Chamber of the Yarg dated 23.10.2017 and numbered 2017/14784 E. 2017/16301 K., https://emsal.yargitay.gov.tr/BilgiBankasiIstemciWeb/yeniTasarim/index.jsp.

[115] Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017. Page 593.

[116] Centel, Tankut. Introduction to Turkish Labour Law. Cham: Springer, 2017. E-book Edition. Page 181; Mollamahmutoğlu, Hamdi / Astarlı, Muhittin / Baysal, Ulaş. İş Hukuku Ders Kitabı Cilt 1: Bireysel İş Hukuku. Ankara: Lykeion Yayınları, 2018. Page 293.

or performance and there should be a reasonable time period between the warnings and termination. Within the framework of the principle of "*proportionality on termination*"[117] applied by the Yarg, the validity of the termination depends on the seniority of the employee and the nature and the frequency of the behaviours of the employee. Therefore, each case must be evaluated separately on its own nature[118].

3.1.2.2. Behaviours of the employee

The behaviours of employee may give employer the right to terminate the employment contract with notice period. As regulated under Article 25/II of the IK, the behaviours of employee may also cause termination of employment contract without notice period, *i.e.* for just cause[119]. Obviously, the importance level of these behaviours is different. As long as the effects of such behaviours are not as serious as the ones regulated under Article 25/II of the IK but they still disrupts the normal workflow (operation) and affect the concord at the workplace in a negative way, the employer may terminate the employment contract for valid reason[120]. In most of the cases, these behaviours cause also violation of the employment contract. However, there may be a behaviour of the employee that constitutes a valid reason but is not in contradiction with the employment contract.

The legislative intention of Article 18 of the IK gives a number of examples to the behaviours of the employee which may constitute a valid reason; "*… damaging the employer or causing uneasiness in respect of damaging the employer; asking for*

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[117] Mollamahmutoğlu, Hamdi / Astarlı, Muhittin / Baysal, Ulaş. İş Hukuku Ders Kitabı Cilt 1: Bireysel İş Hukuku. Ankara: Lykeion Yayınları, 2018. Page 291.

[118] 7. Civil Chamber of the Yarg ruled in its decision dated 23.03.2016 and numbered 2015/42411 E. 2016/6949 K. that "*On the other hand, in accordance with the principle of proportionality, the method chosen and applied at termination should not be clearly disproportionate when compared to the purpose pursued. In other words, the severity of the intervention and the importance and severity of the reasons that justify it should be weighed.*", see http://www.kazanci.com/kho2/ibb/giris.html.

[119] *See* Section 4.1.1.

[120] Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017. Page 594.

money from colleagues at the workplace which creates discomfort; provoking colleagues against the employer; despite the warnings, performing the work incompletely, poorly or insufficiently; engaging in relationships with others in a manner that adversely affects workflow and the atmosphere at the workplace; making long phone calls which stops the workflow; often coming to work late and going around the workplace by hindering their work; being fractious with their superiors or colleagues, unnecessarily often getting into an argument with their superiors or colleagues"[121]. Obviously, the valid reasons relating to the behaviours of the employee are not exhausted by the examples listed here[122].

It has been often tricky whether a behaviour of the employee constitutes a valid reason or just cause in terms of termination of employment contracts. The significant distinction is that whether the behaviours of the employee shake the confidence relationship or cause collapse of the basis of the trust because the employment relationship is established on the strength of personal trust. If the behaviour of the employee does not shake the confidence relationship or cause collapse of the basis of the trust but disrupts the normal workflow (operation) and adversely affects the concord at the workplace and thus, the employer reasonably cannot be expected to continue the employment relationship, then the employer may terminate the employment contract for valid reason relating to employee's behaviour[123]. Another factor is the level of the employee's fault in terms of distinction of whether the behaviour of the employee constitutes a valid reason or just cause. However, the Yarg finds the breach of the duty of care by slight negligence adequate though this is

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[121] *See* https://www.tisk.org.tr/tr/e-yayinlar/is_kanunu_yenilenmis_4__baski/pdf_is_kanunu_yenilenmis_4__baski.pdf.

[122] Centel, Tankut. Introduction to Turkish Labour Law. Cham: Springer, 2017. E-book Edition. Page 179-180.

[123] Çelik, Nuri / Canikoğlu Nurşen / Canbolat, Talat. İş Hukuku Dersleri. İstanbul: Beta Yayıncılık, 2018. Page 502.

criticized by the doctrine[124]. In any case, every and each situation must be assessed native to its characteristic with the principle of proportionality where there the employer has freedom of contract and enterprise on one hand and the employee has right to labour on the other[125].

Misleading the employer: As per Article 25/II-a of the IK, if the employee misleads the employer at the time when the employment contract was concluded by falsely asserting that they have the qualifications or satisfy the requirements for which is an essential point of the contract, the employer may terminate the employment contract for just cause. On the other hand, if the employee's misleading only adversely affects the operation at the workplace, then the employer may terminate the employment contract only for valid reason[126].

Commenting to the detriment of the employer: As per Article 25/II-b of the IK, if the employee comments or behaves that harm the honour or dignity of the employer or a member of their family or makes groundless attributions or accusations harming the honour or dignity of the employer, the employer may terminate the employment contract for just cause. However, if the employee's comments or acts only adversely affects the concord at the workplace and the employer can no longer be expected to continue the employment relationship, then the employer would only be entitled to terminate the employment contract for valid reason[127].

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[124] Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017. Page 596.

[125] Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017. Page 597.

[126] Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017. Page 598.

[127] Narter, Sami. İş Güvencesi, İşe İade Davaları ve Tazminatlar. Ankara: Adalet Yayınevi, 2017. Page 126.

Employee's discord: As per Article 25/II-d of the IK[128], if the employee teases the employer, a member of their family or a colleague, or comes to workplace as drunk or drugged, or uses such substances at the workplaces, the employer may terminate the employment contract for just cause. In case of the behaviours of the employee that being fractious with their superiors or colleagues, unnecessarily often getting into an argument with their superiors or colleagues, the employer may only terminate the employment contract for valid reason[129]. Even though they do not tease, the behaviours of the employee must disrupt the normal workflow (operation)[130].

Lack of employee's loyalty/commitment: As per Article 25/II-e of the IK, if the employee behaves in contradiction to honesty and loyalty/commitment, such as misuse of the employer's trust, theft, disclosure of professional secrets of the employer, the employer may terminate the employment contract for just cause. However, if the employee's such behaviours do not amount to disloyalty but shows that the employee lacks the required level of loyalty/commitment and this shakes the employer's confidence, then the employer could only terminate the employment contract for valid reason[131].

Employee's absence and coming to work late: As per Article 25/II-g of the IK, if the employee is absent from work for consecutive two working days, or twice in a month on a day following any holiday or three working days within a month without the

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[128] Article 25/II-c of the IK regulates that the employer may terminate the employment contract without notice period if the employee sexually harasses another employee of the employer. This is not examined here because such behaviour of an employee directly shakes the confidence relationship and causes collapse of the basis of the trust and thus, constitutes a just cause.

[129] Çelik, Nuri / Canikoğlu Nurşen / Canbolat, Talat. İş Hukuku Dersleri. İstanbul: Beta Yayıncılık, 2018. Page 508.

[130] Öktem Songu, Sezgi. Bir Haklı Fesih Sebebi Olarak "Sataşma". Sicil İş Hukuku Dergisi, 39, 113-145. İstanbul: 2018. Page 137-141.

[131] Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017. Page 600.

employer's permission or basing on a justified reason, the employer may terminate the employment contract for just cause[132]. However, if the employee does not come to work regularly but their absence does not amount to the level set under Article 25/II-g of the IK, then the employer can only terminate the employment contract for valid reason[133]. In addition, if the employee often comes to work late or leaves the work early without the employer's permission or basing on a justified reason, the employer may again terminate the employment contract for valid reason as this disrupts the working order at the workplace[134].

Employee's inefficiency in performing their duty: As per Article 25/II-h of the IK, if the employee insists on not performing their assignment/duty although they are reminded thereof, the employer may terminate the employment contract for just cause[135]. The legislative intention of Article 18 of the IK gives the example of "*despite the warnings, performing the work incompletely, poorly or insufficiently*" as a valid reason[136]. These mean that, despite the warnings; if the employee does not perform their assignment/duty at all, the employer may terminate the employment contract

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[132] This provision is highly criticised as it is too strict. It is not considered appropriate to terminate the employment contract of a senior employee just because of an absence for consecutive two working days.

[133] Çelik, Nuri / Canikoğlu Nurşen / Canbolat, Talat. İş Hukuku Dersleri. İstanbul: Beta Yayıncılık, 2018. Page 505.

[134] 9. Civil Chamber of the Yarg ruled in its decision dated 29.05.2017 and numbered 2016/13471 E. 2017/9078 K. that "*It is understood from the whole file that the claimant continues to come to work late despite the warnings and behaves or has attitude against the defendant employer, that the trust relationship between the parties is damaged and the claimant's acts are not sufficient to justify termination for just cause, but resulted that the continuation of the employment relationship cannot be expected by the defendant employer significantly and reasonably. Accordingly, as it is understood that the termination is based on valid reasons, the decision to accept the case with the wrong assessment instead of the rejection was inaccurate and required reversal.*", see http://www.kazanci.com/kho2/ibb/giris.html.

[135] This provision is highly criticised as it is too strict. It is not considered appropriate to terminate the employment contract of a senior employee just because of an absence for consecutive two working days.

[136] *See* https://www.tisk.org.tr/tr/e-yayinlar/is_kanunu_yenilenmis_4__baski/pdf_is_kanunu_yenilenmis_4__baski.pdf.

without notice period and if the employee does perform their assignment/duty but incompletely, poorly or insufficiently, then the employer may terminate the employment contract with notice period. The behaviours of the employee which indicate that they are not interested in and responsible for work enough may also cause termination of the employment contract with notice period[137] as the legislative intention of Article 18 of the IK lists "*making long phone calls which stops the workflow; … and going around the workplace by hindering their work; being fractious with their superiors or colleagues*" among the examples of a valid reason based on employee's behaviours[138].

Causing damage on the assets of the employer: As per Article 25/II-ı of the IK, if, either willingly or due to lying down on the job, the employee damages machinery, installations or other articles or materials that belongs to the workplace or available to them and the damage cannot be compensated by their 30-days wage, the employer may terminate the employment contract for just cause. However, if the damage does not exceed the employee's 30-days wage, then the employer, depending on the characteristics of the event, could only terminate the employment contract for valid reason[139].

