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RESEARCH ARTICLE

## Romantic Relationships in the Workplace: a Critical Approach to the Turkish Courts' Case Law on the Employee's Right to Respect for Private Life

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### Abstract

The nature of an employment contract carries the risk that an employee's personal rights, including their private life, may become open to the employer's intervention. As the employee's private life is an area which is open to employer intervention, the need to draw the boundaries of employer intervention in the context of balancing the interests of the employee and the employer, as well as the need to protect the privacy of the employee's private life within the boundaries of the workplace, keeps this issue on the agenda of Turkish labour law doctrine and the judiciary today. To demonstrate the current developments in Turkish labour law - which will reveal the current approach towards the fundamental rights of employees, especially romantic relationships in the workplace- in this article, after briefly explaining the principles of the individual application system to the Constitutional Court in Turkish law and the concept of the right to respect for private life, the topic is discussed in light of the individual application jurisprudence of the Turkish Constitutional Court and the judgments of the Court of Cassation and Courts of Appeal.

### Keywords

Turkish labour law, Employee's private life, Right to respect for private life, Romantic relationships in the workplace, Individual's fundamental rights in labour relations, Individual application jurisprudence of the Constitutional Court

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## I. Introduction

Although historically, it was considered that an individual's fundamental rights could be protected by limiting the state's intervention (negative obligation), later, it was seen that this limitation was insufficient for protection. Violations of individuals' fundamental rights and freedoms within the scope of relations between private law persons have been experienced with painful examples<sup>1</sup>. Therefore, by accepting the obligation of the state to ensure the protection of these rights within the scope of relations between private law persons, the scope of protection of individuals' fundamental rights and freedoms has been expanded.

In labour relations, the power imbalance between the employer and employee indicates a structure similar to the relationship between a state and an individual<sup>2</sup>. When an employee starts working under an employment contract, it means that they begin to work under the subordination of the employer and must follow their instructions. Therefore, since there is a hierarchical structure between the employer and employee, the risk of the employer's interference with the employee's fundamental rights and freedoms is much higher, and the importance of protecting these rights and freedoms becomes more evident. Correspondingly, with the acknowledgement of the need to protect individuals' fundamental rights and freedoms within the sphere of protection of private persons, the approach that an employer has absolute authority over its employees has been abandoned in the historical development of labour law. The opinion that employees can enjoy their fundamental rights and freedoms in the workplace and that the employer's authority may be limited in the face of these rights and freedoms has improved accordingly. Thus, the distinction between private life and working life in labour law has become essential; the employer's authority has been limited, and the employee's individual rights have entered the workplace<sup>3</sup>.

The right to respect for private life of the employee is only one aspect of the employee's personality rights in the labour relationship and workplace<sup>4</sup>. As the employee's private life is an area which is open to employer intervention, the need to draw the boundaries of employer intervention in the context of balancing the interests of the employee and the employer, as well as the need to protect the privacy of the employee's private life within the boundaries of the workplace, keeps this issue on the

1 For the examples concerning the labour relations, see, Nuri Çelik, Nurşen Caniklioğlu, Talat Canbolat and Ercüment Özkaraca, *İş Hukuku Dersleri* (35th ed., Beta 2022) 4-5; Sarper Süzek, *İş Hukuku* (21st ed., Beta 2021) 8 ff; Ali Güzel, 'Fabrikadan İnternet'e İşçi Kavramı ve Özellikle Hizmet Sözleşmesinin Bağımlılık Unsuru Üzerine Bir Deneme' in Prof. Dr. Kemal Oğuzman'a Armağan (İş Hukuku ve Sosyal Güvenlik Hukuku Türk Milli Komitesi, Türk Tarih Kurumu Basımevi 1997) 83 ff

2 Ali Güzel, 'İş Hukukunda Yetki ve Özgürlük' (2016) 15 (1) Prof. Dr. Turhan Esener'e Armağan İstanbul Kültür Üniversitesi Hukuk Fakültesi Dergisi, 93, 95 ff; Deniz Ugan Çatalkaya, *İş Hukukunda Ölçülülük İlkesi* (Beta 2019) 57 ff

3 Ali Güzel, Deniz Ugan Çatalkaya and Hande Heper, 'Droits et libertés fondamentaux du citoyen-salarié en droit du travail' (2022) (71) Annales de la Faculté de Droit d'Istanbul 221, 225 ff

4 See, Çelik, Caniklioğlu, Canbolat and Özkaraca (n1) 352; Süzek (n1) 413; Ömer Ekmekçi and Esra Yiğit, *Bireysel İş Hukuku Dersleri* (3rd ed., On İki Levha 2021) 300; Güzel, Ugan Çatalkaya and Heper (n3) 239 ff; Şükran Ertürk, *İş İlişkisinde Temel Haklar* (Seçkin 2002) 86

agenda of Turkish labour law doctrine and the judiciary today. In particular, disputes regarding the termination of employment contracts due to romantic relations between employees and their co-workers have been the subject of recent and controversial decisions of the Turkish Court of Cassation and the Courts of Appeal. This issue has also been brought before the Turkish Constitutional Court (TCC) by the right of individual application. It is noteworthy that there are inconsistencies between the approaches adopted by the instance courts and the jurisprudence of the TCC in terms of the protection of the personal rights of employees. In line with the case law of the ECtHR, the TCC has developed an approach towards protecting fundamental rights and freedoms under the state's positive obligations in relations between individuals. In this sense, the TCC jurisprudence is considered to have an essential place in the development of Turkish law. Therefore, to demonstrate the current developments in Turkish labour law - which will reveal the current approach towards the fundamental rights of employees - in this study, after briefly explaining the principles of the individual application system to the Constitutional Court in Turkish law and the concept of the right to private life, the topic is discussed in light of the individual application jurisprudence of the Constitutional Court and the judgments of the Court of Cassation and Courts of Appeal.

## II. An Overview of The Right Of Individual Application to The Constitutional Court in Turkish Law

Under Article 11 of the Turkish Constitution, constitutional provisions are fundamental legal rules that bind individuals as well as state organs. Therefore, it is clear that the fundamental rights and freedoms regulated in the Constitution apply not only vertically between the state and individuals but also horizontally between individuals<sup>5</sup>. Moreover, under Article 40 of the Constitution, titled "Protection of fundamental rights and freedoms", anyone whose constitutional rights and freedoms have been violated has the right to request prompt access to the competent authorities. Furthermore, the individual application remedy provides an opportunity for individuals who allege that a fundamental right or freedom has been violated to apply to the Constitutional Court for the enforcement of their right, even if they have been unsuccessful when applying for other judicial remedies<sup>6</sup>.

Upon the result of the referendum in 2010, an amendment to the Constitution was adopted, granting the right of individual application to the Constitutional Court regarding fundamental rights and freedoms. According to the additional subclause

5 Bülent Tanör and Necmi Yüzbaşıoğlu, *1982 Anayasasına Göre Türk Anayasa Hukuku* (Updated 20th ed., Beta 2020) 134 ff; Ertürk (n4) 36 et ff; Gaye Burcu Yıldız, 'İşyerinde Yaşanan Gönül İlişkisinin İş Sözleşmesinin İşverence Feshi Açısından Değerlendirilmesi' (2021) XXV (3) Ankara Hacı Bayram Veli University Faculty of Law Review 3, 6; Ugan Çatalkaya (n2) 167

6 Tanör and Yüzbaşıoğlu (n5) 537

included in Article 148, anyone may apply to the Constitutional Court on the ground that one of their fundamental rights and freedoms within the scope of the European Convention on Human Rights, which are guaranteed by the Constitution, has been violated by public authorities. Since the beginning of the 2000s, due to the extraordinary increase in the number of applications made to the ECtHR, the application load has become unbearable, and consequently, the measures to be taken by the Council of Europe concerning some countries, including Turkey, were being discussed<sup>7</sup>. In justification for the 2010 constitutional amendment, it is understood that the Turkish government introduced the individual application remedy as a solution to these disputed measures. In fact, in the amendment preamble, it is stated that the European Court of Human Rights accepted the individual application remedy as an effective remedy for the elimination of rights violations and that this individual application remedy would be beneficial in reducing the number of lawsuits filed against Turkey and the number of violation decisions to be made by the ECtHR<sup>8</sup>.

The provision stipulates that the fundamental rights and freedoms guaranteed in the Constitution, which are the subject of individual applications, should also be included in the scope of the European Convention on Human Rights. Therefore, the rights subject to an individual application should be regulated both in the Constitution and the ECHR<sup>9</sup>. Accordingly, under this provision, the Constitutional Court determines that alleged violations of fundamental rights and freedoms, which are regulated in the Constitution but not in the scope of the ECHR, are not within its jurisdiction. Even if the fundamental right subject to the alleged violation is regulated more broadly in the Constitution, the Constitutional Court limits the subject of the complaint with the common protection area of the Constitution and the ECHR and decides in terms of the narrow scope of the norm in the ECHR.

