



## THE SCOPE OF EMPLOYMENT SECURITY REGULATIONS FOR WORKPLACES UNDER TURKISH LABOR LAW

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**Ulas Baysal**

Istanbul Technical University, Department of Management Engineering, Macka Campus, Istanbul, Turkey.

[baysalu@itu.edu.tr](mailto:baysalu@itu.edu.tr), ORCID :0000-0003-0954-2183

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### ABSTRACT

**Purpose-** Within this study, we will examine that which establishments are falling under employment security regulations in Turkish Law.

**Methodology -** The range of employment security provisions related establishment will be discussed in the light of precedents of the Court of Cassation and views of scholars.

**Findings-** The questions as which persons should be included as an employee when determining the number of employees or how establishments operating in foreign countries will be evaluated, cause uncertainties and needs clearer explanations.

**Conclusion-** Precedents of the Court of Cassation about the scope of employment security related establishment differ from case to case. Therefore, employers should examine in detail the legal position in this matter before termination of employment contracts.

**Keywords:** Job security, establishment, termination, employee, employer

**JEL Codes:** K31, K41, J41

### 1. INTRODUCTION

Employment security -which can be defined as judicial scrutiny over termination of employee's labor contract by employer-, is regulated under Turkish Law and in particular under Articles 18-21 of Labor Law numbered 4857. As per Article 18 of Labor Law: "The employer terminating the labor contract with indefinite term executed with his employee -who is employed in a workplace where thirty or more employees are employed and who meets a minimum seniority of six months-, must rely on a valid reason for such termination that arises from the capacity or conduct of the employee or from the operational requirements of the business, workplace or service." If the employee falls within the scope of the relevant article, i.e. he is protected by employment security, the employer is obliged to comply with the specific procedures envisaged for termination of labor contract and to rely on a valid reason. If the employer cannot prove that the termination is based on a valid reason, the employee can file a reemployment lawsuit before court.

Article 18/4 of the Labor Law constitutes the exception to the rule of excluding workplaces that employ less than 30 employees as per Article 18/1 Labor Law. In this regard, Article 18/4 of Labor Law regulates that if employer has multiple workplaces, all belonging to the same business field, the total number of employees working in all workplaces is considered to be the total number of employees in each workplace. Within the scope of both paragraphs of the same article, some problems cause uncertainty, these include which employees are to be taken into consideration in calculating the total number of employees and how workplaces located overseas are to be evaluated. This study is going to evaluate which workplaces are within the scope of employment security in the light of high court decisions and doctrine. It will be discussed firstly which types of employees will be taken into consideration in calculating the number of 30 employees. Another problem by determining of the number of 30

employees is calculating the number of employees working on the basis of joint employment and working at the companies with organic bonding. One more issue discussed at this article is the situation of employees working at employer's workplace located overseas in the calculation of 30 employees. Furthermore, the point in time based on which the calculation of 30 employees is examined at this paper.

