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TERMINATION OF EMPLOYMENT: A CASE STUDY OF TURKISH LABOUR LAW TO COMPARE ILO CONVENTION NO. 158

Pir Ali KAYA[*]

ABSTRACT

Today, employment security is a most important need for wage-earners, especially in developing countries which have a high rate of unemployment, where firing workers is a way to lower wages. Because of that there are some provisions of international regulations that need to be addressed. Job security and restrictions on firing figure prominently in much national labour legislation. These provisions and principles are underlined in ILO Recommendation No. 119 and Convention No. 158. In this paper, attention is focused on ILO Convention No. 158 and its repercussions on Turkish labour law.

Keywords: Employ ent Security, Job Security and Restrictions, Termination of Employment, Turkish Labour Law, ILO Convention No.158.

1.Introduction

Standards providing for certain restrictions on employers' rights to terminate employment were first proposed in the early 1960s. A Recommendation concerning Termination of Employment at the initiative of the Employer, No. 119, was adopted in 1963. Its general principle is that termination of employment should not take place unless there is a valid reason connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service. While the definition or interpretation of the valid reason is left to the discretion of each country, the Recommendation classifies that valid reasons are not constituted by issues including union membership or participation in proceedings against an employer. The general principles of the Termination of Employment Convention, 1982 (No. 158) are the same as in the earlier Recommendation, aiming to ensure protection against termination of employment without valid reason. (Plant, 1994: 28)

On the other hand, Turkish labour law, especially individual labour law (1475 Act, Article 13) provide for "the termination of labour contract through a term of notice". Besides envisaging notification of the other party by the employer, it brings no other obligation on the employer to state the grounds for termination or to base termination on justifiable grounds. Hower, Turkey

[*]Dr., Faculty of Economics and Administrative Sciences Department of Labour Economics and Industrial Relations, Uludağ University, BURSA

ratified ILO Convention No. 158 in June 1994, which makes necessary (obligatory) some revisions in Turkish labour law because termination of a labour contract by notice is not in conformity with ILO Convention No. 158.

2. The emphasis of ILO Conventions

ILO Conventions were imaginative innovations from the point of view of the from of collective international instruments and served as prototypes that were initiated in widely varying degrees. The content of ILO standards has exerted a profound influence on the activities of the international community in such fields as the protection of human rights, social policy and development policy. (ILO, 1976: 9)

Besides, international labour Conventions are international treaties which are binding on the countries which ratify them. These countries voluntarily undertake to apply their provisions, to adopt national law and practice to their requirements and to accept international supervision. (ILO, 1990: 9; ILO, 1986: 9)Article 19, para. 5 (d) of the ILO Constitution provides that if the member state "obtains the consent of the authority or authorities within whose competence the matter lies, it will communicate the formal ratification of the Conventions to the Director-General and will take such action as may be necessary to make effective the provisions of such Convention". In ratifying a Convention a state undertakes a formal commitment to "make effective the provision of the Conventions; ratification sets in motion highly elaborate and systematic machinery for supervising the application of Conventions". (ILO, 1992: 13; ILO, 1990: 74) On the other hand, the government must not pick and choose only certain articles of Conventions which it wishes to apply. (ILO, 1989:6)

3. Provisions of ILO Convention No. 158 about Termination of Employment

The Convention has very wide scope. It provides that it "applies to all branches of economic activity and to all employed persons " (Convention No. 158, Article 2/1).In Article 3it explores the term "termination". According to that article "termination of employment" means termination of employment on the employer (Convention No. 158, Art.3). Then it enumerates those reasons which are not valid grounds for termination, such as union membership or participation in union activities at appropriate hours, seeking office or acting as a worker's representative, filing a complaint or participation in proceedings against an *employer* for violation of law or regulations, race, colour, sex, marital *status*, family responsibility, pregnancy, religious, political opinion, national extraction or social origin, absence from work during maternity leave

and temporary absence from work because of illness or injury (Convention No. 158, arts. 5 and 6)