When evaluating individual applications, it is also important to consider the meaning of a right being regulated in the European Convention on Human Rights. Law No. 6216 on Establishment and Rules of Procedures of the Constitutional Court regulates that the expression “being within the scope of the European Convention on Human Rights” also includes additional protocols. Due to this provision, the Constitutional Court accepts that it has the authority to examine complaints based on the ECHR and only the additional protocols to which Turkey is a party and conversely finds applications regarding the rights regulated in the additional protocols to which Turkey is not a party, inadmissible on the grounds of lack of jurisdiction in terms of

7 Serkan Cengiz, ‘Avrupa İnsan Hakları Mahkemesi’nin Temel Hak ve Özgürlükleri Koruma Standardı Açısından İki Yıllık Anayasa Mahkemesi Bireysel Başvuru Uygulamasının Değerlendirilmesi’ in E Göztepe and MM Alpbaz (eds), *Anayasa Mahkemesine Bireysel Başvuru* (Kamu Hukukçuları Platformu, On İki Levha 2017) 177

8 See the justification of the provision amending Article 148 of the Constitution of Law No. 5982, [https://www.anayasa.gov.tr/media/6382/gerekecli\\_anayasa.pdf](https://www.anayasa.gov.tr/media/6382/gerekecli_anayasa.pdf)

9 Melek Acu, ‘Bireysel Başvuruya Konu Edilebilecek Haklar’ (2014) (110) Journal of TBB 403, 407

subject matter<sup>10</sup>. Additionally, when evaluating individual applications, the TCC does not only take into account the texts of the conventions but also considers the case law of the ECtHR in line with the fact that the ECHR is a living instrument.

There is also a limitation in terms of the subject of individual applications for legislative and regulatory administrative transactions. In accordance with Law No. 6126, these transactions cannot be the subject of an individual application. Therefore, unlike Federal Germany, which constitutes the classical framework of the individual application remedy, the right of individual application cannot be exercised against a law because it constitutes a personal, direct, and current violation of a fundamental right<sup>11</sup>.

The Constitutional Court also acts similarly to the principle of subsidiarity in the ECtHR. In this sense, the Court is not a means of annulment of administrative or judicial decisions as a last and extraordinary remedy; for example, it sends the file to the relevant court to remedy the violation<sup>12</sup>. As a result of this understanding, it is regulated in the Constitution that ordinary legal remedies must be exhausted for the application in question. In other words, as a condition of application, all of the administrative and judicial remedies stipulated in the law must be exhausted before the application is made<sup>13</sup>. The ECtHR has also held that the individual application remedy is a mandatory, effective, and accessible domestic remedy in terms of applications coming from Turkey, and applications made to the ECtHR without first exhausting this remedy are inadmissible, except in exceptional cases<sup>14</sup>.

Furthermore, the Constitutional Court adopts the approach that protecting fundamental rights and freedoms in legal relations between individuals is the state's positive obligation and evaluates the violations of rights in court decisions. However, the Court does not deal with material and legal errors in the decisions of the courts unless there is an allegation of arbitrariness in the application; it only examines whether the meaning of the fundamental rights and freedoms used in the interpretation and application of the law is misunderstood in the court decision and the scope of the protection area<sup>15</sup>. In this respect, inspired by the ECtHR criteria regarding the

10 Tolga Şirin, 'Türk Anayasa Mahkemesi'nin Bireysel Başvuru Kararlarının Değerlendirilmesi' in E Göztepe and MM Alpaz (eds), *Anayasa Mahkemesine Bireysel Başvuru* (Kamu Hukukçuları Platformu, On İki Levha 2017) 44; Ömer Ekmekçi, H. Burak Gemalmaz, Volkan Aslan and H. Hilal Yılmaz, *Anayasa Mahkemesine Bireysel Başvurunun Temel Esasları ve İş ve Sosyal Güvenlik Hukukuna İlişkin Kararlar* (On İki Levha 2022) 11 ff

11 İbrahim Ö. Kaboğlu, *Anayasa Hukuku Dersleri (Genel Esaslar)* (Updated and Simplified 16th ed., Legal 2021) 368

12 See Tanör and Yüzbaşıoğlu (n5) 539; Ekmekçi, Gemalmaz, Aslan and Yılmaz (n10) 43 ff.; Korkut Kanadoğlu and Ahmet Mert Duygun, *Anayasa Hukukunun Genel Esasları* (2nd ed., On İki Levha 2021) 483

13 For details see, Ekmekçi, Gemalmaz, Aslan and Yılmaz (n10) 13 ff; Kanadoğlu and Duygun (n12) 469. For details regarding the exceptional rules of exhaustion of remedies in the matter of the disputes on mobbing see also, Burak Gemalmaz, 'Anayasa Mahkemesine Bireysel Başvuru Esasları ve Başvuruların Değerlendirilmesi' in *Anayasa Mahkemesi Bireysel Başvuru Kararları Çerçevesinde İş Hukukunun Değerlendirilmesi Semineri* (İntes Yayınları 2023) 37 ff

14 See, *Ümmühan Kaplan v. Turkey* App. no 24240/07 (ECtHR, 20.3.2012)

15 Kanadoğlu and Duygun (n12) 467; Ekmekçi, Gemalmaz, Aslan and Yılmaz (n10) 43-50. See also, Cengiz (n7) 193 ff; Gemalmaz (n13) 43-44

fundamental rights under ECHR Arts 8, 9, 10, and 11, first of all, the TCC evaluates the criteria of whether there is an interference with the right, the interference is conducted in accordance with the law, the interference furthers a legitimate aim, the interference is necessary in a democratic society, and, in this respect, whether the measures are proportional to the legitimate aim pursued and impairs the essence of the right<sup>16</sup>.

### III. An Overview Of The ECtHR And The Turkish Courts' Approach To The Right To Respect For Private Life In Terms Of An Employee's Private Life

A personal right is an absolute right and covers all material, moral and economic rights of the person<sup>17</sup>. In this respect, a person will be able to demand the recognition and respect of this right from everyone. Personal rights cannot be qualified as *numerus clausus* and include all personal values such as physical presence, life, bodily integrity, physical and mental health, honour and dignity, name and image, trade secrets, credit reputation, and private life.

In general terms, private life contains personal information that a person discloses to others to the extent determined by them<sup>18</sup>. Moreover, as it is an area where a person can act freely without any interference, it emerges as an interest that must be protected within the scope of personal rights.

It is impossible to draw the boundaries of the notion of private life by counting a certain number of elements. The ECtHR has adopted the approach that it would be too restrictive to limit the notion of “private life” to an “inner circle” in which the individual may live their own life as they choose, thus entirely excluding the outside world not encompassed within that circle. According to the ECtHR, Article 8 guarantees a right to “private life” in the broad sense, including the right to lead a “private social life”, that is, the possibility for the individual to develop their social identity. In that respect, the right in question enshrines the possibility of approaching

16 Şirin (n10) 67; Gülsevil Alpogut, ‘İşyerinde Kamera Gözetlemesi ve AİHM Kararları ile Tespit Edilen Esaslar’ in K Doğan Yenisey (ed), *Prof. Dr. Savaş Taşkent’e Armağan* (On İki Levha 2019) 285 ff; Deniz Ugan Çatalkaya, ‘Anayasa Mahkemesi Bireysel Başvuru Kararları Çerçevesinde İş Hukuku Uygulamaları’ in *Anayasa Mahkemesi Bireysel Başvuru Kararları Çerçevesinde İş Hukukunun Değerlendirilmesi Semineri* (İntes Yayınları 2023) 113-115

17 See, İbrahim Aydın, ‘İşçinin Kişiliğinin Korunmasına Yönelik Düzenlemeler ve Borçlar Kanunu Tasarısının Konuyla İlgili Maddelerinin Değerlendirilmesi’ (2005) 19 (6) TÜHİS 21; Emine Tuncay Kaplan, ‘Yeni Türk Borçlar Kanunu Hükümlerine Göre İş İlişkisinde İşçinin Kişilik Haklarının Korunması’ (2011) (24) Sicil 40, 41

18 Mustafa Dural and Tufan Öğüz, *Türk Özel Hukuku Cilt II - Kişiler Hukuku* (Filiz 2022) 138 ff.; M. Kemal Oğuzman, Özer Seliçi and Saibe Oktay-Özdemir, *Kişiler Hukuku* (Revised 20th ed., Filiz 2021) 208 ff; Ahmet K. Sevimli, *İşçinin Özel Yaşamına Müdahalenin Sınırları* (Legal 2006) 7 ff; Ahmet K. Sevimli, ‘İşçinin Özel Yaşam Hakkı Bağlamında İşçi-İşveren İlişkisi’ (2008) (10) Sicil 53; Fuat Bayram, ‘Türk İş Hukukunda İşçinin Kişilik Hakkını Koruma Borcu’ (DPhil Thesis, Marmara Üniversitesi 2011) 26, 258 ff; Ugan Çatalkaya (n2) 284 ff; Cédric Jacquelet, *La vie privée du salarié à l'épreuve des relations de travail* (PUAM 2008) 17 ff; Gilles Auzero, Dirk Baugard and Emmanuel Dockès, *Droit du travail* (35th ed., Dalloz 2022) 917 ff; Elsa Peskine and Cyril Wolmark, *Droit du travail* (15th ed., Dalloz 2022) 235 ff

others to establish and develop relationships with them<sup>19</sup>. The Court considers that the notion of “private life” may include professional activities and that in the course of their working lives, most people have a significant, if not the greatest, opportunity to develop relationships with the outside world<sup>20</sup>.