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[137] Çelik, Nuri / Canikoğlu Nurşen / Canbolat, Talat. İş Hukuku Dersleri. İstanbul: Beta Yayıncılık, 2018. Page 511. 7. Civil Chamber of the Yarg ruled in its decision dated 23.03.2016 and numbered 2015/42411 E. 2016/6949 K. that "*According to the contents of the file, … the irresponsible and irrelevant behaviour of the claimant during the work caused the employer to suffer a huge amount of damage and shook the employer's trust. When the claimant's acts are taken into consideration, it is understood that the employer cannot maintain the employment relationship. Even if it is not accepted as weighing as just cause, it is a valid reason for the termination of the employment contract of these behaviours that disrupt the conduct of the work and the work order in the workplace and the decision given for the acceptance of the case instead of the rejection of the case is erroneous and requires reversal.*", *see* http://www.kazanci.com/kho2/ibb/giris.html.

[138] *See* https://www.tisk.org.tr/tr/e-yayinlar/is_kanunu_yenilenmis_4__baski/pdf_is_kanunu_yenilenmis_4__baski.pdf.

[139] Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017. Page 604.

Employee’s detention or arrest for a short period of time: As per Article 25/IV of the IK, in case the employee is detained or arrested and their absence exceeds the notice periods (2-8 weeks) indicated in Article 17, the employer may terminate the employment contract for just cause. However, if the absence of the employee due to detention or arrest does not exceed their notice period, then the employer, can terminate the employment contract for valid reason as this adversely affects the normal workflow at the workplace[140].

Other behaviours: The most common employee behaviours which may cause termination of the employment contract are explained above, but it is impossible to exhaust the list of such behaviours. In addition to the above, some other behaviours of the employee which may cause termination of the employment contract with notice periods are as follows[141]:

- causing discomfort by gossiping about employer, employer' representatives and other employees,
- listening to the door of the employer,
- disobeying smoking ban even though it does not endanger the safety of work at the workplace,
- not attending to the training provided by the employer,
- avoiding learning new business methods,
- behaving in an inappropriate manner to the other employees even though it does not amount to sexual harassment,
- behaving disrespectfully and ungallantly to the customers,
- causing justified complaints by the customers.

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[140] Narter, Sami. İş Güvencesi, İşe İade Davaları ve Tazminatlar. Ankara: Adalet Yayınevi, 2017. Page 135.

[141] Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017. Page 605.

In any case, in order for termination for valid reason based on employee's misbehaviour, such behaviour must disrupt the normal workflow (operation) and adversely affect the concord at the workplace and the employer reasonably cannot be expected to continue the employment relationship.

As per Article 19/2 of the IK, the employment contracts for indefinite period of an employee cannot be terminated for valid reason due to behaviour or efficiency of that employee without receiving their defence against such claims[142]. Accordingly, pursuant to the settled precedents of the Yarg, in order to be able to terminate the employment contract for valid cause due to behaviours of the employee, the employee must be provided with warnings to improve their behaviour and there should be a reasonable time period between the warnings and termination. Within the framework of the principle of "*proportionality on termination*" applied by the Yarg, the validity of the termination depends on the seniority of the employee and the nature and the frequency of the behaviours of the employee. Therefore, each case should be evaluated separately on its own nature[143].

3.1.2.3. Business requirements

Termination based on necessities or requirements of the enterprise, the workplace or the work is not related to the employee's own personality while the efficiency or behaviour of the employee is. Such reasons originally arise from economic difficulties or requirement of reorganization or technological developments[144]. These all cause

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[142] Centel, Tankut. Introduction to Turkish Labour Law. Cham: Springer, 2017. E-book Edition. Page 181; Mollamahmutoğlu, Hamdi / Astarlı, Muhittin / Baysal, Ulaş. İş Hukuku Ders Kitabı Cilt 1: Bireysel İş Hukuku. Ankara: Lykeion Yayınları, 2018. Page 293.

[143] 7. Civil Chamber of the Yarg ruled in its decision dated 23.03.2016 and numbered 2015/42411 E. 2016/6949 K. that "*On the other hand, in accordance with the principle of proportionality, the method chosen and applied at termination should not be clearly disproportionate when compared to the purpose pursued. In other words, the severity of the intervention and the importance and severity of the reasons that justify it should be weighed.*", see http://www.kazanci.com/kho2/ibb/giris.html.

[144] Even though there is no direct reference to economic difficulties or requirement of reorganization or technological developments in Article 18 of the IK, some other articles give indication on what kind of necessities of the enterprise, the workplace or the work create surplus labour. Article 29/1 of the

abolition of some positions or change in the characteristics of some positions which creates surplus labour, *i.e.* supernumerary. Termination based on necessities (requirements) of the enterprise, the workplace or the work ensures adjustment of surplus labour to the required[145].

The legislative intention of Article 18 of the IK divides the reasons based on business requirements into two groups: reasons arising from within the workplace, reasons arising from out of the workplace[146]. There are a few examples given to the reasons arising from within the workplace such as "*implementation of new working methods; reduction in the workplace; application of new technology; cancellation of some parts of the workplace; abolition of certain parts of business*". As for the reasons arising from out of the workplace, the legislative intention of Article 18 of the IK emphasizes "*becoming impossible to sustain work at the workplace because of decrease in circulations and sales opportunities; decrease in demands and orders; energy shortage; economic crisis in the country; general stagnation in the market, loss of foreign market, shortage of raw material*"[147].

In practice, before terminating an employment contract due to business requirements, a managerial decision is taken by the employer where the organisational, technical and administrative reasons of the restructuring or

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IK provides that "*When the employer intends mass dismissal due to economic, technologic, structural or similar necessities required by the enterprise, the workplace or the work, they shall notify this to the trade union representatives, the respective regional directorate and the Turkish Employment Agency in writing at least 30 days in advance.*". In addition to this, Article 6/5 of the IK provides that "*… The right of the transferor or the transferee to terminate for reasons necessitated by economic, technologic or organisational changes is reserved; so is the employer's and the employee's right to terminate the contract for just cause.*".

[145] Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017. Page 606.

[146] Centel, Tankut. Introduction to Turkish Labour Law. Cham: Springer, 2017. E-book Edition. Page 180.

[147] *See* https://www.tisk.org.tr/tr/e-yayinlar/is_kanunu_yenilenmis_4__baski/pdf_is_kanunu_yenilenmis_4__baski.pdf.

implementation of new technology is clarified and substantiated in detail. In principle, the employers are free to take any decision affecting the success and future of their enterprises even if they are to enterprises' disadvantage. Under no circumstances are such managerial decisions subject any judicial review unless they are taken for only purposes of termination of an employment contract[148].

As well as managerial decisions are not listed among the valid reasons by the IK, the employers cannot take these decisions in order to dismiss an employee. While the employers cannot take managerial decisions to dismiss an employee, the managerial decisions may of course cause a dismissal. The employers cannot directly base on managerial decisions while terminating an employment contract, there must be a valid reason, *i.e.* necessities (requirements) of the enterprise, the workplace or the work as stated in Article 18 of the IK anyway and this must create a surplus labour[149].

In case the enterprise makes loss, but the labour requirement stays the same, there would not be a necessity (requirement) of the enterprise, the workplace or the work in terms of valid reason. Likewise, in case some part of the business is closed down, but the same business in carried out somehow and accordingly, there is no change in the labour requirement, the employer cannot terminate any employment contract based on business requirements.

Economic difficulties: Economic difficulties such as significant and constant decrease in operations of the enterprise, constant decrease in turnover and orders, output gap, finance and budget deficit, customer turnover, difficulties in wage payments, economic crises which adversely affects the enterprise can be counted among the

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[148] Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017. Page 607.

[149] 9. Civil Chamber of the Yarg ruled in its decision dated 11.12.2018 and numbered 2018/4502 E. 2018/22900 K. that "*… Within this context, the employer must prove that they have made a decision regarding termination, that this decision creates a surplus labour, that they applied this decison consistently and that the termination was inevitable.*", see http://www.kazanci.com/kho2/ibb/giris.html.

necessities of the enterprise[150]. These must also make termination unavoidable. On the other side, a temporary decrease in turnover or a slight drop in operations of the workplace cannot be a ground for termination. Closure of a business or workplace can be a valid reason for termination with notice periods as long as the employer does not wilfully misconduct as this is within the employer's freedom of enterprise[151].

Reorganization: The employer may at their own discretion reorganise the enterprise in order to operate efficiently, competitive and effective. In this case, instead of an existing difficulty, taking measures against a probable risk motivates the employer. The employer takes a managerial decision and accordingly, may reduce the production, change the production methods, close down a part of the enterprise, concentrate on a part of the business or merge or demerge some parts of the business to increase the quality, efficiency or competitive capacity. As a result of such reorganization, there may reasonably be a surplus labour[152]. Obviously, reorganization for the purposes of termination of employment contracts is not accepted as a valid reason.

A real and serious managerial decision would not suffice alone, the employer must have started to apply the decision and it must cause a surplus labour. The Yarg refers to term "*norm kadro*" and requires an investigation on the actual number of the

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[150] Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017. Page 609.

[151] 7. Civil Chamber of the Yarg ruled in its decision dated 20.10.2016 and numbered 2016/29721 E. 2016/16996 K. that "*… In addition, burden of proof is with the employee, when it is claimed that the employer terminated with a motive other than economic and operational reasons, the managerial decision may be subject to review as to whether it has been implemented arbitrarily and also, proportionally and unnecessarily under the scope of the principle that the termination is the last resort and whether the necessity of the workplace was inevitable. … The proportionality review should be carried out for the inevitability of termination within the framework of -technical review, not in economic terms- the principle that the termination is the last resort in terms of whether this decision is in accordance with the law and whether it eliminates the possibility of the employee to continue to work since the purpose of the managerial decision and whether this purpose was really necessary is outside the judicial review.*", see http://www.kazanci.com/kho2/ibb/giris.html.

[152] Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017. Page 611.

employees and *norm kadro* at the date of the termination and if there is a reasonable surplus labour[153]. The Yarg further requires an investigation whether any employee has been hired as substituted for the employee who had been dismissed[154].