## **2. FINDINGS AND DISCUSSIONS**

### **2.1. Points That Will Be Taken into Consideration for the Calculation of 30 Employees**

Determination of which person will be taken into consideration as an employee in calculating the number of 30 employees - which is the criterion for determining whether a workplace fall within the scope of employment security- is a problem that should be solved initially. In the decisions of Court of Cassation, it is clearly stated for the purpose of this calculation that no differentiation can be made between the employees working on different types of labor contracts i.e. labor contracts with definite or indefinite term; full time or part time labor contracts; permanent or seasonal labor contracts. Existence of labor contracts of employees that will be included in the calculation are sufficient and these employees do not have to work in practice at the time termination notice is served. However, if a substitute employee is employed to take up the tasks of the absent employee who is on leave due to illness, occupational accident and pregnancy or similar grounds also including normal leave, the substitute employee will not be taken into consideration in the calculation of 30 employees (Celik, Caniklioglu, Canbolat, 2018: 479; Narmanlioğlu, 2014: 498; Kaplan-Seneyen, 2018: 276). As per Article 18/5, Labor Law, employer's representatives and their assistants -who do not benefit from employment security due to their position, shall also be taken into consideration in the calculation of the number of employees in a workplace (The decision of the Court of Cassation 9. Civil Chamber dated 24.05.2018 with merit number of 2018/4616 and decision number of 2018/11626; the decision of the Court of Cassation 22. Civil Chamber dated 24.04.2018, with merit number of 2018/2914, and decision number of 2018/9559; the decision of the Court of Cassation 9. Civil Chamber dated 12.4.2018 with merit number of 2017/23664, and decision number of 2018/8529; the decision of the Court of Cassation 22. Civil Chamber dated 5.3.2018, with merit number of 2018/1480, and decision number of 2018/5708; the decision of the Court of Cassation 22. Civil Chamber dated 12.02.2018, with merit number of 2017/45888, and decision number of 2018/2713; the decision of the Court of Cassation 9. Civil Chamber dated 18.12.2017 with merit number of 2016/32626, and decision number of 2017/21574; the decision of the Court of Cassation 22. Civil Chamber dated 12.12.2017 with merit number of 2017/43958 and decision number of 2017/28461; the decision of the Court of Cassation 9. Civil Chamber dated 22.11.2017 with merit number of 2016/28027 and decision number of 2017/18860).

According to the established case-law of the Court of Cassation, the following will not be taken into consideration in the calculation of 30 employees in a workplace: apprentices, interns and students taking vocational training, all of whom are not employees and casual employees, as well as those that are employed under temporary working relations and sub-employers' employees. If an illegal sub-employment is constituted in order to avoid employment security provisions, relevant employees shall also be included to the number of employees in the workplace. Additionally, employees of the sub-employer and temporary employees who sustain their labor contract with their employer who provides temporary employees are also taken into consideration in the calculation of the number of employees in their own respective workplaces (The decision of the Court of Cassation 9. Civil Chamber dated 24.05.2018 with merit number of 2018/4616 and decision number of 2018/11626; the decision of the Court of Cassation 22. Civil Chamber dated 24.04.2018 with merit number of 2018/2914 and decision number of 2018/9559; the decision of the Court of Cassation 9. Civil Chamber dated 12.4.2018 with merit number of 2017/23664 and decision number of 2018/8529; the decision of the Court of Cassation 22. Civil Chamber dated 5.3.2018 with merit number of 2018/1480 and decision number of 2018/5708; the decision of the Court of Cassation 22. Civil Chamber dated 12.02.2018 with merit number of 2017/45888 and decision number of 2018/2713; the decision of the Court of Cassation 9. Civil Chamber dated 18.12.2017 with merit number of 2016/32626, and decision number of 2017/21574; the decision of the Court of Cassation 22. Civil Chamber dated 12.12.2017, with merit number of 2017/43958 and decision number of 2017/28461; the decision of the Court of Cassation 9. Civil Chamber dated 22.11.2017 with merit number of 2016/28027 and decision number of 2017/18860).

If there is an employee whose labor contract is terminated before the termination notice applies for reemployment after obtaining a favorable court decision ordering for invalidity of the termination, this employee shall also be taken into account in the calculation of 30 employees. In such case, if the invalidation action against the termination has not been concluded yet, then the outcome shall be awaited by the Court by rendering this matter as a preliminary issue to the case in hand.

## **2.2. Joint Employment and the Matter of Organic Bond**

The existence of joint employment and organic bonding may also lead to problems in terms of determining the number of employees within the scope of employment security.