It is noteworthy that the Turkish Constitutional Court displays a similar approach to private life in its case law. The right to respect for private life is guaranteed by Article 20 of the Constitution, stipulating that everyone has the right to demand respect for their private and family life and that the privacy of private or family life shall not be violated. The Constitutional Court perceives the scope of private life as broad as the ECtHR: “*Private life is a broad term not susceptible to exhaustive definition. In the meantime, this notion protects elements such as an individual’s material and moral integrity, physical and social identity, name, sexual orientation, sexual life etc. Personal data, self-improvement, and family life also fall within this right*”<sup>21</sup>. By following the case law of the ECtHR, the Constitutional Court accepts that private life can expand into social life, in other words, the public sphere and that under certain conditions, a person may have a legitimate expectation of protecting their privacy in the public sphere<sup>22</sup>.

In this respect, when we consider whether an employee’s right to private life is protected within the employment relationship and the workplace or whether an employee can have a legitimate expectation in this regard, it compels attention that an employee who works under an employment contract accepts to work under the employer’s authority and voluntarily gives up, to a certain extent, their faculty to do whatever they want and the opportunity to exercise some of their rights and freedoms within the scope of this relationship. Moreover, the fact that the execution of work, which is the employee’s primary liability arising from the employment contract,

19 *Niemietz v. Germany*, App no 13710/88 ECtHR 16.12.1992) §29; *Peck v. United Kingdom* (Fourth Section) App no. 44647/98 (28.11.2003) §57; *Sidabras v. Lithuania* (Second Section), App nos 55480/00, 59330/00 (27.7.2004) §43; *Özpinar v. Turkey* (Second Section) App no 20999/04 (19.10.2010) §45; *Barbulescu v. Romania* (GC) App no 61496/08 (5.9.2017) §70; *López Ribalda and others v. Spain* (GC), App nos 1874/13, 8567/13 (17.10.2019) §88. See also Jean-François Renucci, *Droit européen des droits de l’homme, Droits et libertés fondamentaux garantis par la CEDH* (6th ed., LGDJ 2015) 228 ff; Laurence Burgorgue-Larsen, *La convention européenne des droits de l’homme* (2nd ed., LGDJ 2015) 133 ff; Sevimli (n18) 15; Evra Çetin, *İnsan Hakları Avrupa Sözleşmesi’nin 8-11. Maddeleri Bağlamında Çalışanların Hakları* (On İki Levha 2015) 104 ff; Hakan Keser, ‘İşçi Davranışları Kapsamında İş Sözleşmesinin Özel Hayat, Aile Hayatı ve Cinsel Yönelimler Sebebi ile İşverence Feshedilmesi’ (2017) (37) Sicil 9, 11; Alpagut (n16) 276 ff; Mustafa Alp and Dilek Dulay Yangın, ‘Haklı Yahut Geçerli Fesih Nedeni Olarak İşyerinde Yaşanan Duygusal İlişkiler – Anayasa Mahkemesi ve Yargıtay Kararları Çerçevesinde Değerlendirmeler’ (2021) 27 (2) MÜHF-HAD 1380, 1391

20 *Fernández Martínez v. Spain* (GC), App. no 56030/07 (ECtHR, 12.6.2014) §109-110; *Barbulescu v. Romania*, §71; *Lopez Ribalda and others v. Spain*, §91 ff

21 Turkish Const. Court, no 2017/14907, 30.9.2020, §33; similarly, see, no 2018/4144, 25.2.2021, §31

22 Turkish Const. Court, no 2013/1614, 3.4.2014, §31-34; similarly, see, no 2013/9660, 21.5.2015, §30-33. According to case law of the Constitutional Court: “(...) It is clear that the concept of private life cannot be reduced to maintaining everyone’s personal life as they wish and keeping the outside world separate from this circle. In this respect, Article 20 of the Constitution guarantees a private social life. (...) The privacy area covers the private area where the State cannot interfere or can intervene at a minimum for legitimate purposes. The extent of the individual’s right to privacy is, as a rule, his/her private area. However, the right to protection of private life may also extend to the public sphere in some cases because the concept of legitimate expectation makes it possible to protect the privacy of individuals in the public sphere under certain conditions”. See also, Alpagut (n16) 286-288



cannot be considered independently of their personality results in the acceptance of the employment contract as a contractual relationship directly related to the personality of the employee, and reveals the *intuitus personae* character of this contract<sup>23</sup>.

This nature of an employment contract carries the risk that an employee's personal rights, including their private life, may become open to the employer's intervention. For this reason, the need to protect the employee's private life against the employer's interference arises since it is accepted in the case law of the Constitutional Court that has developed in line with the case law of the ECtHR that private life does not exclude professional life. The Constitutional Court expresses this issue by referring to the case law of the ECtHR as follows: “*According to ECtHR, the professional life cannot be omitted from the concept of private life. Restrictions on professional life on the grounds of private life factors may fall within the scope of Article 8 of the Convention to the extent that it affects the individual's social identity. At this point, it should be noted that most people get the opportunity to develop their relations with the outside world within the framework of their activities in their professional life*”<sup>24</sup>.

Indeed, an employee can form personal, emotional bonds in the working environment<sup>25</sup>. Working life should be accepted as a part of an employee's social life. Since the concept of private life cannot exclude professional life, as revealed by the ECtHR and the Constitutional Court case law, an employee's right to private life should also be protected at the workplace. On condition that it does not affect the working environment, workplace order, flow of work and performance, the elements of an employee's private life should be considered as an area that the employer cannot interfere with, even if they are connected to the relations and friendships established in the workplace<sup>26</sup>. On the other hand, one of the subjects of judicial decisions regarding interference with private life in employment relations is romantic relations between co-workers. In these decisions, we come across cases where the employment contracts are terminated due to such relations, without compensation, within the scope of Article 25/II of the Labour Code, as they are considered “*situations that do not comply with the rules of morality and goodwill*”. On the other hand, we think that it is not pursuant to act on the assumption that all romantic relationships in the

23 About the *intuitus personae* character of the employment contract, *see also*, Ali Güzel, ‘Ekonomik ve Teknolojik Gelişmelerin Işığında Hizmet Sözleşmesinin “Intuitus Personae” Niteliği Üzerinde Yeniden Düşünmek’ in *Halid Kemal Elbir’e Armağan* (Istanbul Üniversitesi Hukuk Fakültesi 1996) 167 ff; Marie-Annick Peano, ‘L’intuitus personae dans le contrat de travail’ (1995) *Dr. soc.* 129; Bayram (n18) 73 ff; Fuat Bayram, ‘Borçlar Kanunu Tasarısı Işığında İşverenin İşçinin Kişiliğini Koruma Borcu’ in *İş Hukuku ve Sosyal Güvenlik Hukuku Türk Milli Komitesi 30. Yıl Armağanı* (2006) 11 ff; Ugan Çatalkaya (n2) 272 ff

24 Turkish Const. Court, no. 2018/4144, 25.2.2021, §22; similarly, *see*, no. 2017/14907, 30.9.2020, §24. *See also*, Alp and Dulay Yangın (n19) 1383 ff; Keser (n19) 12

25 Hediye Ergin, ‘İşyerinde Gönül İlişkisinin İş Sözleşmesinin Feshine Etkisi’ (2016) (35) *Sicil* 67, 68; Alp and Dulay Yangın (n19) 1381; Yusuf Yiğit, ‘Yargıtay Kararları Işığında İşyerinde Yaşanan Duygusal (Romantik) İlişkilerin İşverenin İş Sözleşmesini Fesh Hakkına Etkisi’ (2020) 5 (1) *Çankaya Üniversitesi Hukuk Fakültesi Dergisi* 3773, 3774

26 *See*, Sevimli, (n18) 238; Erhan Birben, ‘İşçinin Özel Yaşamı Nedeniyle İş Sözleşmesinin Feshi’ in Tankut Centel (ed), *İş Hukukunda Genç Yaklaşımlar II* (On İki Levha 2016) 139; Keser (n19) 21 ff



workplace will negatively affect the workplace and should be regarded as a cause of termination. Therefore, we consider it essential to evaluate the approach of the Turkish judicial bodies regarding disputes created by such employer interventions, which violate the employee's right to private life and right to work.