Technological developments: Technological developments may force employer to apply such developments at the workplace, revise and modernise production processes, introduce new computer and automatization systems, optimise the production processes to customer needs. Such changes may cause abolition of some positions or substitution of the employees with more qualified ones[155]. Therefore, technological developments may be a valid reason if they cause a surplus labour[156].

To sum up, in order for a termination due to business requirement to be deemed valid, the employer is required to prove (i) the business requirements which constitute basis for termination, (ii) that the employer terminated the employment contract as "*last resort*", and (iii) that the termination is applied consistently[157].

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[153] 9. Civil Chamber of the Yarg ruled in its decision dated 12.02.2018 and numbered 2017/19777 E. 2018/2427 K. that "*The court should summon all documents indicating the work on norm kadro regarding the implementation of the managerial decision, the job descriptions of the employees and the payrolls indicating whether or not any employee was hired six months before and six months after the termination and should receive additional report on these issues from another expert committee who have sufficient expertise in bank management and give its ruling by making review on arbitrariness, consistency, proportionality of the termination (the last resort principle of the termination) according to all evidence available. According to the material and legal reasons explained, giving ruling with lack of research and investigation was wrong and required reversal.*", see http://www.kazanci.com/kho2/ibb/giris.html.

[154] 22. Civil Chamber of the Yarg ruled in its decision dated 05.04.2016 and numbered 2016/3392 E. 2016/9815 K. that "*The court should summon … the payrolls indicating whether or not any employee was hired six months before and six months after the termination …*", see http://www.kazanci.com/kho2/ibb/giris.html.

[155] Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017. Page 614.

[156] In some cases, the number of the employees needed for the operation of the business stays the same, but it is no longer possible for several employees to be employed since the business requires employees who have different qualifications. In such cases, the termination would be accepted valid.

[157] For a relevant precedent, *see* the decision of 22. Civil Chamber of the Yarg dated 20.09.2017 and numbered 2017/38789 E. 2017/18658 K., https://emsal.yargitay.gov.tr/BilgiBankasiIstemciWeb/yeniTasarim/index.jsp.

However, the courts cannot make an examination as to whether the managerial decision is beneficial or fit for purpose[158].

Finally, there is no regulation for the principle of social selection under Turkish Law. The principle of social selection requires employers to carry out another process before termination for selection of the employee whose contract would be terminated. The social selection would be conducted based on criteria such as efficiency, seniority, pension, age etc.

The Yarg, however, had previously given decisions requiring employers to conduct social selection by adopting this principle from the KSchG[159]. As such decisions have been highly criticised by the doctrine on the grounds that there is no such regulation under Turkish Law and it is not certain that which criteria has priority, the Yarg changed its decision and no longer investigates whether such selection has been carried out[160]. The Yarg, now, investigates only whether the employer has complied with the prohibition of discrimination among the employees while deciding whose employment contract would be terminated[161]. Even though the principle of social

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[158] Dereli, Toker. Labour Law in Turkey. Alphen aan den Rijn: Kluwer Law International, 2015. Page 203.

[159] 9. Civil Chamber of the Yarg ruled in its decision dated 01.05.2006 and numbered 2006/4745 E. 2006/12211 K. that "*While selecting the employee to be dismissed; the employer should compare the employees who undertake the same job in the workplace, and consider the order to be made among the employees according to the criteria such as efficiency, failure to come to work due to illness, fulfilling the obligation to work with care, seniority, entitlement to retirement, being married and having children or young. In other words, the criteria on which social selection is based should be determined.*", see http://www.kazanci.com/kho2/ibb/giris.html.

[160] Narter, Sami. İş Güvencesi, İşe İade Davaları ve Tazminatlar. Ankara: Adalet Yayınevi, 2017. Page 83; Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017. Page 621.

[161] 9. Civil Chamber of the Yarg ruled in its decision dated 24.11.2008 and numbered 2008/12816 E. 2008/32010 K. that "*On the other hand, except for the "absolute prohibition of discrimination" provided in Article 5 of the Labour Law No. 4857, there are no legal regulations in our Labour Law legislation binding the employer in the selection of the employee whose employment contract will be terminated. However, it is possible for the employer and employee to make an agreement which sets out certain criteria in this regard. The validity of the criteria agreed by the parties in this respect depends on whether they are legally acceptable and objective. The termination which are in violation of the absolute prohibition of discrimination or of failure to comply with the objective criteria agreed*

selection is neither regulated under Turkish Law nor required by the Yarg anymore, as a matter of course, it can be agreed under collective labour agreements.

The Yarg were previously trying to fill the deficiency in the legal arrangements by adopting the principle of social selection from the KSchG. However, this was contrary to law because there was no such regulation in Turkish Law or gap in law left on purpose by the legislator to be filled by the judiciary. Therefore, the recent precedents of the Yarg are in point. On the other hand, this principle needfully protects the interests of employees and should be enacted by the Turkish Law as well. Otherwise, the employers will be free to select an employee who is too old to find a new job and has dependents while there is another early career-stage employee who does not have any dependent but performs a little bit better than the former.

3.1.3. Principle of *Ultima Ratio*

If there is a less affecting measure than terminating an employment contract, the employer must take this instead of dismissing an employee. This is called as the principle of *ultima ratio* and accepted in many jurisdictions. As job security requires continuation of the employment and considers the termination an exceptional way, it is no surprise that the principle of *ultima ratio* is accepted, and the employment contracts are terminated as a last resort in jurisdictions where the job security provisions are in effect[162].

Even though there is no clear reference to the principle of *ultima ratio* in the IK, the legislative intention of Article 18 of the IK states that "*The employer is expected to consider the termination as a last resort. Therefore, when making interpretation in*

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by the parties, if any other conditions have been fulfilled, shall be deemed invalid. On the other hand, although there is an agreement on how to determine the employee to be dismissed, the employer is bound with the criteria that they stated that they had considered during the termination.", see http://www.kazanci.com/kho2/ibb/giris.html.

[162] Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017. Page 616.

accordance with the concept of the valid reason, it should always be investigated whether the termination was avoidable."[163]. However, the main legal basis for the principle of *ultima ratio* is the rule of good faith regulated under Article 2/1 of the TMK which is read as "*Everyone has to abide by the rule of good faith when exercising their rights and fulfilling their obligations.*".

Not only in case of termination due to necessities (requirements) of the enterprise, the workplace or the work does the employer have to terminate the employment contract as a last resort, but also in case of termination due to inefficiency/poor performance or behaviour of the employee, the principle of *ultima ratio* is applied[164]. Even though the reason of the termination arises from the employee themselves, the employer must apply to less affecting measure, if there is any[165].

As a matter of course, the less affecting measure must be applicable and not expensive or uneconomic or damaging to business. The employer is not expected to create new positions within the business as well[166]. Finally, it should be noted that the principle of *ultima ratio* becomes more of an issue when there is a valid reason for termination of the employment contract. If the reason for the termination is

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[163] *See* https://www.tisk.org.tr/tr/e-yayinlar/is_kanunu_yenilenmis_4__baski/pdf_is_kanunu_yenilenmis_4__baski.pdf.

[164] Narter, Sami. İş Güvencesi, İşe İade Davaları ve Tazminatlar. Ankara: Adalet Yayınevi, 2017. Page 80.

[165] 9. Civil Chamber of the Yarg ruled in its decision dated 26.11.2018 and numbered 2018/2745 E. 2018/21448 K. that "*Termination due to behaviour is only necessary if there is no slighter remedy than termination of the contract. Another means of the principle of proportionality than the warning is changing the place of work. Changing the place of work is a means that comes up as a slighter remedy compared to termination. However, the application of this measure depends on the condition of being possible for the employer and the rightful expectation of it from the employer. If it is not possible to employ the worker employee at another workplace, in accordance with the principle of proportionality and the principle of ultima ratio, the termination based on change in working conditions should be considered in accordance with Article 22 of the Labour Law.*", see http://www.kazanci.com/kho2/ibb/giris.html.

[166] Gürsel, İlke. Feshe Bir Alternatif Olarak İşverenin Fesihten Önce İşçiyi Başka İşte Çalıştırması. Sicil İş Hukuku Dergisi, 40, 97-113. İstanbul: 2018. Page 104.

invalid, then there is no need to investigate whether the employer applied the termination as a last resort[167].

The application of the principle of *ultima ratio* is developed by the precedents of the Yarg[168]:

- If it were possible to keep employing the employee by calling off the overtime work or offering the employee working with flexible hours at the workplace, the termination based on necessities of the business would be deemed invalid[169];
- If it were possible to avoid termination by employing the employee at another vacant position, department or workplace of the same employer[170], the termination based on necessities of the business would be deemed invalid[171];

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[167] Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017. Page 617.

[168] Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017. Page 618-619.

[169] 9. Civil Chamber of the Yarg ruled in its decision dated 15.02.2018 and numbered 2018/949 E. 2018/2916 K. that "*… As required by the principle that the termination is the last resort, it has not been proved by the employer that the measures such as application of unpaid leave, abolition of overtime practices have been taken. It is understood from the records that overtime practices continued towards the last months of 2015.*", see http://www.kazanci.com/kho2/ibb/giris.html.

[170] Gürsel, İlke. Feshe Bir Alternatif Olarak İşverenin Fesihten Önce İşçiyi Başka İşte Çalıştırması. Sicil İş Hukuku Dergisi, 40, 97-113. İstanbul: 2018. Page 107.

[171] 9. Civil Chamber of the Yarg ruled in its decision dated 15.02.2018 and numbered 2018/949 E. 2018/2916 K. that "*[As required by] the principle that the termination is the last resort, the employer has an obligation to investigate the possibilities of employing the employee whose employment contract to be terminated for valid reason and to offer them to the employee. No information and documents have been submitted showing that an alternative position offered to the claimant as required by this obligation and it is understood that the termination was not complying with the principle that the termination is the last resort. [As a matter of fact,] according to the settled precedents of the Court of Cassation, if the employer has more than one workplace, it should be investigated whether it is possible to employ the employee in other workplaces as a last resort. The other workplaces where the employee to be employed do not have to be located in the same enterprise or in the same branch of activity or even in the same province, and it is sufficient that the workplace belongs to the same natural or legal person employer. Since it is understood that there are other workplaces of the defendant enterprise which are in the same branch of activity, termination cannot be accepted as valid.*", see http://www.kazanci.com/kho2/ibb/giris.html.