The Convention provides that "the employment of a worker shall not be terminated unless there is a valid reason connected whit the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service" (Convention No. 158, Art. 4). This means that termination of a labour contract is only to be on justified grounds. In addition, Article 7 and Article 9/3 provide the limits of justification: "The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity" (Convention No. 158, Art. 7) and "In cases of termination stated to be for reasons based on the operational requirements of the undertaking, establishment or service, the bodies referred to in Article 8(court, labour tribunal, arbitration committee or arbitrator.) of this Convention shall be empowered to determine whether the termination was indeed for these reasons but the extent to which they shall also be empowered to decide whether these reasons are sufficient to justify that termination shall be determined by the methods of implementation referred to in Article 1 of this Convention" (Convention No. 158, Art. 9/3).

The Convention deals with the procedures to be followed for the termination of employment and for appeal against termination. In order for the worker not to have to bear alone the burden of proving that the termination was not justified the Convention provides for either or both of two possibilities: (a) the burden of proving the existence of a valid reason shall rest on the employer; Art. 9/2a) and/or (b) the competent bodies shall be empowered to search a conclusion having regard to the evidence provided by the parties and according to procedures provided for by national law and practice.(ILO, 1988: 29) Article 8/1 provides that "A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as court, labour tribunal, arbitration committee or arbitrator" and article 9/1 and 9/2a provide that "The bodies referred to in Article 8 of this Convention shall be empowered to examine the reasons given for the termination and the other circumstances relating to the case and to render a decision on whether the termination was justified" and "the bodies referred to in article 8 of this Convention shall be empowered to reach a conclusion on the reason for the termination having regard to the evidence provided by the parties and according to procedures provided for by national law and practice".

It provides for a reasonable period of notice to be given or compensation in lieu thereof, unless the worker is guilty of serious misconduct, and for a severance allowance and/or other forms of income protection (unemployment insurance or assistance, or other social security benefits).

These matters are covered in Article 11 and Article 12. Article 11 provides that " A worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period". Article 12 provides that "A worker whose employment has been terminated shall be entitled, in accordance with national law and practice, to: (a) a severance allowance or other separation benefits, the amount of which shall be based, inter alia, on length of service and the level of wages, had paid directly by the employer or by a fund constituted by employers' contributions; or (b) benefits from unemployment insurance or assistance or other forms of social security, such as old-age or invalidity benefits, under the normal conditions to which such benefits are subject; or © a contribution of such allowance and benefits" (Article 211).

It provides that in the case of an unjustified termination of employment, it this cannot be reversed and/or the reinstatement of the worker is not practicable, adequate compensation is payable (Article 10).

Lastly, is provides that termination of employment for economic, technological, structural or similar reasons causes more detailed provision to come into play concerning the obligation of the employer to consult with workers' representatives and to notify the competent authority, as early as possible, giving the relevant information (Art. 13 and Art. 14).

4. The provisions of Turkish labour law about termination of employment

If we disregard the ending of individual labour contracts by means other than termination (such as mutual consent of the parties, death, expiration of the definite time period)(Dereli, 1982: 129) Turkish individual labour law provides two types of rules for termination to the individual labour contract. The first involves the serving and respecting of a term of notice (Art. 1475; Art. 13). The second is referred to as "termination without term of notice" or "terminating the contract for just cause" (Act 1475, Arts. 16 and 17) (Ekonomi, 1990: 47, Süral, 1992: 28-29, Dereli, 1982: 131.)

4.1. Termination by means of notice

This type of termination is unilateral termination and is possible only for labour contracts of an indefinite period.(Süral, 1992: 29) The period of time between the announcement of the decision to terminate the labour contract and the date on which the labour contract is deemed to end constitutes the term of notice. The obligation to respect the same terms of notice has been imposed on both parties by labour law (Act 1475). The aim is to mitigate the consequences of the unilateral decision - either by the employee or employer - to terminate

the labour contract by giving the employee a chance to look for a new job while he still has an income and by providing the employer with the necessary time to find a new employee. (Dereli, 1982: 13)

a. Length of the term of notice

Act 1475, Article 13 (A) provides that a contract for permanent employment made for an indefinite period may be terminated by the employer or the employee if one of the parties gives notice to the other. The contract shall terminate:

(a) in the case of an employee whose employment has lasted less than six months , at the end of the second week following the serving of notice to the other party;

(b) in the case of an employee whose employment has lasted for six months or more but for lees than one-and-a-half years, at the end of the fourth week following the serving of notice to the other party;

(c) in the case of an employee whose employment has lasted for six months or more but for less than three years , at the end of the sixth week following the serving of notice to the other party;

(d) in the case of an employee whose employment has lasted for more than three years, at the end of the eighth week following the serving off notice to the other party. These are minimum periods and may be increased by agreement between the parties (Art. 13 (B).