#### **IV. Turkish Court Of Cassation And Courts Of Appeal's Approach To The Employee's Right To Respect For Private Life And Romantic Relationships In The Workplace**

##### **A. Immediate Termination with Just Cause on the Grounds of Immorality, Breach of Integrity and Loyalty**

Article 419 of the Turkish Code of Obligations provides a general provision regarding the processing of employees' data by employers. According to this article, an employer can only process an employee's data to the extent that it is related to the employee's ability to work or is necessary to execute the employment contract. In other words, an employer does not need to be aware of any information regarding an employee's private life unless it is related to the work performed or unless it is compulsory for the execution of the work<sup>27</sup>. Therefore, it would be against the law for an employer to have this information, to attempt to obtain it and, of course, to use such information about an employee's private life as the basis for a work-related decision even though it does not affect the work. Otherwise, the employee's right to private life guaranteed by the Constitution will be violated. For example, information regarding the marital status, sexual orientation, and romantic or sexual relations of an employee and with whom they have relations is undoubtedly an area which remains in the employee's private life and, therefore, cannot be interfered with by the employer.

An element related to an employee's private life may adversely affect their performance, the workplace, the work's functioning, and the workplace's order. In that case, it may be possible to terminate the employment contract, either immediately with just cause or with notice and a valid reason, depending on whether this negativity renders the employment relationship unbearable or not<sup>28</sup>. At this stage, the employer is required to prove the negativity on which the termination is based. Accepting the contrary will violate an employee's fundamental right again.

27 See, Çelik, Caniklioğlu, Canbolat and Özkaraca (n1) 367; Aydın (n17) 28-29; Ahmet Sevimli, 'Veri Koruma İlkeleri Işığında Türk Borçlar Kanunu Madde 419' (2011) (24) Sicil 120, 134 ff; Alpagut (n16) 292, 309 ff; Ugan Çatalkaya (n2) 292 ff

28 Sevimli (n18) 281-282; Keser (n19) 16, 20 ff; Ergin (n25) 70 ff; Yıldız (n5) 35; Alp and Dulay Yangın (n18) 1381, 1389; Yiğit (n25) 3781-3782. (For details related to the valid reasons and just causes for termination and the difference between these terminations see, Çelik, Caniklioğlu, Canbolat and Özkaraca (n1) 506 ff, 604 ff, 63; Sarper Süzek, 'İşçinin Yetersizliği ve Davranışları Nedeniyle Geçerli Fesih' in *Prof. Dr. Can Tuncay'a Armağan* (Legal 2005) 565 ff, 576 ff; Ekmekeçi and Yiğit (n4) 679 ff; Keser (n19) 15 ff, 30; Yiğit (n25) 3786 ff; Ugan Çatalkaya (n2) 473, 489, 492)

However, in some of the decisions of the Court of Cassation on this matter, it is unclear whether the judge sufficiently compels the employer to prove this negativity<sup>29</sup>. Moreover, the Court of Cassation considers a romantic relationship between co-workers a reason for termination with just cause.

In a concrete case subject to a decision of the Court of Cassation, the Court evaluated whether the termination of the contract of the complainant employee was based on a just cause<sup>30</sup>. In his defence, the employer claimed that the employee, who was married with three children, had a romantic relationship with a married employee who worked at the same workplace, and that this situation caused trouble in the workplace. When the employer wanted to take the employee's statement, he accepted his relationship but refrained from giving a defence statement. The Court of First Instance decided to accept the case and reinstated the employee. According to the Court's reasoning, the employer could not prove that the relationship of the complainant employee caused negativity in the workplace.

Moreover, the Court of First Instance decided that a relationship between co-workers cannot be considered a valid reason for termination, and if the contrary is accepted, the employee's freedom to work will be restricted. Upon the appeal of the defendant's attorney against this decision, the Court of Appeal rejected the claim. However, the Court of Cassation held that the behaviour of the employee -married with three children- harmed the regular functioning of the work and the working environment and constituted a breach of integrity and loyalty. The Court of Cassation decided that the reinstatement claim should be rejected on the grounds that the trust relationship between the employer and employee was damaged, the termination of the employment contract did not interfere with the employee's private life, and therefore, the termination was based on a just cause.

From our standpoint, unless an employer demonstrates that a relationship between co-workers harms the functioning of the workplace, an employee should not suffer the heaviest sanction of termination (immediate and without compensation) for just cause. Considering the existence of a relationship between co-workers as the sole reason for termination constitutes a violation of an employee's right to private life. Nevertheless, the Court of Cassation interprets a situation where other employees notice the relationship between co-workers as a reason for termination. Moreover, we find it unacceptable that the Court emphasizes an employee's marital status, marriage and children, and refers to the immorality of their relationship<sup>31</sup>.

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29 Ergin (n25) 71

30 Court of Cassation, 9th Division, 15.4.2019, 2018/10504, 2019/8673. *See also*, Çelik, Caniklioğlu, Canbolat and Özkaraca (n1) 631; Alp and Dulay Yangın (n19) 1411; Yiğit (n25) 3793

31 Similarly, the emphasis on the marital status by the Court of Cassation draws the attention of the doctrine: Ergin (n25) 74-75; Alp and Dulay Yangın (n19) 1387; Keser (n19) 26

In a concrete case subject to another decision of the Court of Cassation, the complainant employee, who worked as a driver at the workplace, claimed that the employer had terminated his employment contract without just cause<sup>32</sup>. The employer, on the other hand, claimed that the termination was based on a just cause. The employer brought up issues which raised suspicion that there was a relationship between the complainant employee and his co-worker (S.B.), who both took leave until noon on the same day for different reasons and then returned to the workplace at similar times. According to the investigation conducted at the workplace, the employer alleged that the complainant and his co-worker, both of whom were married to other people, were behaving remarkably sympathetically to each other on the shuttle bus and got off the shuttle at the same stop in the evenings, even though they did not live at the same address; entered the men's locker room together at the workplace; and that, to have a conversation with S.B., the complainant pulled his truck in front of the kitchen where S.B. was working. Although other employees warned the complainant employee, the situation did not change. After the employer learned about the situation on 11.2.2014, S.B. accepted it. The employer also claimed that the complainant's defence statement was requested, and upon his refusal to give a statement, his employment contract was terminated without notice and compensation under Article 25/II (e) and (c) of the Labour Code No. 4857.

It should be noted that Article 25 of the Labour Code regulates immediate termination with just cause if an employee sexually harasses another employee (25/II, c) or in case of behaviour which is contrary to integrity and loyalty, such as abusing an employer's trust, stealing, or revealing an employer's professional secrets (25/II, e)<sup>33</sup>.

According to the first instance court, the subcontractor employee (S.B.), declared that she was in a relationship with the complainant and did not complain that she had been sexually harassed or molested. Besides, any report that the employer kept regarding the complainant's delay in the performance of work during his working period was not submitted to the case file, and no action was taken due to the relationship between the co-workers and their leave on the same day. For these reasons, the Court concluded that the late arrival of each employee to work on the following working day can only be considered as a behaviour that may damage the trust between the employer and the employee. Considering the principle of proportionality, the Court decided that the termination was based on a valid reason, not just cause, so the complainant should have received severance and notice pay.

Upon appeal of the first instance court's decision, the Court of Cassation stated that the fact that his co-workers had noticed, as a result of his attitude and behaviour

32 Court of Cassation, 9th Division, 27.6.2019, 2017/11196, 2019/14430.

33 For details, see, Çelik, Caniklioğlu, Canbolat and Özkaraca (n1) 620 ff; Süzek (n1) 694 ff; Ekmekçi and Yiğit (n4) 702 ff

at the workplace, that the complainant had an affair with a female employee, created negativity in the workplace. The Court of Cassation also accentuated that the behaviour of the complainant was offending good morals and concluded that the termination was based on a just cause. To the Court of Cassation, the first instance court's judgment regarding severance and notice pay was faulty. That is why the decision was reversed. In our opinion, the conclusion reached by the Court and the emphasis on "acts offending good morals" cannot be considered correct. The Court of Cassation's emphasis on immorality is also criticized in the doctrine<sup>34</sup>.

