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Legal Changes in Turkish Labor Law Reflected on Tourism Workers

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Abstract

The latest legal amendments in Turkish labor law have naturally affected all working life and therefore also tourism workers. Within the Turkish labor law system, mediation law has become compulsory. It is now necessary for a tourism worker to complete the mediation phase before going to the labor court. Business Law is a law where legal changes are frequent due to the fact that it is an area that constantly develops and renews itself. Among the factors that cause this situation are the effects of the developing technology on business relations, emerging new needs, case-law changes in the judiciary, cancellation decisions of the Constitutional Court. The legal amendments made in the field of Labor Law have recently been intensified with the enactment of the Labor Courts Law No. 7036. Significant changes were made in terms of labor law, in particular mandatory mediation envisaged in the law and regulations for applications to the Social Security Institution; Under this law, the Labor Law no. 4857 required the necessity of making new regulations in other labor laws.

Key words: Tourism workers, Mediation, Labour, Law

Introduction

At the beginning of the recent changes in Labor Law, changing business judgments are in order. The Law on Labor Courts numbered 7036, which brought substantial changes in this context, was adopted on 12.10.2017 and entered into force upon publication of the Official Gazette dated 25.10.2017. The most fundamental issue that has changed in terms of Labor Law with the entry into force of the Labor Courts Act has been the provision of the mediation institution as a trial condition. This substantial change in business disputes has been found in the Law No. 4857, which is the basic law in relation to business relations, and necessary amendments have been made in order to ensure unity between the two laws. In this study, the innovations and changes made in terms of the Labor Code and the Labor Law will be examined and the results and evaluation of the subject will be presented.

Amendments and Innovations Relevant to "Business Council Law" Number 7036

A. Generally

The Law on Labor Courts No. 5521, which has been in effect since 1950, has been abolished as of 25.10.2017, when the Labor Courts Law No. 7036 was adopted. It has been argued that the law was enacted in order to reduce the concentration in the labor courts, to get quick results, and to ensure that the parties have the ability to define themselves easily¹. The amendments made within the scope

¹ Hasan Özkan "İş Davalarında Dava Şartı Arabuluculuk". *Legal İş Hukuku ve Sosyal Güvenlik Hukuku Dergisi*, Yıl:2017, C: 14, S: 56, s. 1881; Ali Güzel "İş Mahkemeleri Kanunu Tasarısı Taslağı Hakkında Bazı Aykırı Düşünceler!..." *Çalışma ve Toplum Dergisi*, İstanbul 2016, N: 2016/3, p. 1131-1132; Salim Yunus Lokmanoğlu "İş

of the law are the introduction of compulsory mediation for certain disputes and the requirement to apply to the Social Security Institution before filing a lawsuit against Social Security and General Health Insurance Law and other social security legislation.

B. Regulation on the Establishment, Duties and Authority of the Labor Courts and Other Provisions

Regarding the establishment of the Labor Courts, which was first included in the judicial organization in 1950, in Article 2 of the new Law No. 7036 of the Labor Courts, unlike the article 5521, the labor courts were in the primary custody and in the places where there were no labor courts, In addition, it is included in the 7036 number that the distribution of work will be done by HSK and distribution will take into consideration the density of work, specialization and the nature of the works².

In parallel with the order of duty, the regulation of powers in the labor courts was also clearly settled and reconsidered in parallel with the provisions of the HMK. According to the arrangement, the general competent court has shown the case as a settlement on the date the case is opened or a court of place where the work / transaction is made; If there are more than one case, the settlement of one of them is the court. Regarding the compensation claims arising from work accidents, the settlement court of the worker who has suffered a work accident or damage and the damaged worker has been designated as a court of competent jurisdiction in accordance with the TBK tort. In the event of disputes in the Labor Courts in accordance with the foreseen duties and rules of procedure, the judicial procedure shall be re-examined and judged to be in accordance with the simple judicial procedure.

In accordance with Law No. 7036, Paragraph 5521, Paragraph No 5521, the provision of HMK is applied to the provisions of HMK (HUMK), but the provisions of HUMC and HMK are quite different, In this context, unlike the sphere of labor law, labor court decisions do not constitute a definite provision as a rule and are subject to appeal examination in this respect; in cases other than those expressly mentioned, can also be passed through the appeal examination. In this respect, lawsuits and works that can not be measured by money, and the law which has closed the road of appeal in terms of cases not exceeding 3000 Turkish Lira, has not been properly taken into new blood.