The employee is not obliged to give his full labor force to one specific employer, he can execute labor contracts with multiple employers at the same time (Mollamahmutoglu/Astarlı/Baysal, 2018: 38; Süzek, 2018: 156). It is legally possible for an employee to work with multiple employers for various jobs under part time labor contracts and it is also possible for an employee to have multiple employers under the same labor contract envisaging the same job for the same period. The latter is the joint employment. In such relation, although there are multiple employers as the contracting parties, there is still one labor relationship. In joint employment, each employer aim to have an employee who will work full time, therefore employers are jointly liable against the employee as per Article 162 and the following articles of Turkish Code of Obligations. Accordingly, each employer is entitled to the rights arising from the labor law regulations and the labor contract and also responsible for the obligations arising from these sources.

In the decisions of Court of Cassation, it is stated that some employees jointly serve to multiple employers at the same time under the joint employment scheme which is observed in particular within group companies. The established case-law of Court of Cassation adopted the following approach: "These companies, which are mostly related with each other under the management organization, can serve in the same buildings, and some employees perform their obligations to work in favor of all employers. The following can also be given as examples for this matter: the administration of all companies carried out by the same person, the accounting, security, transportation, cleaning, cafeteria and catering services provided to all of the employers. In such a relationship, only employees who serve to all companies and employees who serve the defendant company should be taken into consideration in the criterion of 30 employees. If the employee is serving to all companies, then the number of employees in all companies should be taken into account" (The decision of the Court of Cassation 9. Civil Chamber. dated 12.4.2018, with merit number of 2017/23664, and decision number of 2018/8529; The decision of the Court of Cassation 22. Civil Chamber. dated 5.3.2018, with merit number of 2018/1480, and decision number of 2018/5708; The decision of the Court of Cassation 9. Civil Chamber. dated 18.12.2017, with merit number of 2016/32626, and decision number of 2017/21574; The decision of the Court of Cassation 22. Civil Chamber. dated 12.12.2017, with merit number of 2017/43958, and decision number of 2017/28461; The decision of the Court of Cassation 9. Civil Chamber. dated 22.11.2017, with merit number of 2016/28027, and decision number of 2017/18860; The decision of the Court of Cassation 9. Civil Chamber. dated 18.10.2017, with merit number of 2016/35565, and decision number of 2017/16089; The decision of the Court of Cassation 9. Civil Chamber. dated 13.9.2017, with merit number of 2016/18638, and decision number of 2017/13164; The decision of the Court of Cassation 22. Civil Chamber. dated 27.3.2017, with merit number of 2017/30583, and decision number of 2017/6245).

In the organic bond relations, a legal person standing as an employer includes different personalities in the representation in order to prevent the employee from exercising his rights arising from labor contract or the labor law. In this case, the independence of the legal person shall be limited and be deemed to be on the same legal footing as the entity with whom the former has the organic bond. Court of Cassation holds liable the real employer or all the employers with whom the former has the organic bond by lifting the corporate veil. Organic bond can be determined by the fact that relevant companies' addresses, fields of activity, partners and representatives are the same. Additionally as per the decision of Court of Cassation: "Employees serving to all employers together with the employees whose transfer has been made do not have to be working in the same business field under the organic bond scheme or joint employment regardless of the nature of the operation." (The decision of the Court of Cassation 9. Civil Chamber. dated 22.11.2017, with merit number of 2016/28027, and decision number of 2017/18860; The decision of the Court of Cassation 9. Civil Chamber. dated 18.10.2017, with merit number of 2016/35565, and decision number of 2017/16089; The decision of the Court of Cassation 9. Civil Chamber. dated 18.12.2017, with merit number of 2016/32626, and decision number of 2017/21574; The decision of the Court of Cassation 9. Civil Chamber. dated 7.6.2018, with merit number of 2018/5425, and decision number of 2018/12840; The decision of the Court of Cassation 9. Civil Chamber. dated 14.3.2018, with merit number of 2018/1959, and decision number of 2018/5292; The decision of the Court of Cassation 22. Civil Chamber. dated 5.3.2018, with merit number of 2018/1480, and decision number of 2018/5708).