Suppose that the aspects of an employee's private life were not seen as appropriate according to the value judgment and moral sentiment of society, their co-workers or their employer. Beyond any doubt, this cannot be considered a reason for termination. Thus, it is also indicated in the justifications of Law no 4857, that the reasons arising from the employee's incompetence or behaviour may cause termination only if they cause negativities in the workplace. If the employee's behaviour or attitude which is not approved socially or ethically does not have any negative effect on the employment relationship, it can not be considered a valid reason for termination<sup>35</sup>.

For example, although it is morally disapproved in some circles for a female to have a child out of wedlock, it is clear that this is a matter entirely related to the employee's private life and does not concern the workplace, the functioning of the work and the employer. In this respect, it cannot be a reason for the termination or any employer's work-related decision<sup>36</sup>. Therefore, we believe that the approach of the Court of Cassation in the given decision is open to criticism.

At this point, we wish to emphasize that the Court of Cassation's decisions are of great importance in forming an accurate and uniform jurisprudence, as they also shape the approach of the courts of appeal on the subject.

For instance, in one decision, the Court of Appeal showed a similar approach to the Court of Cassation.<sup>37</sup> In this concrete case, the complainant employee, who was married with three children, was working as a maintainer. The employer terminated his employment contract after he posted during working hours an affectionate photo taken with his co-worker (Z.S.) on his Facebook account, who worked as an occupational health and safety expert at the same workplace. The court of first instance concluded that the termination of the employment contract did not interfere with the employee's private life and was based on a just cause because the complainant's

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34 Yıldız (n5) 11; Alp and Dulay Yangın (n19) 1411

35 See also, Süzek (n28) 576 ff; Keser (n19) 18; Alp and Dulay Yangın (n19) 1385

36 Similarly, see also, Birben (n26) 152; Eda Manav, *İş Hukukunda Geçersiz Fesih ve Geçersiz Feshin Hüküm ve Sonuçları* (Turhan 2009) 244

37 Regional Court of Appeal (Sakarya), 9th Division, 4.11.2020, 2019/2883, 2020/1383, Şahin Çil, *İş Hukuku Yargıtay İlke Kararları 2019- 2021* (8th ed., Yetkin 2021) 830-831

behaviour was contrary to integrity and loyalty and damaged the trust relationship between the parties to the employment contract. Upon the complainant's appeal, the court of appeal decided to reject the claim on the merits.

### **B. The Fact that A Relationship between Co-Workers Has A Negative Influence on the Workplace**

It is also possible to encounter disputes where a romantic relationship between employees negatively affects the order in the workplace and the flow of work. Therefore, in that case, the employer can terminate the employment contracts of these employees with just cause or valid reason<sup>38</sup>.

Some cases draw attention in terms of the hierarchical relationships between employees: In one dispute before the Court of Appeal, the employee claimed that the employer had terminated their employment contract unfairly<sup>39</sup>. The employer, on the other hand, pleaded that the claimant had been warned more than once for reasons such as leaving the workplace during working hours without permission, breaking the rules, and using profanity towards other personnel. The employer also alleged that the claimant had developed an intimate relationship with another employee (K1), who worked in the same department. K1 had complained to the claimant about some colleagues with whom they did not get along well, and demotivated and intimidated the personnel with threats. The claimant then used his position to get these people dismissed by providing a negative view of them. Likewise, according to the employer's allegation, K1 and the claimant employee were seen together in a position friendlier than regular colleagues at the workplace.

In this case, the Court of Appeal decided that the termination was based on a just cause because of a breach of integrity and loyalty, taking into account that the claimant was in the position of a supervisor of the person with whom they had a romantic relationship. The Court also considered that the claimant was using their authority for personal purposes and that K1 was using their superior's powers to threaten other colleagues.

In our opinion, in this case, it is appropriate to consider whether the relationship between co-workers has harmful effects on the workplace and to pay attention, especially to the hierarchical position of the employees and its impacts on the work. Indeed, a romantic relationship between a supervisor and a subordinate in the workplace may cause the supervisor to treat the person with whom they are in a relationship in a privileged position whilst making decisions about promotions and rewards. This discrimination will affect the other employees' work environment and

38 Keser (n19) 21; Ergin (n25) 70 ff; Yiğit (n25) 3789, 3791; Alp and Dulay Yangin (n19) 1382

39 Regional Court of Appeal (Ankara), 6th Division, 9.10.2018, 2017/3072, 2018/2130.

the peace at work<sup>40</sup>. However, we should add that, in this case, the employer must also prove the existence of discrimination, as mentioned above. Without such concrete proof, the mere allegation that other employees had doubts about this issue should not have constituted a valid reason for the termination of the supervisor's employment contract<sup>41</sup>. It should be added that a romantic relationship between a supervisor and a subordinate may also be an issue that needs attention from another perspective, whether the supervisor abuses their powers over their subordinate. Undoubtedly, the supervisor's abuse of management authority and attempts to establish a relationship with their subordinate that goes beyond the working relationship is a situation that can disrupt the peace of the working environment.

In some decisions, the Court of Cassation does not decide on concrete and objective criteria such as the hierarchical position among the employees and its impact on the workflow. Besides, the Court of Cassation does not require the first instance court to make the necessary research and determination on the issue. For this reason, it should be noted that the jurisprudence of the Court is not getting steady<sup>42</sup>. Regrettably, the matters that do not constitute a persuasive precedent, such as an employee's marital status and the level of their relationships, are emphasized in the decisions.

In another dispute subject to a decision of the Court of Cassation<sup>43</sup>, there was a romantic relationship between the customer relations manager -the complainant- and the bank branch manager. According to the decision of the first instance court, it was against the natural flow of life to wait for two adults to report their romantic relationship to the bank's executives. Besides, there is no such requirement in the Constitution or laws. Thus, the court decided that the termination was unjustified, considering that this would only concern the spouses and relatives of these two adults, even though it was subjectively possible to disapprove of a relationship between a married person and their co-worker. The Court of Cassation, on the other hand, concluded that because the employee did not provide information about the relationship when the employer requested an explanation, the employer could not be expected to continue the employment contract. In our opinion, it is not accurate for the Court of Cassation to consider the existence of a relationship with the branch manager - without any concrete evidence about impartiality or discrimination- and the failure to furnish information on this matter alone as a valid reason for termination<sup>44</sup>. We must admit that the decision of the first instance court is more accurate and shows that the issue remains in the employee's private life.

40 Birben (n26) 150; Alp and Dulay Yangin (n19) 1397; Yiğit (n25) 3778

41 Yıldız (n5) 23

42 For other examples of decisions with regard to romantic relationships between a supervisor and a subordinate *see*, Alp ve Dulay Yangin (n19) 1397 ff; Ergin (n25) 75

43 Court of Cassation, 22nd Division, 19.1.2015, 2014/35211, 2015/79

44 Yıldız (n5) 23; Alp and Dulay Yangin (n19) 1399

In another concrete case subject to a decision of the Court of Cassation<sup>45</sup>, the complainant, who worked in a bank, was dismissed because he had a relationship with another employee and they kissed at the workplace. The complainant filed a lawsuit claiming that the employer had terminated his employment contract without just cause. The employer pleaded that the termination was justified because, according to the records of the internal correspondence used in the bank, the complainant had asked a married employee of the bank to meet out of the office after working hours and on weekends and, despite her refusal, he physically harassed her. The court of first instance determined that the reason for the termination was the complainant's attempt to establish a relationship with another employee and that he confirmed this in his statement of complaint. However, the complainant indicated that he did not know at the beginning that the female employee was married and that she did not refuse him. He also added that she did not want to break up when he intended to because she was unhappy in her marriage. He affirmed that he kissed her to say goodbye when he was assigned to another branch. Since there was no other employee or customer in the workplace during the kissing incident, it was not the subject of any complaint. The employer discovered the situation from the security camera footage.

Upon examining the correspondences on the computer, the first instance court determined that there was no evidence that the female employee was uncomfortable with the complainant's behaviour. Likewise, the court, taking into account the other issues mentioned and the kissing incident, decided that it would not be compatible with the principle of proportionality to accept that the termination was based on just cause or valid reason.