- If it were possible to continue to the employment by providing the employee with training for new technologies and this were not a burden to the employer, the termination based on necessities of the business would be deemed invalid[172];
- If it were possible to avoid termination by employing the employee at another vacant position where the employee could work more efficient, the termination based on inefficiency of the employee would be deemed invalid.

3.1.4. Circumstances That Cannot Be a Valid Reason for Termination

The legislator has, *inter alia*, stated the followings in Article 18/3 of the IK as they cannot constitute a valid reason for termination[173]:

- union membership or participation in union activities outside working hours or even within working hours with the consent of the employer,
- acting as a workplace union representative;
- filing a complaint with administrative or judicial authorities or participating in ongoing proceedings against the employer in order to protect their rights against the employer;
- race, colour, gender, marital status, family responsibilities, pregnancy, birth, religion, political opinion and so on;
- absence from work during maternity leave when it is forbidden by law to have female employees engaged in work;

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[172] 22. Civil Chamber of the Yarg ruled in its decision dated 21.06.2013 and numbered 2013/13849 E. 2013/15121 K. that "*In the present case, while it was necessary to make a viewing with the expert committee consisting of the business manager, financial advisor and lawyer on whether the claimant had been able to work in other departments with a short training and whether the termination is complied with the principle that the termination is the last resort or not, and review the workplace documents and decide accordingly, the written decision given by basing on only witness statements is contrary to the procedure and the law and requires reversal.*", see http://www.kazanci.com/kho2/ibb/giris.html.

[173] Dereli, Toker. Labour Law in Turkey. Alphen aan den Rijn: Kluwer Law International, 2015. Page 203; Centel, Tankut. Introduction to Turkish Labour Law. Cham: Springer, 2017. E-book Edition. Page 180.

- temporary absence from work during the waiting period due to illness or accident (which lasts for more than 6 weeks beyond the notice periods).

3.2. In terms of German Law

Employees who have completed a qualifying working period of 6 months without interruption and are employed in enterprises employing more than 10 full-time employees on a regular basis are also protected by the KSchG dated 10 August 1951. In such cases, employers can only terminate the employment contracts if the termination is socially justified and compatible and there are only three statutory justifications for dismissal: personal capability or conduct of the employee and operational reasons[174].

3.2.1. Scope of Job Security

As stated, in order for employees to enjoy protection of job security, they must have been employed for more than 6 months in an enterprise where more than 10 employees have been employed.

3.2.1.1. Employees subject to KSchG

Only the employees who are subject to KSchG can enjoy the protection by job security. The below conditions are already stated in the KSchG.

3.2.1.2. Condition of 10 employees

In most of the cases, the job security provisions are applied to employees of the businesses where more than 10 employees have been employed. However, because of an amendment, the job security provisions are also applied to employees of the businesses where there are less than 10 employees, but more than 5 employees who

[174] Lorenz, Michael / Falder, Roland. The German and Chinese Labour Law. Springer Gabler, 2016. Page 113.

have been employed at least since 31 December 2003[175]. Therefore, the employers should carefully consider whether to hire the 11th employee which would immediately provide all employees with job security protection.

As for the calculation of the number of the employees working in enterprises, part-time employees are also included in total number unlike the trainees and apprentices. However, the part-time employees are not counted as full-time employees, they are counted pro rata basis. As per Section 23 of the KSchG, given that the weekly working period is 40 hours; a part-time employee with a regular working time of not more than 20 hours is counted as a 1/2 full-time employee, and a part-time employee with a regular working time of not more than 30 hours is counted as a 3/4 full-time employee.

As per Section 23 of the KSchG, save for a few sections, job security provisions shall "*not apply to establishments and administrations regularly employing five or fewer employees, excluding persons employed for vocational training.*". However, "*In establishments and administrations regularly employing ten or fewer employees, excluding persons employed for vocational training*" save for a few articles, job security provisions "*shall not apply for employees whose employment relationship commenced after 31 December 2003*". "*In determining the number of employees*", the employees whose employment relationship commenced after 31 December 2003, "*shall not be taken into account until ten employees are regularly employed.*".

As for an example to the application of the above regulation; in case a company employs 9 employees and 6 of whose employment commenced before 2003. Those 6 employees would enjoy protection of job security provisions but the other 3 employees not. However, if only 5 of those employees had been employed before

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[175] Kirchner, Jen / Kremp, Pascal R. / Magotsch, Michael. Key Aspects of German Employment and Labour Law. Berlin: Springer, 2018. E-book of Second Edition. Page 174.

2003, then none of the 9 employees would enjoy protection of job security provisions[176]. Therefore, the number of the employees who have been employed at least since 31 December 2003 bears significant importance in terms of scope of job security application.

3.2.1.3. Condition of 6-month employment

As Section 1 of the KSchG clearly states that "*The termination of the employment relationship of an employee who has been employed in the same establishment or the same company without interruption for more than six months is legally invalid if it is socially unjustified.*", only the employees who have at least 6-month seniority would fall under the scope of job security application. Even if the employment contract does not explicitly mention a probationary period, the above regulation would apply[177].

The employer has a complete 6-month period to decide whether they would like to continue the employment relationship with the employee. The termination notice can be served until the very end of this period. The employer does not have to consider the notice period for the calculation of the 6-month period, *e.g.* the notice period may last after the end of 6-month period. For example, if the employment relationship commences on 1 January, the termination notice must be served on 30 June at the very latest[178].

3.2.1.4. Certain appointed and managerial persons

Pursuant to Section 14/1 of the KSchG, the job security provisions shall not apply "*in establishments of a legal entity, members of the body appointed to legally represent*

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[176] Kirchner, Jen / Kremp, Pascal R. / Magotsch, Michael. Key Aspects of German Employment and Labour Law. Berlin: Springer, 2018. E-book of Second Edition. Page 174.

[177] Kirchner, Jen / Kremp, Pascal R. / Magotsch, Michael. Key Aspects of German Employment and Labour Law. Berlin: Springer, 2018. E-book of Second Edition. Page 175.

[178] Kirchner, Jen / Kremp, Pascal R. / Magotsch, Michael. Key Aspects of German Employment and Labour Law. Berlin: Springer, 2018. E-book of Second Edition. Page 175.

the legal entity" and "*in establishments of a partnership, the persons appointed by law, the articles of association or the bylaws to represent the partnership.*" In addition, pursuant to Section 14/2 of the KSchG, save for a few sections, the job security provisions shall not also apply "*to managing directors, directors of establishments and similar managerial employees who have the authority to independently hire or dismiss employees.*".

As is stated by the KSchG, the representatives of a legal entity, and the persons appointed to represent the partnership and the managing directors, directors of establishments and similar managerial employees who have the authority to independently hire or dismiss employees are excluded from the application of the job security.

3.2.2. Reasons for Socially Justified Termination

Once all the conditions are met for application of job security provisions, the employer must present a specific reason to be able to terminate the employment contract and this reason must be socially justified. In order to ensure that the termination is socially justified, the termination must be based on either the employee's conduct, person-related or operational reasons.

The employer must not only present a reason for termination but also be able to prove that the reason constituting a breach of contract is socially justified as the burden of proof is on the employer. In case an employment contract is terminated by the employer and the termination is disputed by the employee, the employer has to introduce evidence for the reason for termination, *e.g.*, the employee was absent from work and at what time. Only then the burden of proof shifts to the employee, *e.g.*, they must evidence that they were absent for a good reason.[179].

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[179] Kirchner, Jen / Kremp, Pascal R. / Magotsch, Michael. Key Aspects of German Employment and Labour Law. Berlin: Springer, 2018. E-book of Second Edition. Page 178.

3.2.2.1. Person-related reasons

In cases where employee is not able to fulfil the requirements of their job anymore because of illnesses (*e.g.* recurrent short-term disorders, chronic diseases or a protracted or long-term illness) or addiction, the employment contract can be terminated based on personal capability of the employee. In principle, if the employee is no longer able to perform their contractual obligations, then termination of the employment contract would be socially justified[180]. In order to ensure that the termination is socially justified, there should be a situation in which the employer can no longer be expected to accept the consequences of *e.g.* further periods of frequent sick leave.

On the other side, competing interests of the contracting parties should also be reconsidered during the termination. The competing interests of the parties may differ according to the economic impact of termination on company and on work performance, the consequences of termination for other employees, the length of the sickness, the duration of employment relationship, the practicability of transferring the employee to another workplace, the size of the company and so on.

The above points have been systematised by the precedents under the below test which is helpful to understand whether a termination would be socially justified[181]:

- First, at the time of termination, it should be unforeseeable that the employee would retrieve their ability to perform contractual obligations in the near future.

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[180] Kirchner, Jen / Kremp, Pascal R. / Magotsch, Michael. Key Aspects of German Employment and Labour Law. Berlin: Springer, 2018. E-book of Second Edition. Page 176.

[181] Kirchner, Jen / Kremp, Pascal R. / Magotsch, Michael. Key Aspects of German Employment and Labour Law. Berlin: Springer, 2018. E-book of Second Edition. Page 176.

- Second, the employer's business must seriously be suffered a loss from the employee's inability to perform contractual obligations[182].
- Third, the competing interests of the parties must be considered, and the employer's interest must outweigh the employee's interest. The social circumstances that the employee in must be considered as well.
- Fourth, the employer is required to comply with the principle of *ultima ratio*[183].

Typical person-related reasons are illness, addiction and no longer having the required permit[184]:

Illness: Certainly, not all kind of illnesses would socially justify the termination of employment contract. As per the above test, it is important to assess whether it is foreseeable that the employee would regain their ability to perform obligations. If the employee provides sufficient proof that they will not be ill in the future or has a positive or a favourable medical prognosis, then the contract cannot be terminated based on this reason except the employer proves the contrary[185].

Illnesses cause absence of employee from work which would be detriment to employer's interest. As the length of the statutory leave due to sickness is 6 weeks per year, it is unlikely that the termination would be socially justified and valid when the absence of employee has not even exceeded 6 weeks per year. However, there

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182 Examples for such a loss could be loss of production, machinery breakdowns, loss of customers, inability to find adequate substitute staff.

183 *See* Section 3.2.4.

184 For a detailed list, *see*: https://beck-online.beck.de/?vpath=bibdata/komm/BeckOK_45_BandArbR/KSchG/cont/BeckOK.KSchG.p1.glD.glII I%2Ehtm.