During the term of notice parties have an obligation and duties respecting the notice decision. If one side cannot respect the period of notice, it is liable to pay "notice compensation" (notice pay) to the other side (Art. 13(C).

Employers have a right to terminate a labour contract by paying "notice compensation" in advance for the duration of the term of notice (Art. 13 c/2).

An employee dismissed because of having filed a grievance against the employer or due to his membership in a given trade union will be considered as having been abusively dismissed. An abusively dismissed worker will be entitled to "bad faith compensation" which is equal to three times the wage corresponding to the notice periods (Art. 13 c/3).(Ekonomi, 1990: 47, Süral, 1992: 30-31)

Terminating a labour contract with bad faith because of being a trade union member or agreeing with union activities is repeated in the Trade Union Act (282) Article 3, and trade union members are paid an annual compensation. If an employer terminates a labour contract for a reason cited in Article 31/111 and V, he is liable to pay an "annual compensation" and employees' and employees' other rights under labour acts and other connected acts. However, when an annual compensation is to be paid, notice compensation is not applicable.(Dereli, 1982: 118, Süral, 1992: 32)

Another aspect of terminating a labour contract by notice concerns severance pay. If a labour contract is terminated with notice by the employer, he is obliged to pay the employee a severance allowance (Art. 1475, Arts. 13 and 14). (Dereli, 1982: 148, Ekonomi, 1990: 48-49)

4.2.Termination of labour contract by means of justification

Termination of a labour contract without a term of notice may be defined as "the act by which the employer or the employee unilaterally and immediately terminates the individual labour contract". In this category, if there is just cause, either party is entitled to end the contract legally without having to observe any period of notice regardless of whether the contract is for a definite or an indefinite period.(Dereli, 1982: 138, Ekonomi, 1990: 49)

The reasons for breaking for contract for just cause have been grouped into three categories both for the employee and the employer (Arts. 16 and 17). These are reasons of health, immoral or dishonourable conduct or other similar behaviour and *force majeure*.(Süral, 1992: 41-42, Ekonomi, 1990: 51-52, Dereli, 1982: 139-141)

5. The conflict between Turkish labour law and Convention No. 158

5.1. Turkish labour law (Act 1475) provides two ways of terminating labour contracts. The first is termination by notice. This implies no obligation on the employer for termination 8(Art. 13). The second is termination by justification of health reasons or immoral or dishonourable conduct or *force majeure* (Arts. 16 and 17.). However, ILO Convention No. 158 provides for only one method of termination, which is justification. It states that "the employment of a worker shall not be terminated unless there is a valid reason connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking establishment or service" (Convention No. 158, art. 4).

5.2. ILO Convention No. 158, Article 9/2 (a) provides that "the burden of proving the existence of valid reason for termination as defined in article 4

of this Convention shall rest on the employer "However , Turkish labour law cannot provide a binding regulation for an employer to prove a valid reason for termination by notice (Art. 13). On the other hand ,the worker has a right to apply to a labour court for reason of termination with notice or justification. But to confirm the reason of termination rests on the workers .(Dereli, 1982: 135-136) Convention No. 158 has very wide scope. It "applies to all branches of economic activity and to all employed persons" (Art. 21). This means that the Convention provides employment security for all workers. But in Turkish law (in general), there are only two groups who have employment security under the concept of contract worker. The first category is "civil servants", persons employed under the Civil Servant Act. This category has less job security.(Dereli, Zentinoğlu, Urla, 1993: 693) The second category is trade union representatives(shop stewards)Article 30 of the Trade union Act 2821 states: "An employer may not terminate the labour contract of a trade union representative without a just cause, to be indicated clearly and precisely . In case of dismissal , the trade union representative or his union has the right to apply to the competent labour court within one month following the notification. The suit has to be concluded within two months, according to the accelerated trial procedure, and the court's decision is final. If the court decides for reinstatement, nullifying the dismissal, the worker will be paid for the period throughout which he was not employed, on the condition that he starts working within six working days following the decision of the court". (Süral, 1992: 34) Thus, shop stewards are the only category of workers who have been granted full job security under present Turkish law.(Dereli, 1982: 177)