The Court of Cassation, on the other hand, reversed the decision and found that the employer's termination was based on just cause as follows: *“The private life and the rule of privacy do not cover act committed in the workplace and publicly against another employee. Although it is not fully clarified whether the female employee consents to the behaviour subject to the termination, it is in itself incompatible with integrity and loyalty the fact that the employee experiences an incident in the workplace as described above with another employee who is also married”*.

We understand from the decision that the complainant worked as a deputy manager at the bank. If one of the employees in an emotional relationship is hierarchically superior to the other, this can affect the superior's objective behaviour, for example, in terms of the execution of work, distribution of tasks, or performance evaluation. Moreover, it can occur that an employee cannot refuse or is harassed when their supervisor insists on meeting outside the workplace and having a romantic relationship. In these circumstances, it can be concluded that the employer can terminate the

45 Court of Cassation, 9th Division, 12.2.2019, 2015/30145, 2019/3397; see also, Yiğit (n25) 3793



contract with just cause or valid reason. However, in the concrete dispute, these two elements were not mentioned, and there was no need for research and evidence in this direction in the Court of Cassation's reasoning. On the contrary, the kissing of two employees in the workplace was considered a just cause for termination on its own.

Moreover, the Court of Cassation, while evaluating the kissing incident in the workplace as a severe cause rendering the employment relationship unbearable, did not consider whether the incident disrupted the work by causing trouble, or if the other employees and customers witnessed the incident.

In some other decisions, the negative impacts of a romantic relationship in the workplace, such as a complaint e-mail sent to the managers, or a dispute in the workplace, were considered grounds for termination, and not only the existence of the relationship itself<sup>46</sup>. From our standpoint, this approach can be regarded as more appropriate. We should point out that there are also decisions in which this approach is demonstrated.

In this direction, for example, in a dispute before the Court of Appeal<sup>47</sup>, the complainant, a cabin chief, after learning that her ex-boyfriend, who worked as a pilot at the same airline, had a new girlfriend, encouraged this woman to report the pilot to the employer with false accusations. Since some e-mails were sent to the company's senior executives, the Court of First Instance and the Court of Appeal concluded that the termination of the complainant's employment contract was based on a just cause.

In another dispute resolved by the Court of Appeal<sup>48</sup>, upon hearing of a romantic relationship between two employees of the same branch, the employer changed their workplace. On the day of the incident, when the complainant, who worked as a store manager, met the female employee in front of the store, the complainant's wife came, and after a noisy verbal argument, the complainant left the workplace with his wife. Considering that people became alarmed and the employees had to calm down the customers in the store, the court of first instance concluded that the incident had affected the workflow and disrupted the order in the workplace. On the other hand, because of the employee's more than 17 years working at the same workplace and his efforts during the incident to end the discussion, the court decided that the complainant's behaviour was not so severe that it collapsed the trust relationship between him and the employer. The Court of Appeal upheld the court of first instance's decision, considering that the termination was based on a valid reason, not a just cause.

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46 For other concrete case examples *also see*, Alp and Dulay Yangın (n19) 1403 ff; Keser (n19) 23 ff; Yiğit (n25) 3790 ff

47 Regional Court of Appeal (Istanbul), 28th Division, 11.7.2019, 2018/1615, 2019/1384

48 Regional Court of Appeal (Istanbul), 27th Division, 24.2.2017, 187/181

Another dispute<sup>49</sup> concerned the termination of a complainant's employment contract with just cause, on the ground that a former employee, who had an affair with the complainant, tried to kidnap her from the front of the workplace. The negative impact on the workplace of an incident that had occurred after the relationship had started at the workplace was, in this case, determined as a valid reason for termination by the Court of Cassation. In another decision<sup>50</sup>, the Court of Cassation considered as a just cause for termination the fact that the complainant had insisted on becoming lovers with a female employee again, despite the woman's refusal. The Court described the complainant's behaviour as an interference according to Article 25 of the Labour Code.

There are also decisions that we find accurate and where the employer, who claims that a romantic relationship between employees hurts the work, is required to prove their allegation. Indeed, in a dispute subject to a Court of Cassation decision<sup>51</sup>, the employment contract was terminated with just cause because the workflow and environment were affected by the claim that there was a romantic relationship between the complainant and her co-worker K1. K1 was married, and according to the employer's statement, K1's sister called the workplace and insulted the secretary on the phone, putting the secretary down as the complainant. Then, when the sister wanted to speak with the complainant, the complainant refused. The employer terminated the complainant's contract based on the disturbances in the workplace, stating that other employees were aware of this situation, and the court of first instance found the termination justified. The Court of Cassation, on the other hand, decided that the termination was invalid and that the complainant should be reinstated, considering the witness statements that the two employees were not in any state or attitude that would disturb the work environment, and the lack of evidence indicating that the complainant was disrupting the work.

In a dispute resolved by the Court of Appeal<sup>52</sup>, the complainant employee, who was in the process of a divorce, established an intimate relationship with a co-worker. After an e-mail from the complainant's spouse to the complainant's employer about this relationship and the texting between the co-workers, the employer terminated the complainant's employment contract with just cause based on the company's disciplinary board regulation. The employer alleged that "the act committed does not comply with integrity and loyalty, rules of morality and goodwill" for reasons such as the relationship being known and spoken about by other employees and was causing some disturbance at the workplace and damaging the company's reputation. The Court of Appeal concluded that the termination was invalid, considering that the

49 Court of Cassation, 9th Division, 14.2.2017, 2016/4182, 2017/1911

50 Court of Cassation, 22nd Division, 2.4.2012, 2011/13073, 2012/6143

51 Court of Cassation, 22nd Division, 21.6.2012, 2011/18241, 2012/14160

52 Regional Court of Appeal (Istanbul), 30th Division, 6.7.2020, 2019/1151, 2020/1063

employer could not prove the disturbance in the workplace and that the messages between people remained within the scope of private life. The court also considered that upon becoming aware of the contents of the text messages by e-mail, the employer did not explain what action was taken against the other employee. The Court also found that the termination of only the complainant's contract was against the principle of equality.

In an old decision<sup>53</sup>, the Court of Cassation revealed that a relationship between co-workers had nothing to do with the work, as long as it did not cause negativity in the workplace, with the following statement, which we find very accurate: *“According to the information, document in the case file and especially the defendant's defence, the complainant's employment contract was terminated because it disrupted work ethics, work discipline and safety in the workplace. From the testimonies heard during the trial, it is understood that a romantic relationship occurred outside the workplace between the complainant woman and another male employee working in the same workplace. This action of the complainant has nothing to do with the work and the workplace.”*

As it is especially emphasized in the decisions of the Constitutional Court, which will be given below, within the contractual relationship between an employer and employee, the protection of the employee's private life against the employer's unfair interventions depends directly on the court's ability to provide a fair balance between the parties' interests. In this respect, the method followed by the court, the evaluation of the existence of the intervention, its legitimate justification, the fact that the court conducts sufficient research on the issues that will illuminate the case, and the control over whether the interference with a fundamental right is proportional to the aim, is crucial. Otherwise, it should be concluded that the court is insufficient to fulfil its positive obligations in terms of the protection of a fundamental right. For example, justifying sanctions like termination by the employer following allegations based on hearsay or gossip made by other employees will violate the employee's right to private life<sup>54</sup>. Besides, the fact that some elements have no impact on the working environment and are entirely within the scope of private life, and sometimes even unreal events which turn into the justification of an employer's decisions, will also be a violation of the employee's right to private life.

## **V. Turkish Constitutional Court's Approach To The Employee's Right To Respect For Private Life And Romantic Relationships In The Workplace**

The Constitutional Court takes the criteria in the European Convention on Human Rights and the ECtHR judgments regarding Article 8 of the Convention as a reference

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53 Court of Cassation, 9th Division, 25.12.1997, 18665/22471

54 Ergin (n25) 78; Keser (n19) 23; Alp and Dulay Yangin (n19) 1409

in individual applications regarding disputes in which the employee faces sanctions such as disciplinary punishment or termination due to romantic relationships. In line with the view that the state must effectively protect the right to respect for private life even between private persons, in these applications, the Constitutional Court determines whether the fundamental rights and freedoms of the employees have been violated in court decisions in the context of Article 20 of the Constitution, titled “right to respect for private life”<sup>55</sup>.

When the jurisprudence of the Constitutional Court is examined, in this regard, it is seen that first of all, individual applications regarding members of the Turkish Armed Forces (TAF) come before the Constitutional Court. Although these decisions do not fall within the scope of labour law, the issue of how the Constitutional Court handles the romantic relationships of public officials and which criteria it evaluates are important in terms of the compatibility of the approach of the Court of Cassation with the decisions of the ECtHR. Therefore, in the study, firstly, the individual application decisions regarding the members of TAF will be discussed, and then the decisions regarding the applications of the employees within the scope of labour law will be evaluated.

