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Litigation - Turkey

Court rules on criteria for valid termination of employment agreements

Contributed by **Cerrahoglu Law Firm**

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Pursuant to Article 19 of the Labour Law (4857), an employer should specify clearly and definitely the reasons for termination of an employment agreement. In addition, an employer cannot terminate an employment agreement based on reasons related to the employee's actions and performance without allowing the employee the opportunity to defend himself or herself against such allegations.

According to Article 20/2 of the law, the employer has the burden of proving the validity of the reasons for termination.

Pursuant to Article 21/2, if the court determines that the employer has not provided a valid reason, or that the reason shown is invalid and thus the termination is invalid, the employer is obliged to reinstate the employee to work within one month of the employee's application. Otherwise, the employer should pay the employee an indemnity of between four and eight months' salary. Moreover, a maximum of four months' salary should be paid to the employee for the period during the lawsuit in which he or she was unemployed.

The Court of Appeals ruled on this issue in a decision dated December 1 2009 (2009/42088 E, 2009/32333 K). In this case the employer had terminated the employment agreement without allowing the employee a defence. The employer had given inefficiency and an inability to perform as desired in the assigned duties as grounds for the termination. The employee filed a lawsuit against the employer requesting determination of the invalidity of the termination and his reinstatement to work.

The Ninth Chamber of the Court of Appeals decided that according to the contents of the termination notice, the reason for termination was based on business requirements. In selecting the employee, the performance criterion was taken into consideration; therefore, the termination was not directly based on the inadequacy of the employee. For this reason there was no need to hear the employee's defence before termination.

The court further decided that a flexible approach should be taken regarding terminations arising from business requirements in which the employer's discretion is given priority for evaluation of the employee's performance, unless the employer's discretion is misused. The court ruled that a distinctive factor may be whether employees with lower performance levels continue to be employed following the termination date.

Pursuant to Article 20/2, the employer has the burden of proving the validity of the reasons for termination. In order to meet the requirements of such burden, the employer should first prove that the termination is in compliance with the formal requirements, and then that the reasons for termination are valid (or justifiable). In this context, the employer should prove that:

- it had taken a decision to make a termination;
- such decision had created employment surplus;
- it had applied such decision consistently; and
- the termination had been inevitable.

The Court of Appeals concluded that in order to determine the validity of the termination, the labour court should investigate and base its decision on whether the employer was affected by the economic crisis. If the answer is yes, the court should consider the following factors:

- whether such situation required a reduction in the number of employees;

- whether the business decision taken by the employer was applied coherently;
- whether any new employees had been hired;
- whether the new employees had been hired to replace the terminated employee(s);
- whether the new employees had the same qualifications as the terminated employee(s);
- whether the termination was inevitable;
- whether the reduction in business could be overcome by measures other than termination;
- how the low-performance criterion, which was stated as the criterion taken into account for the termination, was determined;
- whether there are any employees in the workplace with lower performance levels than the terminated employee(s); and
- whether such employees are still employed in the workplace.

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