185 Zenker, Ilona. Basics of German Labour Law: The Employment Relationship. Norderstedt: Books on Demand, 2014. Kindle Edition. Location 1211-1213.

is no settled precedent regarding the length of the absence due to illness which would suffice for termination[186]. Each and every case is unique as per its own characteristics and must therefore be assessed separately. The important point is the application of the above-mentioned test as the BAG does[187].

As regards to long-term illnesses, according to precedent, an absence of 18 months from work has been assumed as detrimental to employer's interest and the termination was accepted as socially justified and valid provided that the employee's return was not foreseeable. As for the short-term but frequent illnesses, according to precedent, only absences of about 15-25 % in total within the last 3 years would be considered as frequently. Accordingly, the termination would be accepted as socially justified and valid provided that the employee will most probably be absent in the foreseeable future[188].

Addiction: A serious addiction to alcohol or drug is regarded as illness and thus, the above explanations are valid in such cases as well. As per the above test, the addiction of the employee must continuously prevent him fulfilling their contractual duties properly and accordingly, have negative influence on the employer's interest. Otherwise, the termination would not be socially justified and valid. The Courts looks

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[186] Kirchner, Jen / Kremp, Pascal R. / Magotsch, Michael. Key Aspects of German Employment and Labour Law. Berlin: Springer, 2018. E-book of Second Edition. Page 177.

[187] The BAG ruled in its decision dated 13.05.2015 and numbered 2 AZR 565/14 that "*The social justification for terminations on the grounds of illness has to be considered in three stages. Termination in the case of a long-term illness is socially justified within the meaning of Section 1/2 of the KSchG if -first stage- there is a negative prognosis regarding the probable duration of incapacity to work, -second stage- a significant impairment of operational interests based on this is to be determined and -third stage- a balancing of interests shows that the operational disadvantages lead to a burden on the employer, which is no longer acceptable (BAG 20 November 2014 - 2 AZR 664/13 - paragraph 13, 30 September 2010 - 2 AZR 88/09 - paragraph 11 for further information, BAGE 135, 361).*", see http://juris.bundesarbeitsgericht.de/zweitesformat/bag/2015/2015-09-23/2_AZR_565-14.pdf.

[188] Kirchner, Jen / Kremp, Pascal R. / Magotsch, Michael. Key Aspects of German Employment and Labour Law. Berlin: Springer, 2018. E-book of Second Edition. Page 177.

for a prognosis had been made at the time of the termination, whether the employee was willing to go through a rehabilitation or therapy[189].

Work permit: In case the employee does no longer have the required work permit to be able to work in Germany and as per the above test, it is not foreseeable that they will be issued a new one in due course, then the termination would be socially justified and valid.

In principle, no warning is required to be served to the employee because person-related reasons are not employee's fault and it is beyond their power to go back to previous situation. As it is the employer who has the burden of proof that the above test is successfully applied, it is advised the employers to serve a warning letter prior to the termination where applicable[190]. Otherwise, it is often not easy to provide convincing evidence.

3.2.2.2. Reasons related to employee's conduct

While the termination based on personal capability refers to personal characteristics and ability of the employee, the termination based on employee's conducts is associated with individual acts of the employee and these conducts are mostly intentional. In the case of reasons related to employee's conduct, the below test which is helpful to understand whether a termination would be socially justified, is applied[191]:

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[189] Kirchner, Jen / Kremp, Pascal R. / Magotsch, Michael. Key Aspects of German Employment and Labour Law. Berlin: Springer, 2018. E-book of Second Edition. Page 177.

[190] Kirchner, Jen / Kremp, Pascal R. / Magotsch, Michael. Key Aspects of German Employment and Labour Law. Berlin: Springer, 2018. E-book of Second Edition. Page 177.

[191] Kirchner, Jen / Kremp, Pascal R. / Magotsch, Michael. Key Aspects of German Employment and Labour Law. Berlin: Springer, 2018. E-book of Second Edition. Page 178.

- First, the employee must have acted in a way that would objectively be accepted as breach of contractual obligation.
- Second, there must be real possibility that the employer would breach their contractual obligation again. This shows that the termination is not a punishment for the employee's own conduct but a measure to avoid any possible future breach.
- Third, the competing interests of the parties must be considered, and the employer's interest must outweigh the employee's interest. The social circumstances that the employee in must be considered as well.
- Fourth, the employer is required to comply with the principle of *ultima ratio*[192].

Both the termination without notice periods and the termination with notice periods based on conducts of employee mainly arise from the acts of the employee but they differ in terms of importance and intensity of the acts. Obviously, the acts which cause termination with notice periods due to conducts of employee are simpler and might be, for example, unauthorised leave-taking, absenteeism, or the consumption of drugs or alcohol at company premises[193]. Typical reasons related to employee's conduct include alcohol and drug use at the workplace, employee's unexcused absence, certain conducts out of the office, poor performance, certain conducts against employer or colleagues[194]:

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192 *See* Section 3.2.4.

193 Zenker, Ilona. Basics of German Labour Law: The Employment Relationship. Norderstedt: Books on Demand, 2014. Kindle Edition. Location 1220-1222.

194 For a list, *see*: https://beck-online.beck.de/?vpath=bibdata/komm/BeckOK_45_BandArbR/KSchG/cont/BeckOK.KSchG.p1.glE.glV%2Ehtm and https://beck-online.beck.de/?vpath=bibdata/komm/BeckOK_45_BandArbR/KSchG/cont/BeckOK.KSchG.p1.glE.glVI%2Ehtm.

Alcohol and drug use at the workplace: In case it is probable that the employee would cause damage when they drink/use or work under the influence of alcohol or drug the employer is not even required to serve warning before terminating the contract. Since it is at employees' own discretion to be subject to alcohol or drug test, the employers always struggle to evidence that the employer consumed or worked under the influence of such substances and thus, are advised to have witnesses if they intend to terminate the employment contract based on this reason[195].

Unexcused absence: If the employee is repeatedly absent from work or extends the holidays without the employer's permission or basing on a justified reason or gives false information to the employer regarding their absence, *e.g.* submits medical certificate while they are in fact not sick, the employer may terminate the employment contract. As might be expected, it is not easy to prove when the employee gives false information[196].

Certain conducts out of the office: The conducts of the employee while not working may be a socially justified reason if and only the conduct has negative impacts on the employment relationship. The BAG ruled that dismissal of an employee who was convicted of child abuse without any relation to the activity of the company, is not socially justified even though the other employees working on the site had refused to do their work as long as the employee concerned had continued to work[197].

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[195] Kirchner, Jen / Kremp, Pascal R. / Magotsch, Michael. Key Aspects of German Employment and Labour Law. Berlin: Springer, 2018. E-book of Second Edition. Page 178.

[196] Kirchner, Jen / Kremp, Pascal R. / Magotsch, Michael. Key Aspects of German Employment and Labour Law. Berlin: Springer, 2018. E-book of Second Edition. Page 178.

[197] The BAG ruled in its decision dated 15.12.2016 and numbered 2 AZR 431/15 that "*The State Labour Court wrongly dismissed the unfair dismissal lawsuit in respect of the defendants' ordinary dismissal. … The defendant has not shown any reasons which could justify a proper termination within the meaning of Section 1/2/1 of the KSchG. The provision applies to the employment relationship of the parties in accordance with Section 1/1, Section 23/1 of the KSchG. … Only if, despite such efforts, the realization of the threat is promised and the employer is threatened with grave economic disadvantages, termination may be justified. The prerequisite for this, however, is that dismissal is the only means that can be used to avert the damage (BAG 19 July 2016 - 2 AZR 637/15 - op. Cit., 18 July*

Poor performance: If an employee continuously underperforms, the employer may terminate the employment contract. However, again, it is not easy for employers to prove that the employee underperforms in case of a dispute as burden of proof is on the employer. The employees obviously are under the obligation of performing their work on average and the average should be set based on their individual abilities. Obviously, not all the employees who show less performance than the average at the workplace may be faced with the termination since there always are some employees performs under the average. Only the employees who show significantly lower performance than they would show given the circumstances, their abilities and capabilities, may be faced with the termination. According to the precedents, the requirement for poor performance is set at least 30%[198] for a socially justified termination.

The artful point is determining the average as there are many elements and it is not easy to find comparable employees. Apart from the employees' own characteristics, the conditions in which the employees work are usually different. Therefore, it is strongly suggested employers to determine the performance evaluation criteria as detailed as possible and give clear instructions to the employee where possible. Employee's failure to comply with the instruction should be responded with the warnings. If the employee continues to do so, then the employer may terminate the employment contract[199].

2013 - 6 AZR 420/12 - op. Cit.).", see http://juris.bundesarbeitsgericht.de/zweitesformat/bag/2017/2017-03-30/2_AZR_431-15.pdf.

[198] Kirchner, Jen / Kremp, Pascal R. / Magotsch, Michael. Key Aspects of German Employment and Labour Law. Berlin: Springer, 2018. E-book of Second Edition. Page 179.

[199] Kirchner, Jen / Kremp, Pascal R. / Magotsch, Michael. Key Aspects of German Employment and Labour Law. Berlin: Springer, 2018. E-book of Second Edition. Page 179.

Certain conducts against employer or colleagues: Employees' inappropriate conducts against their employer or colleagues such as sexual harassment, whistleblowing, bullying may be justification for termination of their employment contract[200].

Differently from the termination due to person-related reasons, the employer is obliged to issue a warning to the employee prior to a dismissal for purposes of stopping employee to repeat their misconduct. The termination is usually considered invalid if the employee is not given any prior warning in case of termination due to reasons related to employee's conduct[201]. However, no warning is required if it is evident that the employee is in breach of the employment contract due to their conducts. As stated above, especially if there is a severe breach or criminal offence, the employer is reasonably not expected to give warning.

As for the form requirements, the warnings do not have to be in writing. However, as a matter of course, the employers are well advised to issue warning letters, *i.e.* in writing and serve in way that is possible to prove later in case of a dispute. However, there are certain points that need to be covered by the warnings. In particular, a warning should (i) describe the conducts of the employee, (ii) state how the employee should have acted in compliance with their contract and (iii) their employment contract may be terminated in case the misconduct is repeated[202].