5.3. ILO Convention No. 158 provides for "termination of employment at the initiative of the employer" (Art. 3), but Turkish labour law provides that employment may be terminated by employer or employee (Arts. 13, 16, 17).

5.4. Convention No. 158 contains supplementary provisions concerning termination of employment for economic, technical, structural or similar reasons.(Roger, 1994: 28-29) In these cases, more detailed provisions concern the obligation on the employer to consult with workers' representatives and to notify the competent authority as early as possible, giving the relevant information (Arts. 13 and 14). But in Turkish labour law, there are no provisions concerning the obligation on the employer to consult with workers' representatives. There is only a provision to notify the competent authority. In Act 1475, Art. 24. if the employer intends to lay off at least ten or more employees, he is obliged to inform the competent government authority of his intention to lay off workers at least one month in advance.(Ekonomi, 1990: 56, Dereli, 1982: 143, Unsal, 1992: 23)

5.5. Turkish individual labour legislation provides for two types of rules, those which are absolutely binding and those which are relatively binding.(EIRR, 29) The regulations for terminating labour contracts are relatively binding rules, but in ILO Convention No. 158, the provisions are absolutely binding rules (Art. 1).

6.Conclusion

The system of ILO Conventions involves major innovations in the nature of collective international instruments, since unlike the traditional diplomatic treaties between states, Conventions were the outcome of collective international decisions of a quasi-legislative character. Conventions become binding on the countries that ratify them, like international treaties. However, although Conventions are meant to be obligations, they have no binding force in themselves. The member States only assume the obligation to apply the provisions of Conventions which they ratify.

Besides, of all the major international institutions, the ILO is the only one with a genuinely tripartite structure. It has a universal aim. Because of that the Conventions are adopted by the Conference with a two-thirds majority. It is clear that employers and workers play an important role, together with the government, and a corpus of standards has been drawn up with their participation. That means Conventions are adopted by tripartite consultation and there is no force for adopting. On the other hand, ILO Conventions concern basic human rights and social development, so that if a country ratifies a Convention, it means that country wants to improve workers' rights and to improve working conditions.

ÖZET

Bağımlı çalışanları doğrudan ilgilendiren iş güvencesi ; haklı bir nedene dayanmaksızın , hizmet sözleşmesinin sona erdirilmesi durumunda , keyfiyete karşı işçiyi korumayı amaçlayan ve işçi-işveren ilişkisinde hukukilik arayan bir kurumdur. Dolayısıyla çalışma hukukunun en dinamik ve en sorunlu alanlarından birini teşkil etmektedir. Bu çalışmada " iş güvencesinin" bilincinde olarak bir çok ülke mevzuatında yer alan ve gerçek anlamda iş güvencesiyle ilgili olarak uluslar arası düzeyde normatif bir zemin hazırlayan İLO'nun hizmet ilişkisinin sona erdirilmesiyle ilgili 158 sayılı sözleşmesiyle Türk İş Hukuku'ndaki düzenlemeler karşılaştırılmak istenmiştir. Öncelikle 158 sayılı sözleşmede öngörülen düzenlemelerin mahiyeti belirtilmiş daha sonra Türk İş Hukuku'nda yer alan düzenlemelerin neler olduğu vurgulanmış , sonuçta ise İLO'nun 158 sayılı sözleşmesiyle Türk İş Hukuku karşılaştırılmış ve Türk İş Hukuku'nun handikapları ortaya konulmaya çalışılmıştır.

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