### **A. Members of The Army Being Sanctioned To Leave The Turkish Armed Forces Due To Romantic Relationships**

In these applications, the Constitutional Court has emphasized that the public officials' expectation regarding respect for their private life while performing their jobs is legitimate and justified. At the same time, the Court has stated that the administration has a wide margin of appreciation, regarding military service, which has its characteristics, and people who accept a certain status by choosing a military profession also accept that certain restrictions can be applied to their fundamental rights and freedoms by military discipline. That being said, the Court also accentuates that, even though the administration has a wide margin of appreciation in terms of regulatory authority due to the requirements of military service, it should not be forgotten that public officials also benefit from the guarantees outlined in the Constitution regarding fundamental rights and freedoms in their working life. Thus, in this context, the regulations which limit the right to respect for private life must comply with the criteria regulated in Article 13 of the Constitution<sup>56</sup>. In addition, the Court has stated that, for the interference with the private life of persons serving in the military to be lawful, it must be demonstrated that the disciplinary punishment applied was a compulsory measure arising from a social need. Also, the Court of Constitution states that the courts are expected to explain, with sufficient and relevant

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55 Alp and Dulay Yangın (n19) 1391-1392

56 Turkish Const. Court, *Ergün Özlük*, no. 2015/17513, 18.7.2019, §48; *Z.A.*, no. 2015/6302, 12.9.2019, §56

justification, the negative reflections of the action subject to intervention on the profession performed and the inconveniences that may arise in terms of ensuring military discipline and the proper execution of public service. These explanations should be addressed by taking into account the diversity in lifestyles that is a result of the changes and developments that have occurred in the social structure over time<sup>57</sup>.

According to the Court, it is clear that the sanction of dismissal from the TAF has a significant impact on the economic future of individuals, as they are deprived of their basic source of livelihood as well as their professional life. In this respect, to be able to say that the restriction on the right to privacy is appropriate and proportionate to the requirements of a democratic society, it must be an exceptional measure of last resort, taking into account the effects and consequences on those performing military service, and the envisaged sanction must be proportionate to the action<sup>58</sup>.

For example, in this regard, the Constitutional Court has evaluated the dismissal of applicants who were dismissed due to their living together as husband and wife without being legally married, which is regulated as a disciplinary offence under the title of “dismissal from the armed forces” in the TAF Disciplinary Law, and a dismissal offence in the Military Penal Code, in terms of these criteria<sup>59</sup>. The court dwelled on that, during the administrative process, how the action, which was attributed to the applicant, affected the proper performance of the duty and military discipline, and the reason it was considered to be contrary to general morality, was not justified. In the decision, it was emphasized that, in court’s decisions, while the concrete event was examined in terms of whether the elements of the disciplinary offence occurred, and research and evaluation were made only for the determination of these issues, the reflections of the applicant’s act on his profession, however, which remained in the field of privacy, could not be revealed<sup>60</sup>.

In addition, taking into account the right to privacy in judicial decisions, the TCC has determined that: the grounds regarding the connection of the sanctioned act with the requirements of military service and the reasons why it would disrupt military discipline are not specified; the restriction on the aforementioned right, which is a necessary, compulsory and proportional measure to be implemented to ensure the continuity of military service and discipline, is not demonstrated; and a fair balance has not been established between the public interest followed by the rule and the rights and freedoms of the individual<sup>61</sup>. In the concrete case, even though the applicant insisted on living with a woman as husband and wife, it is clear that the punishment of direct

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57 *Ergün Özlük*, §50; *Z.A.*, §58

58 *Ergün Özlük*, §53; *M.O.*, no. 15.1.2020, 2016/11733, §37

59 *Z.A.*, §40 ff

60 *Z.A.*, §59

61 *Ergün Özlük*, §52

dismissal from the profession had a heavy consequence compared to the applicant's action since it was understood that how the aforementioned act was reflected in the profession performed could not be shown<sup>62</sup>. Therefore, the Constitutional Court decided that the right to privacy had been violated.

In another decision, the Constitutional Court decided to the contrary and did not accept that the dismissal of the applicant from the armed forces was a violation of privacy, considering that he had committed a disciplinary offence of "moral weakness" due to his relationship with a civilian nurse, who was working within the same clinic and who was also the wife of another member of the armed forces. In the decision, the court examined whether the applicant's private life had an impact on his professional life in the concrete case, and determined that the aforementioned actions exceeded the limits of private life and had reflections on the task, such as the complaint of the nurse's spouse and their attempts to match their shift dates<sup>63</sup>. The Court also stated that, in these circumstances, in the personnel system where very strict military discipline rules and hierarchy apply, the evaluation of the actions which are attributed to the applicant as a factor which negatively affects the institutional discipline and reputation, and the imposition of disciplinary sanctions due to these actions, can be considered as a necessary intervention in a democratic society.

In the decision, it was concluded by the court that there was no interference with the requirements of a democratic society and the principle of proportionality in the dismissal of the applicant. This was due to his acts being contrary to the general moral structure of society to such a degree that would harm his duty, and his social and family life; and the reasons for his actions to spread to the institution he worked for were found to be sufficient and convincing<sup>64</sup>. In the same vein, in a previous application, the TCC determined, taking into account the facts that: the applicant had a relationship with a woman who worked in the night clubs which the applicant was in charge of inspecting, that this woman got pregnant from this relationship, and she had complained to the applicant's institution (TAF) about this relationship; that there were sufficient and convincing reasons for the effects of the applicant's actions on his professional life. Therefore, it was decided by the Supreme Court that it was necessary and proportionate in a democratic society to dismiss the applicant because of his acts which were contrary to the general moral structure of society to such a degree that would harm his duty, social and family life<sup>65</sup>. In our opinion, the Constitutional Court has introduced important criteria in its decisions. However, although it can be accepted that the administration's margin of appreciation may be wider when it comes to intervening in the private lives of TAF officers, we believe that the duties

<sup>62</sup> *Ergün Özlük*, §53; *Z.A.*, §62

<sup>63</sup> *M.O.*, §40

<sup>64</sup> *M.O.*, §42

<sup>65</sup> Turkish Const. Court, *İ.A.*, no. 2016/3423, 14.9.2017, §31

that they've performed in the TAF should also be taken into consideration in these evaluations in line with the principle of proportionality. Otherwise, it may lead to unlawful interference in the private life of military officers. Therefore, it would be appropriate to consider this criterion in the decisions of the Constitutional Court.

## **B. Termination of Employment Contracts Due To Romantic Relations With Co-Workers**

Three applications were brought before the Constitutional Court claiming that the applicant's right to private life was violated due to the immediate termination of their employment contracts because they had romantic relations with co-workers at the workplace.

In the examination of the application of H.Ç. dated 23 September 2020<sup>66</sup>, the Constitutional Court explained which criteria should be considered. In this context, the Court stated that the employer may impose restrictions on certain behaviours and actions that fall within the scope of the employee's private life, as a rule, for reasons that can be considered justified and legitimate, such as the effective conduct of business, and occupational health and safety. The Court also emphasized that the employer's authority and rights are not unlimited; the fundamental rights and freedoms granted to the employee - the right to respect for private life in the concrete case - are also protected within the workplace boundaries, and at the same time, restrictive and mandatory workplace rules should not harm the essence of the basic rights of employees. In this context, the Court stated to accept that the employer could terminate the employment contract, based solely on the reason that the employee had a relationship with another employee working at the same workplace, would not comply with the employee's rightful expectation that, in a democratic society, his fundamental rights and freedom should also be respected in the workplace and that this relationship should be carried out. The Court concluded that it was necessary to examine whether the relationship affects occupational health and safety<sup>67</sup>. In this regard, the Court emphasized that the employer must demonstrate the continuation of the employment contract cannot be expected from the employer's point of view, with the negative effects of the existing relationship on the conduct of the business. According to the Constitutional Court, while the reflection of the romantic relationship in the workplace or the functioning of the business is examined by the courts of first instance in disputes on this issue; an evaluation should be made by considering the capacity of the workplace, the duty and record of the employee, and who made the relationship public. In addition, the reasons should be set forth adequately; the conflicting interests between the employer and the employee should be balanced

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66 Turkish Const. Court, H.Ç. no. 2017/14907, 30.9.2020, O.G. 9.12.2020, 31329

67 H.Ç., §42. *Also see*, Alp and Dulay Yangın (n19) 1392; Yıldız (n5), 30-31



fairly, taking into account whether the termination of the employment contract is by the legitimate aim of the employer and is proportionate<sup>68</sup>.