3.2.2.3. Operational reasons

Beside the capability and conducts of the employee, operational reasons caused by economic situation, new technologies, restructuring etc. may also constitute a

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[200] Kirchner, Jen / Kremp, Pascal R. / Magotsch, Michael. Key Aspects of German Employment and Labour Law. Berlin: Springer, 2018. E-book of Second Edition. Page 179.

[201] Kirchner, Jen / Kremp, Pascal R. / Magotsch, Michael. Key Aspects of German Employment and Labour Law. Berlin: Springer, 2018. E-book of Second Edition. Page 180.

[202] Kirchner, Jen / Kremp, Pascal R. / Magotsch, Michael. Key Aspects of German Employment and Labour Law. Berlin: Springer, 2018. E-book of Second Edition. Page 180.

ground for termination with notice period. However, the termination is justified only if the reasons has made it impossible for employer to employ the employee any longer.

According to precedents, the dismissal may be caused either internal or external business reasons. It appears that the employers are more at ease when the termination is based on internal business reasons. The employer may make decision to react to external changes in the market, industry or economy which can cause decrease in demand or sale of a product, significant drops in profits. On the other side, based on the analysis of the business compared to its peers, the employer may decide on the plans and targets of the business as the internal reasons requires. Within this context, the employer may resolve to change or introduce production methods, close a part of whole of the business or outsource of a part of the business[203].

In case of termination due to operational reasons, the below test which is helpful to understand whether a termination would be socially justified, is applied[204]:

- First, there must be an operational reason which compels the employer to dismiss the employee and the employer must show the causal relation between the reason and dismissal.
- Second, the social selection process must be carried out[205].
- Third, the termination must be in comply with the principle of *ultima ratio*[206].

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[203] Kirchner, Jen / Kremp, Pascal R. / Magotsch, Michael. Key Aspects of German Employment and Labour Law. Berlin: Springer, 2018. E-book of Second Edition. Page 180.

[204] Kirchner, Jen / Kremp, Pascal R. / Magotsch, Michael. Key Aspects of German Employment and Labour Law. Berlin: Springer, 2018. E-book of Second Edition. Page 180.

[205] Because of its significance under German Law, the social selection process will be reviewed under a separate heading, *see* Section 3.2.3.

[206] *See* Section 3.2.4.

In any case, the employer must show how the reasons behind his decision has led to the positions be redundant. As stated above, it is easier for the employers to back their internal decision rather than internal ones because the external reasons usually require more detailed analyses. For example, closing down the whole business is an internal decision of an employer which would result in redundancies of the all positions and it does not require a detailed analysis. Such management decisions of the employer are not subject to judicial control and the courts can only intervene if the employer acts arbitrarily[207]. The employer has the burden of proof that the current situation necessities the termination and they did not act arbitrarily.

The most common operational reasons are closure of business, decrease in sales or orders and outsourcing [208]:

Closure of business: If employer decides to shut down a business, full or in part, this socially justifies the termination of the employment contracts. The employer's commercial decision is not subject to judicial review as long as they do not act against the good faith. The employer may of course serve the termination notices in advance to ensure that each termination takes effect before the business is closed[209].

Decrease in sales or orders: The degree of the decrease must be high enough for this reason to be regarded as socially justified. The employer should show that lower total amount of working hours is sufficient to meet the new amount of sales or orders and

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[207] Zenker, Ilona. Basics of German Labour Law: The Employment Relationship. Norderstedt: Books on Demand, 2014. Kindle Edition. Location 1230-1232.

[208] For a detailed list, *see*: https://beck-online.beck.de/?vpath=bibdata/komm/BeckOK_45_BandArbR/KSchG/cont/BeckOK.KSchG.p1.glF.glII I%2Ehtm.

[209] Kirchner, Jen / Kremp, Pascal R. / Magotsch, Michael. Key Aspects of German Employment and Labour Law. Berlin: Springer, 2018. E-book of Second Edition. Page 181.

why this decrease has led to redundancy of a certain position without having other employees to work overtime. The employers are expected to present this statistically[210].

Outsourcing: The employers may strategically decide to outsource certain parts of their businesses and this decision cannot be reviewed by the courts. Finally, in such case, the employment relationship ends because of the employer's resolution[211].

3.2.3. Social Selection Process[212]

In case of termination due to compelling operational reasons, the employer has also the burden of proof that the dismissed employees had been selected in line with Section 1/3 of the KSchG. According to Section 1/3 of the KSchG, such termination is regarded as socially unjustified if the employee's seniority, the age of the employee, his marital status, number of children, financial obligations towards family members or severe disabilities are not sufficiently considered. The employer, at the employee's request, must state the reasons on which the selection in question was made. In any case, the employee who would suffer most from the consequences of the dismissal must be the last to be dismissed for the sake of social protection.

The above regulation imposes an obligation to employers to check whether there is any other employee whose work can be performed by the employee whose employment contract is intended to be terminated. In such case, the employer must carry out social selection process and find out which employee needs greater social protection. The four criteria are set out by Section 1/3 of the KSchG, *i.e.* seniority, age

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[210] Kirchner, Jen / Kremp, Pascal R. / Magotsch, Michael. Key Aspects of German Employment and Labour Law. Berlin: Springer, 2018. E-book of Second Edition. Page 181.

[211] Kirchner, Jen / Kremp, Pascal R. / Magotsch, Michael. Key Aspects of German Employment and Labour Law. Berlin: Springer, 2018. E-book of Second Edition. Page 182 (Zahn, 2011).

[212] Even though this process is a part of the termination based on operational reasons, it is studied separately under this heading because of its significance under German Law.

financial obligations towards family and severe disabilities, none of which has priority over the others. It sometimes is tricky to determine the employee through this process, *e.g.* when an employee is younger but more senior than the other. Therefore, the employers are well advised to carry out a point-based selection method, some of which has been gone through revisions of the courts[213].

As for the determination of the employees who would be included in the social selection process, the employment contracts play an important role. The job description and certain clauses in the employment contract would be the main factors as to which positions can be filled by the employee. Some contracts include a clause which requires the employee to accept any other appropriate work they are qualified for. Such clauses are at employee's advantage in case of termination of their contract[214].

The employees who would be included in the social selection process should be on the same hierarchy level. The employer does not include all the comparable employees working at different operations and the social selection is not limited only a department or unit at an operation[215]. Moreover, employers should not include certain employees[216] who are specifically protected, in the social selection process without prior approval of the certain authorities. In particular, severely disabled employees, pregnant employees and mothers after birth, parents on parental leave and works council members are excluded from the social selection processes.

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[213] Kirchner, Jen / Kremp, Pascal R. / Magotsch, Michael. Key Aspects of German Employment and Labour Law. Berlin: Springer, 2018. E-book of Second Edition. Page 182.

[214] Kirchner, Jen / Kremp, Pascal R. / Magotsch, Michael. Key Aspects of German Employment and Labour Law. Berlin: Springer, 2018. E-book of Second Edition. Page 183.

[215] Kirchner, Jen / Kremp, Pascal R. / Magotsch, Michael. Key Aspects of German Employment and Labour Law. Berlin: Springer, 2018. E-book of Second Edition. Page 183.

[216] The employees whose employment contract cannot be terminated pursuant to collective labour agreement, also enjoy the higher level of protection and excluded from social selection processes.

According to Section 1/3 of the KSchG, employers are allowed not to include the employees whose employment is in the justified operational interest of the employer because of their knowledge, work performance, professional skills or their situation that balance the personnel structure within the establishment in selection process.

To sum up, the social selection process is composed of following steps:

- Determining the employees among whom the social selection process would be carried out, within the operation as per their employment contract, job descriptions and hierarchy levels;
- Excluding the employees who enjoy special protection, *e.g.* employees who are on parental leave;
- Excluding the employees whose employment is in the justified operational interest of the employer;
- Carrying out the selection process, preferably a point-based system which has gone through the approval of a court.

3.2.4. Principle of *Ultima Ratio*

If there is another solution than dismissing the employee, the employer, by force of job security, must apply this instead of applying to termination. No less restrictive means may be available. Hence, the employer has to consider, *e.g.* to relocate the employee to a different vacant position or take any other appropriate action to avoid the termination. This is called as the principle of *ultima ratio* and accepted by German Law as well. As stated above, the employer is required to comply with the principle of *ultima ratio* whether the termination is due to person-related reasons or reasons related to employee's conduct or operational reasons.

Indeed, as per Section 1/2 of the KSchG, "*… The termination is also socially unjustified if … the employee can continue to be employed in another position in the same establishment or in another establishment of the Company …*". However, the only the positions within the same legal entity and at the same or lower hierarchy level are

considered available. The employer does not have to check and offer the vacant positions at other group companies, outside of Germany or at higher hierarchy level.

The principle of *ultima ratio* is applied especially when terminating the employment contract due to operational reasons since the employee's personality and conducts are not involved at all. In such case, the employer serves termination notice but offers a relocation to the employee. The employee then has three options: (i) accepting the offer, (ii) rejecting the offer, and (iii) relocating but applying court to review whether employer's termination and offer is socially justified[217].

In any case, the offered vacant position must be reasonable. As this is interpreted by the courts widely, the employers can reduce the risk of facing with the consequences of socially unjustified termination by offering the employee with a new reasonable job position[218].

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[217] Kirchner, Jen / Kremp, Pascal R. / Magotsch, Michael. Key Aspects of German Employment and Labour Law. Berlin: Springer, 2018. E-book of Second Edition. Page 184.

[218] Kirchner, Jen / Kremp, Pascal R. / Magotsch, Michael. Key Aspects of German Employment and Labour Law. Berlin: Springer, 2018. E-book of Second Edition. Page 185.

CHAPTER 4

TERMINATION OF EMPLOYMENT CONTRACTS WITHOUT NOTICE PERIOD

4.1. In terms of Turkish Law

Termination of employment contracts without notice period may come into question for both employment contracts for definite and indefinite period[219] when the continuation of the contract can no longer be expected from at least one of the parties and the trust relationship between the parties has been collapsed as a consequence of an intolerable situation or a behaviour[220]. The standard whether the continuation of the contract can no longer be expected from at least one of the parties is set by the objective good-faith principles, *i.e.* the principle of honesty regulated under Article 2/1 of the TMK.