## **2.3. Issue of Employer's Workplaces Abroad**

Another point to be discussed is whether or not employees working at employer's workplace located overseas should be included in the calculation of 30 employees. Court of Cassation has different decisions regarding this matter. For instance, in its decision dated 3 July 2006, the Court reversed the judgment of the first instance court that based its decision on the territoriality of laws and stated that "it makes sense that there is no explicit provision stating that the employees working in the

workplaces located abroad operating in the same business field will not be taken into consideration. In other words, there is no legal provision stating that workplaces in the same business field will be evaluated only if they are within the borders of the country. Therefore, the Court should act in favor of the employee and accept that the legal requirements in terms of the number of employees are met by taking into account of all the workplaces belonging to the defendant employer, who clearly and definitely has other workplaces in the same business field” (The decision of the Court of Cassation 9. Civil Chamber. with merit number of 2006/9818, and decision number of 2006/19560). This decision has been criticized in the doctrine quite frequently (Aygül, Uşan, 2007: 75; Odaman, 2007: 82; Tuncay, 75). When more recent decisions are studied, it can be seen that a different chamber of Court of Cassation decided that even if the workplaces located overseas belonging to the employers located in Turkey who have a separate legal personality have organic bond with their counterparts in Turkey, the employees working overseas are not to be taken into account in the calculation of 30 employees (The decision of the Court of Cassation 22. Civil Chamber. dated 18.3.2013, with merit number of 2013/36274; and decision number of 2013/30274). However, in its even more recent decision, Court of Cassation 9. Civil Chamber decided that “in the calculation of 30 employees, employees who work overseas shall also be taken into account due to the fact that the defendant company is affiliated abroad” (The decision of the Court of Cassation 9. Civil Chamber dated. 24.10.2017, with merit number of 2016/27342; and decision number of 2017/16504).

#### **2.4. The Point in Time based on which the Calculation of 30 Employees is to be Made**

Another crucial point in determining whether a workplace falls within the scope of employment security is the point in time based on which the calculation of 30 employees is to be made. The method applied by Court of Cassation on this issue is to use the records of the Social Security Institution as a basis in order to determine the number of employees working in the workplace at the time of termination. The decisions of Court of Cassation on this matter clearly show that courts must render their decision after obtaining the valid payrolls of all employees from Social Security Institution at the time of the termination which information is then to be used to calculate the number of employees working in the same business field at the different workplaces belonging to the same employer across Turkey (For instance: The decision of the Court of Cassation 22. Civil Chamber. dated 05.07.2018, with merit number of 2018/9136, and decision number of 2018/17177). However, Court of Cassation also has decisions in which it diverges from this principle by requiring a research that is to be carried out on whether the nature of the work requires 30 employees. For example, in its decision rendered in 2017, Court of Cassation stated that not only the time of the termination must be taken into account in the calculation of the required number of employees but also the number of employees who are employed regularly in the workplace and whether or not 30 employees are needed for the proper functioning of the workplace and lastly if these criteria are satisfied at the time of the termination (The decision of the Court of Cassation 9. Civil Chamber. dated 22.11.2017, with merit number of 2016/28027, and decision number of 2017/18860).

### **3. CONCLUSION**

Under Turkish Law, the majority of the problems associated with the requirement of having 30 employees employed at a workplace -which is one of the requirements to benefit from employment security provisions- have been resolved by established and accurate decisions of the Court of Cassation. The following are the subjects that have been discussed since the effective date of the applicable provisions which are resolved by the Court of Cassation: which employees will be taken into consideration in the calculation of the number of employees and which will not, how the employees -who filed an invalidation lawsuit against the termination- will be evaluated for determining 30 employees, how the calculation will be made in cases of joint employment and organic bond. The case law, which is not consistent in terms of determining which workplaces and businesses are covered by employment security, is rendered on the following subjects: whether the employees working in the workplaces located overseas will be included in the number of 30 employees and which point in time will be considered as the basis for the calculation of 30 employees.

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