In the concrete case, the TCC emphasized that the reasons stated by the employer were not justified/proven. First of all, according to the Court, although it was determined that the applicant had a relationship with an employee/co-worker named V.B., and the employer terminated the applicant's employment contract because the employer had suffered damage as a result of a bomb threat which was thought to have been made by V.B.'s wife over the phone, it was later understood that the notification was not made by V.B.'s wife, so it was determined that the applicant was not at fault regarding the damage caused by this notification in the workplace, and the employer could not prove the damage in question. Moreover, apart from the aforementioned denunciation, it was not revealed that the relationship between the two co-workers caused negativity in the workplace. Subsequently, the Constitutional Court stated that the statement of only one of the employees who were alleged to have had an affair at the workplace was taken and the existence of the relationship was accepted based on this one-sided statement. Finally, the TCC stated that the employer did not provide sufficient evidence that the romantic relationship between the two co-workers from the workplace was made public by the applicant, that the relationship hurts the workplace, and that these negativities had reached a level where the employer's employment contract could not be expected to continue; and the court of first instance had rendered a verdict without investigating this<sup>69</sup>. Therefore, with this decision, the Constitutional Court accepted that the private relationship of the two employees could result in the termination of the employment contract only if it was proven that the private relationship of the two employees led to concrete problems in the workplace and that these negativities reach a level that would prevent the employer from continuing the contractual relationship.

The Constitutional Court evaluated Esra Ünlü's application by considering the same criteria in its decision dated 25 February 2021<sup>70</sup>. In the concrete case subject to the application, a message which was sent to the phone of the regional manager of the applicant, who worked as a store manager, was reflected on the company e-mail account due to a system installed on the phone of the regional manager by the company. Upon examination of this e-mail, the applicant's employment contract was terminated for just cause, as it was determined that her romantic relationship with her co-worker, who was married and her superior, was contrary to business ethics. The court of first instance stated that the claim that this romantic relationship caused negativities in the workplace could not be proved by the employer. On the contrary, the testimonies of witnesses showed that they did not know about this relationship

68 *H.Ç.*, §43. *Also see*, Alp and Dulay Yangin (n19) 1392

69 *H.Ç.*, §42-43. *Also see*, Alp and Dulay Yangin (n19) 1393

70 Turkish Const. Court, *Esra Ünlü*, no. 2018/4144, 25.2.2021. *Also see*, Alp and Dulay Yangin (n19) 1394

and did not cause unrest in the workplace. However, the court of appeal ruled that such a relationship could make the employment contract unbearable for the employer, even though the relationship was over, and reversed the decision of the court of first instance, ruling that the contract was terminated for a valid reason.

The Constitutional Court stated that the employer could not prove how the aforementioned relationship caused problems in the workplace. On the contrary, it was determined that the relationship had ended before the termination of the contract and that this relationship was not known to the employer and did not cause any negative effects in the workplace. It was concluded that the right to respect private life had been violated since sufficient research had been done on its reflection on the workplace and an event-specific justification had been presented. According to the Court, an examination as to whether the termination of the employment contract was appropriate and proportionate to the employer's purpose and it cannot be said that a prudent process of decision-making was made to establish a fair balance between the interests of the employer and the employee.

The Constitutional Court adopted again the same criteria in its decision in 2022<sup>71</sup> and accepted the right to respect the private life of the employee was violated. In the relevant dispute, the applicant is a security officer at the Izmir Social Security Institution Provincial Directorate, whose employer is a private security company. His contract was terminated for just cause because he had an affair with a married female officer working in this institution. The local court dismissed the case, and the Court of Appeal did not accept the applicant's request for reemployment, because although the love affair did not cause termination with just cause, it would cause termination with valid reason. On the other hand, the female civil servant, who was dismissed for the same reason, filed a lawsuit for the annulment of the administrative act and was reinstated because the court of first instance cancelled the transaction. After all, the alleged relationship was within the scope of private life.

The Constitutional Court emphasized that the employer did not provide any concrete information regarding the negative impact of this relationship in the workplace, only the fact that the female civil servant who was alleged to have a romantic relationship was also dismissed and the administrative court's concrete determination of the romantic relationship, even though he reinstated it, was cited as the reason. However, the administrative court's decision, shown as the only basis, decided that the female officer should be reinstated, even though there was a love affair. In the trial process, the employer did not reveal that this relationship had negative effects on the workplace, and no research was conducted by the courts on whether this love affair was reflected in working life. Therefore, the Constitutional

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71 Turkish Const. Court, II. Division, *Dursun Haydar Daş*, no. 2018/22633, 22.9.2022

Court concluded that a meticulous judgment was not made to establish a fair balance between the interests of the employer and the employee, considering whether the termination of the employment contract was appropriate and proportionate to the employer's purpose, and that the right to respect for private life was violated<sup>72</sup>.

In the aforementioned decisions, it is seen that the romantic relationship between the employee and his/her co-workers cannot be a just and valid reason for the termination of the employment contract.

## VI. Conclusion

From our perspective, the romantic relationships of an employee -whether with a co-worker or not- are related to the employee's private life, and the fact that these relationships are only experienced with a co-worker will not authorize the employer to intervene in this matter, even if it is against the morality of society. For this reason, we think that statements such as "immorality and morals", and "immoral lifestyle", which are included in the decisions of judicial authorities regarding the relations of employees with their colleagues/co-workers, cannot be accepted as grounds for termination. Also, it is clear that, as in the aforementioned decisions, it is not appropriate to deal with issues of whether the employees are married or not, whether their marriage is at a stage of divorce, whether they are happy or unhappy, and the extent of their romantic relationships (measures such as texting or meeting outside, after working hours, in the evening, etc.)<sup>73</sup>.

The only reason for an issue regarding the employee's private life to be used as a basis for the employer's decision to terminate the employment contract may be that it affects the workplace and the conduct of the work. The fact that the romantic relationship affects the work or causes negativity in the workplace should be interpreted objectively as a disruption related to occupational health and safety and the conduct of the work. Otherwise, the fact that this relationship arouses the curiosity of other employees in the workplace, that it is talked about, that other employees find this situation unethical, and that they do not approve, should not be considered a reason under any circumstances. For this reason, in the courts' decisions of first instance, appeal, and cassation in Turkish law, it would be appropriate to confine ourselves to research and determination as to whether the relationship is objectively related to the conduct of the work. While making this examination, criteria such as the capacity of the workplace, the duty and record of the employee, and the hierarchical structure between the parties (co-workers), as stated in the decisions of the Constitutional Court, can be considered<sup>74</sup>.

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72 *Dursun Haydar Daş*, 32-35

73 *Also see*, Alp and Dulay Yangın (n19) 1413; Yıldız (n5) 36

74 *See*, Alp and Dulay Yangın (n19) 1410; Yıldız (n5) 34 ff

It should be accepted that the objective proof of the aforementioned romantic relationship causing negativity at work, or in the workplace, will not be sufficient in determining that the interference with the employee's private life complies with the law. It is necessary to investigate whether the principle of proportionality accepted by the ECtHR and the TCC is applied, or in other words, whether the termination of the employment contract is appropriate and proportional to the legitimate aim of the employer; and whether the conflicting interests between the employer and the employee are balanced fairly<sup>75</sup>. In this perspective, the decisions of the Constitutional Court are important in terms of protecting the employee's romantic relationships within the scope of the right to respect for private life. The Constitutional Court accepts that to interfere with the fundamental rights and freedoms of the employees due to the romantic relations of the employees with their colleagues, this relationship must only lead to negativity in the workplace due to the fault of the employee and this negativity must be proven by the employer, and this approach is also compatible with the contemporary principles of labour law<sup>76</sup>.

Basing a termination on an issue that is completely within the scope of private life is also a violation of the employee's right and freedom to work. Especially in cases where employees' contracts are unfairly terminated on the grounds of relations between married co-workers, the employees' opportunities to find a job again are considerably reduced, and an employee's right to work is violated because they are prevented from earning a living by obtaining a job freely. Therefore, in our opinion, in cases where the employment contract is unfairly terminated due to the employee's romantic relationships, the right to work as well as the right to respect for private life is violated. Although "the duty and the right to work" are stipulated in Article 49 of the Turkish Constitution, and the right to work is not regulated directly in the European Convention on Human Rights, establishing a relationship between the right to work and private life and examining indirectly the violation of the right to work within the scope of ECHR Art. 8 "right to respect for private and family life", it should also be examined in judicial decisions whether these unjust terminations interfere with the right to work and freedom as well as the right to private life.

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75 Ugan Çatalkaya (n2) 492 ff

76 Alp and Dulay Yangın (n19) 1412-1413; Yıldız (n5) 33-34

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