As a general provision, Article 435 of the TBK regulates that "*Each party may immediately terminate the contract for just causes. The party terminating the contract must notify the reason of termination in writing. All situations and conditions when the party that terminates the contract can no longer be expected to continue the service relationship according to the rules of honesty, are considered as just cause.*" and states the legal basis of the termination for just cause whereas there is no such reference in the IK[221].

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[219] Article 24 of the IK states that "*Whether or not the contract is for definite period, the employee may terminate the employment contract before the expiry of the term or without waiting for the notice period in the following cases: …*" and Article 25 of the IK states that "*Whether or not the contract is for definite period, the employee may terminate the employment contract before the expiry of the term or without waiting for the notice period in the following cases: …*".

[220] Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017. Page 700.

[221] Kalkan, Arif. İş Sözleşmesinde Fesih Halleri. Erciyes Üniversitesi Hukuk Fakültesi Dergisi, XIII-1, 281-314. Kayseri: 2018. Page 293.

4.1.1. Just Causes

Under Article 24 of the IK titled "*The employee's right to immediately terminate for just cause*", the causes for terminating an employment contract without notice period by the employee are divided into the following categories: (i) health reasons (Article 24/I)[222]; (ii) immoral, malicious, bad faith, dishonourable conduct or any other similar acts of misconduct of employer (Article 24/II)[223]; and (iii) force major (Article 24/III)[224]. All the reasons which allow employees to terminate their contract without notice period are listed under these categories[225].

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[222] Article 24/I of the IK states that "*I. Health causes: (a) If the performance of the work which is the subject of the employment contract is dangerous for the health or life of the employee due to the nature of the work. (b) If the employer or another employee whom the employer continuously, closely and directly meets, gets an infectious disease or a disease which is incompatible with the work of the employee.*". For further details, see Akyiğit, Ercan. İş Hukuku. İstanbul: Seçkin Yayıncılık, 2018. Page 275-276.

[223] Article 24/II of the IK states that "*II. Conditions that do not comply with the rules of morality and good faith and similar conditions: (a) If the employer misleads the employee at the time of the conclusion of the employment contract by showing false characteristics or conditions about one of the essential points of this contract or by giving unreal information or telling unreal information. (b) If the employer makes remarks or acts in the manner in which the reputation and honour of the employee or one of his family members are harmed or sexually harasses the employee. (c) If the employer teases or intimidates against the employee or one of his family members, or if encourages, provokes, drags the employee or one of his family members for an act against the law or if commits a crime that amount imprisonment, against the employee or one of his family members, or if makes severe attribution or an ungrounded accusation about the employee in the manner in which the reputation and honour of the employee are harmed. (d) If the employee is sexually harassed at the workplace by another employee or a third party and the necessary measures are not taken even though the employer is informed of this case. (e) If the employee's wages are not calculated or paid by the employer in accordance with the provisions of the law or the terms of the contract. (f) In cases the wage is paid on a piece-by-work basis or over the amount of work and the employer assigns the employee less than the number and amount that the employee can perform, unless the wage difference is paid on a time basis and the deficient wage is compensated by the employer, or if the working conditions are not applied.*". For further details, see Akyiğit, Ercan. İş Hukuku. İstanbul: Seçkin Yayıncılık, 2018. Page 277-288.

[224] Article 24/III of the IK states that "*III. Compelling reasons: If there are compelling reasons that require the work be stopped for more than a week at the workplace where the employee works.*". For further details, see Akyiğit, Ercan. İş Hukuku. İstanbul: Seçkin Yayıncılık, 2018. Page 289.

[225] For detailed information, *see* Turunç, Noyan / Sur, Melda. Turkish Labour Law. Izmir: Turunç, 2010. Page 81-82; Dereli, Toker. Labour Law in Turkey. Alphen aan den Rijn: Kluwer Law International, 2015. Page 213-214; Centel, Tankut. Introduction to Turkish Labour Law. Cham: Springer, 2017. E-book Edition. Page 185-189.

Likewise, under Article 25 of the IK titled "*The employer's right to immediately terminate for just cause*", the reasons for terminating an employment contract on just cause by the employer is divided into the following categories: (i) health reasons (Article 25/I)[226]; (ii) immoral, malicious, bad faith, dishonourable conduct or any other similar acts of misconduct of employee (Article 25/II)[227]; (iii) force major (Article 25/III)[228]; and (iv) absence of the employee due to imprisonment and custody (Article

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[226] Article 25/I of the IK states that "*I. Health causes: (a) In case the employee is caught an illness or becomes disabled due to his own intentional acts or disorganized living or alcohol addiction, and if their resultant absence last for three consecutive business days or more than five working days in a month. (b) In case the Health Board determines that the disease which the employee is caught cannot be treated and that it is prejudicial to work at the workplace. The right to terminate the employment contract for the employer arising from illness, accident, birth and pregnancy etc. except for the caused stated in subparagraph a originates when the conditions last more than six weeks after the notice period determined according to employee's term of employment at the workplace as specified in Article 17. In the case of birth and pregnancy, this period commences at the end of the term specified in Article 74. However, the employee is not entitled to wage for the periods that the employee could not work due to the suspension of the employment contract.*". For further details, see Akyiğit, Ercan. İş Hukuku. İstanbul: Seçkin Yayıncılık, 2018. Page 291-296.

[227] Article 25/II of the IK states that "*II. Conditions that do not comply with the rules of morality and good faith and similar conditions: (a) If the employee misleads the employer at the time of conclusion of the employment contract by asserting that they have the required qualifications or conditions for one of the essential points of the contract although they do not have them, or by giving unreal information or telling unreal information. (b) If the employee makes remarks or acts in the manner in which the reputation and honour of the employer or one of his family members are harmed or if makes ungrounded complaints or attributions about the employer in the manner in which the reputation and honour of the employer are harmed. (c) If the employee sexually harasses another employee of the employer. (d) If the employee teases against the employer or one of his family members or one of his employees, or if comes to the workplace as drunk or drugged or uses these substances at the workplace. (e) If the employee conducts contracting to honesty and loyalty such as misuse of trust of the employer, theft, disclosure of employer's professional secrets. (f) If the employee commits a crime at the workplace that would be punished with imprisonment of more than seven days and cannot be postponed. (g) If the employer does not continue his work for consecutive two working days or any two working days following a holiday, or three working days in a month without permission of the employer or employer or justified reason. (h) If the employee insists on not performing their tasks assignments being reminded. (ı) If, either willingly or due to lying down on the job, the employee jeopardises the safety of work or if causes damage and loss on the property of the business or on the machinery, installations or other articles or materials that belongs to the business and available to the employee and the damage cannot be compensated by their 30-days wage.*". For further details, see Akyiğit, Ercan. İş Hukuku. İstanbul: Seçkin Yayıncılık, 2018. Page 297-313.

[228] Article 25/III of the IK states that "*III. Compelling reasons: If there are compelling reasons that prevents the employee from performing work for more than a week at the workplace.*". For further details, see Akyiğit, Ercan. İş Hukuku. İstanbul: Seçkin Yayıncılık, 2018. Page 314.

25/IV)[229]. All the reasons which allow employers to terminate employment contracts without notice period are listed under these categories[230].

4.1.2. Notice for Immediate Termination

The parties can unilaterally and immediately terminate the employment contract for just cause without having to observe any notice periods or paying notice payment. However, as per Article 19/1 of the IK, the employer is required to serve the termination notice in written from involving the reason for termination which must be specified in clear and precise terms[231].

Pursuant to Article 26/1 of the IK, the party wishing to terminate the employment contract must do so within 6 working days of knowing the facts which constitute malicious, immoral or dishonourable behaviour, and in any event the right to claim the termination of contract on account of malicious, immoral or dishonourable behaviour ceases to be operative 1 year after the date of the commission of the act[232]. The "*1 year*" statutory limitation will not be applicable, however, if the employee has obtained material benefit from the act concerned according to the second sentence of Article 26/1 of the IK[233].

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[229] Article 25/IV of the IK states that "*IV. In case the absenteeism exceeds the notice periods stated in Article 17 when the employer is taken into custody or arrested.*". For further details, see Akyiğit, Ercan. İş Hukuku. İstanbul: Seçkin Yayıncılık, 2018. Page 314.

[230] For detailed information, *see* Turunç, Noyan / Sur, Melda. Turkish Labour Law. Izmir: Turunç, 2010. Page 78-80; Dereli, Toker. Labour Law in Turkey. Alphen aan den Rijn: Kluwer Law International, 2015. Page 215-218; Centel, Tankut. Introduction to Turkish Labour Law. Cham: Springer, 2017. E-book Edition. Page 189-195.

[231] Dereli, Toker. Labour Law in Turkey. Alphen aan den Rijn: Kluwer Law International, 2015. Page 204; Mollamahmutoğlu, Hamdi / Astarlı, Muhittin / Baysal, Ulaş. İş Hukuku Ders Kitabı Cilt 1: Bireysel İş Hukuku. Ankara: Lykeion Yayınları, 2018. Page 223.

[232] As stated in the Article, these requirements only apply in cases the termination is made based on Article 24/II or Article 25/II.; Çelik, Nuri / Canikoğlu Nurşen / Canbolat, Talat. İş Hukuku Dersleri. İstanbul: Beta Yayıncılık, 2018. Page 612.

[233] Centel, Tankut. Introduction to Turkish Labour Law. Cham: Springer, 2017. E-book Edition. Page 196.

4.2. In terms of German Law

As explicitly stated under Section 626/1 of the BGB, the party who cannot be expected to continue the employment relationship until the end of notice period or the expiration date of the employment contract for definite period can terminate the contract immediately without complying with any notice period. This type of termination is called summary dismissal or termination for good cause.

There are two significant elements of this termination: A good cause such as significant breach of contract, severe defamation of the employer, criminal offences and two weeks' period of prescription as of time of discovery of good cause.

4.2.1. Good Causes

Section 626/1 of the BGB is regulated as open ended instead of stating all the circumstances or examples that give the parties right to terminate employment contracts without notice period. According to this Section, all circumstances of the individual case should be taken into account and the interests of both parties must be weighed up as while the interest of one party is to continue the employment relationship, the interest of the other party is to terminate the working relationship immediately[234]. However, the threshold is high and again the principle of *ultima ratio* should be applied[235].

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[234] The BAG gives importance to this Section as it ruled in its decision dated 29.07.2017 and numbered 2 AZR 47/16 that "*According to Section 626/1 BGB, the employment relationship can be terminated for good cause without observing a notice period, if there are facts on the basis of which the terminating party, taking into account all circumstances of the individual case and weighing the interests of both parties, cannot be expected to continue the employment relationship themselves until the end of the notice period. … Then it requires the further examination of whether the terminating the employment relationship under consideration of the specific circumstances of the case and weighing the interests of both parties -at least until the expiry of the notice period- is reasonable or not (BAG 17 November 2016 - 2 AZR 730 / 15 - paragraph 20).*", *see* http://juris.bundesarbeitsgericht.de/zweitesformat/bag/2017/2017-11-16/2_AZR_47-16.pdf.

[235] Kirchner, Jen / Kremp, Pascal R. / Magotsch, Michael. Key Aspects of German Employment and Labour Law. Berlin: Springer, 2018. E-book of Second Edition. Page 190.

Examples of reasons that may cause the termination of employment contract without notice period could be:

- persistently refusing to work,
- claiming unfounded sick leave,
- surfing on the Internet for private purposes during worktime,
- pronouncing xenophobic or racist statements,
- working for a competitor of the employer,
- committing an offence, or other criminal behaviour such as misappropriation, fraud, expense fraud, larceny,
- criminal property damage or
- gross insult to the contractual partner[236].

If a dismissal is based on repeated misconduct on the part of the employee, it might be necessary that they be given prior warning in terms of the weighing the interests of the parties.

4.2.2. Notice for Immediate Termination

As per Section 626/2 of the BGB, termination notice can only be given within two weeks of the moment when the party obtains knowledge of decisive facts for termination of the employment contract without notice. The party giving notice must notify the other party, on demand, of the reason for termination notice without undue delay in writing[237]. In case the notice is given after two weeks' period, the termination may be deemed as termination with notice periods.

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[236] Zenker, Ilona. Basics of German Labour Law: The Employment Relationship. Norderstedt: Books on Demand, 2014. Kindle Edition. Location 1189-1191.

[237] *See* Section 623 of the BGB.

The work council must have been provided with the necessary information within the two weeks' period as well. Considering that the work council has 3 days to review and the employer has to conduct an investigation as the case may be, the employer is advised to take action as soon as they discover the good cause[238].

[238] Kirchner, Jen / Kremp, Pascal R. / Magotsch, Michael. Key Aspects of German Employment and Labour Law. Berlin: Springer, 2018. E-book of Second Edition. Page 191.

CHAPTER 5
CONCLUSION

As, in this day and age, almost everyone can easily be a party to employment contracts, it is essential for both parties to pay attention to the rights and obligations regulated by the law in this regard. Furthermore, since the cross-border employment relationships and working abroad are becoming widespread more and more, determining the differences and similarities between law systems and also globalising them as much as possible bear importance. This becomes essential considering the fact that the jurisdictions including Turkey and Germany would broadly like to apply their own rules for employment relationships even if there is an element of foreignness.

When Turkish and German Law are examined in respect to the regulations on termination of employment contracts, it is understood that they have more similarities than differences. The main structures of termination of employment contracts are nearly same as there are two types of termination in both Turkish and German Law: termination with notice period and termination without notice period. In addition, both systems have job security provisions which protects the employees at a higher degree. In cases the job security provisions are applied, the employers can terminate the employment contracts only if there is an objective valid reason related to personal capability or conduct of the employee or operational reasons in both law systems.

While the jurisdictions are rather similar in terms of termination of employment contracts, there are some differences such as duration of notice periods, thresholds for the job security application, regulation of strict rules regarding the criteria for selection of employees who will be dismissed, form of the termination notice and listing all the causes in the law that may lead termination of employment contracts without notice period.

German Law stipulates much longer notice periods for employers than Turkish Law. While the minimum notice period starts from 2 weeks and goes up to 8 weeks in Turkish Law; German Law provides 4-weeks to 7-months' notice periods. This means that an employee who has 20-years' seniority is protected with 8 weeks' notice periods in Turkish Law and 7-months' notice periods in German Law, almost four times length. Another difference regarding notice periods is that German Law regulates the notice periods in 8 degree while Turkish Law in 4 degree. This causes an employee in Turkey who has 3-years seniority and an employee who has 20-years seniority to have the same-length notice periods which is 8 weeks. Therefore, it can be said that the relevant regulation in German Law more fair than Turkish Law. The last point on notice periods is that the employees are only bound with the 4-weeks' notice period and the rest is regulated only for employers in German Law and the parties may agree on different notice periods for employees as long as these are shorter than the ones agreed for employers. However, in Turkish Law, all the notice periods are stipulated for both the employers and employees which provides less protection for employees.

Thresholds for the job security application are also very different between the law systems. The application of job security provisions requires at least 11 (and in some cases, 6) employees in German Law and 30 employees in Turkish Law, who are employed at the respective workplace. Hence, the employees who work at the workplaces where 10 to 30 employees are employed, are protected with the job security in Germany while not in Turkey. This causes exclusion of many employees from the protection of job security provisions in Turkey.

Another significant difference is the requirement of social selection process. German Law has strict provisions regarding the criteria for selection of employees who will be dismissed. On the contrary, there is no such regulation in Turkish Law. The Yarg, however, had previously adopted this principle from the KSchG and required employers to conduct social selection but then incisively reversed its decision. Therefore, the principle of social selection is not applied in Turkey now. This allows employers in Turkey to consider their interests rather than employees' when

selecting the employee for dismissal. For example, an employer may select an employee who is too old to find a new job and has dependents while there is another early career-stage employee who does not have any dependent just because the latter performs a little bit better than the former. Therefore, the employees in Germany has more protection in this regard as well.

Finally, among others, there are two more differences that need to be addressed. As per German Law, the termination notice must be in written form and otherwise, it is null and void. However, in Turkish Law, such regulation is envisaged only for employees who are protected with job security. Therefore, Turkish Law does not provide enough protection for the employees who are outside the scope of job security provisions. The second difference is listing all the just causes in the law. In contrast to German Law, Turkish Law lists all the just causes and therefore, termination without notice periods which places a huge burden on the employee is limited to those listed in the law.

Although the differences are more detailed above, the both law systems are rather similar than different in general terms and this is no surprise because both have the civil law system. In addition, they both have adopted many ILO regulations and are in regular interaction with ILO. Germany is a founding member of the EU and Turkey has adopted or implemented many regulations of the EU. However, in general, one could see that the employee is more protected in German Law rather than Turkish Law which is obvious at least from the examples given above. Within these circumstances, the Turkish legislator is well advised to make the required legal arrangements to provide more protection to the employees in Turkey. These legal arrangements could include, e.g., (i) adopting the provisions on notice periods in Germany or even providing the employees with better protection, (ii) lowering the threshold for the job security application to 10, or even less, (iii) enacting the principle of social selection process.

BIBLIOGRAPHY

Printed Sources

Akyiğit, Ercan. İş Hukuku. İstanbul: Seçkin Yayıncılık, 2018.

Baysal, Ulaş. The Scope of Employment Security Regulations for Workplaces Under Turkish Labor Law. Research Journal of Business and Management, 5 (4), 245-249. 2018.

Centel, Tankut. Introduction to Turkish Labour Law. Cham: Springer, 2017. E-book Edition.

Çelik, Nuri / Canikoğlu Nurşen / Canbolat, Talat. İş Hukuku Dersleri. İstanbul: Beta Yayıncılık, 2018.

Dereli, Toker. Labour Law in Turkey. Alphen aan den Rijn: Kluwer Law International, 2015.

Gürsel, İlke. Feshe Bir Alternatif Olarak İşverenin Fesihten Önce İşçiyi Başka İşte Çalıştırması. Sicil İş Hukuku Dergisi, 40, 97-113. İstanbul: 2018.

Kalkan, Arif. İş Sözleşmesinde Fesih Halleri. Erciyes Üniversitesi Hukuk Fakültesi Dergisi, XIII (1), 281-314. Kayseri: 2018.

Kirchner, Jen / Kremp, Pascal R. / Magotsch, Michael. Key Aspects of German Employment and Labour Law. Berlin: Springer, 2018. E-book of Second Edition.

Lorenz, Michael / Falder, Roland. The German and Chinese Labour Law. Springer Gabler, 2016.

Mollamahmutoğlu, Hamdi / Astarlı, Muhittin / Baysal, Ulaş. İş Hukuku Ders Kitabı Cilt 1: Bireysel İş Hukuku. Ankara: Lykeion Yayınları, 2018.

Narter, Sami. İş Güvencesi, İşe İade Davaları ve Tazminatlar. Ankara: Adalet Yayınevi, 2017.

Öktem Songu, Sezgi. Bir Haklı Fesih Sebebi Olarak "Sataşma". Sicil İş Hukuku Dergisi, 39, 113-145. İstanbul: 2018.

Özcan, Durmuş. Öğreti ve Uygulamada İş Sözleşmesinin Feshi. Ankara: Adalet Yayınevi, 2015.

Süzek, Sarper. İş Hukuku. İstanbul: Beta Yayıncılık, 2017.

Turunç, Noyan / Sur, Melda. Turkish Labour Law. İzmir: Turunç, 2010.

Yürekli, Sabahattin. Türk Borçlar Kanununa Göre Hizmet Sözleşmesinin Sona Ermesi. Ankara: Seçkin Yayıncılık, 2014.

Zenker, Ilona. Basics of German Labour Law: The Employment Relationship. Norderstedt: Books on Demand, 2014. Kindle Edition.

Online Sources

Bundesministerium der Justiz und für Verbraucherschutz. https://www.gesetze-im-internet.de, 26.06.2019.

Beck-Online. https://beck-online.beck.de/Home, 26.06.2019.

Bundesarbeitsgericht. https://www.bundesarbeitsgericht.de/, 11.08.2019.

International Labour Organisation. http://www.ilo.org/global/lang--en/index.htm, 26.06.2019.

Kazancı Hukuk Otomasyon, http://www.kazanci.com/kho2/ibb/giris.html, 26.06.2019.

MAYR Kanzlei für Arbeitsrecht GbR. https://www.mayr-arbeitsrecht.de, 26.06.2019.

Mevzuat Bilgi Sistemi. http://www.mevzuat.gov.tr, 26.06.2019.

Yargıtay Karar Arama. https://karararama.yargitay.gov.tr/YargitayBilgiBankasiIstemciWeb/, 26.06.2019.