C. Mediation as a Condition for Litigation

Article 3 of the Labor Code stipulates the mandatory operation of the mediation institution in order to prevent the bringing of employee-employer disputes directly before the court in respect of certain business disputes and stipulated that the case would be decided to be rejected if the parties proceeded without operating the mediation institution. In this context, according to the first paragraph of the first clause of the law, workers 'or employers' claims based on individual or collective labor disputes and compensation claims have been accepted as a condition of appeal to the parties. On the other hand, the legislator did not foresee the application of mediation as a condition for any business dispute and excluded certain disputes. In the third paragraph of the Article, it should be noted that the pecuniary and non-pecuniary damage claims arising from work accidents and occupational diseases and their determination, appeal and mediation are not prescribed as a condition for mediation, it is also possible that the parties arbitrarily apply mediation. The point of importance at

Mahkemeleri Kanunu Işığında Arabuluculuk Kavramı". *Türkiye Adalet Akademisi Dergisi*, Ankara 2018, Y:9, N: 33 (Ocak 2018), p. 867; Cumhur Sinan Özdemir "İş Davalarında Zorunlu Arabuluculuk Sistemi", *Mali Çözüm İSMMM Dergisi*, N: Kasım-Aralık 2017, p. 245.

² Bektaş Kar, "7036 Sayılı İş Mahkemeleri Kanunu ile Getirilen Düzenlemeler". *Türkiye İnşaat Sanayicileri İşveren Sendikası Dergisi*, İstanbul 2018, N: January February 2018, p. 18.

this point is not only the employees of the regulation under the Labor Law No. 4857, 5953 and 854 of the Press Labor and Maritime Labor Laws³.

It is clear from the third and subsequent articles of the law how a mediation procedure can be followed in terms of the mentioned business disputes⁴. According to the law, the plaintiff must first apply to the mediation office at the place of settlement of the opposite party or place where the work is done, if the mediation office is not available. The general rule is that when a mediator is appointed by the mediation office upon application, it is also possible for the mediator to engage in activities if the parties agree on another mediator in these lists.

The next step is for the mediator to invite the parties to the first meeting on the basis of the information given by the requesting party and the information he will obtain upon the survey. In paragraph 3 of Article 3 of the Law, it is foreseen that the parties to the mediation proceedings, their legal representatives or lawyers may also participate; an employee who has been given written authorization for the employer is also allowed to be represented. That the parties (or persons authorized to represent them) do not attend the meeting without a valid excuse and that, in the event of a mediation event, even if the non-party is justified, the costs of the proceedings will be fully respected and the attorney's fee will not be awarded in favor of that party; if both parties do not attend, the parties shall be entitled to leave the costs incurred in respect of the lawsuits to be filed. In this regard, the legislator is able to say that the parties do not allow them to participate in the process. The last stage of the process is the stage in which the parties have agreed on the disagreement. According to the court, at this stage, the mediator will conclude the activity and the mediator will immediately notify the office and keep the final minutes. In the event of a concluding agreement, the mediator shall be paid no less than the two hourly wage set forth in the Minimum Wage Scheme of the Mediator and, if not otherwise agreed, the mediator's fee shall be paid equally to the parties; if the process relates to work, it shall be the sum of the non-commencement indemnity to be paid in the event that the worker fails to start work and the remuneration and other rights to be payable for the duration of the worker's absence, unless otherwise agreed. If the proceeding is concluded without an agreement, the mediator's fee is foreseen to be met from the Ministry of Justice budget for the first two hours' wage, that the remuneration for the two-hour negotiations will be equal to the parties unless otherwise agreed and both amounts counted from the costs of the proceedings. The compulsory expenditures of the mediation branch, other than the mediator's fee, will be met from the Ministry of Justice budget in the first instance; in the event of an agreement between the parties, they will be ultimately dealt with by the parties, and in case of disagreement, from the unfair party.

Obligation to apply to Social Security Institution

A. Procedure of Appeal to Notice of Withdrawal (Art 20)

According to Article 11 of the Labor Courts Law No. 7036, amendments have been made in Article 20 of the Labor Law. The first amendment envisaged in the Article has been foreseen to require mediation in relation to the request for return to work in relation to the compulsory mediation institution which entered into force in respect of the business disputes we have discussed above.

³ Hakan Pekcanitez/ Oğuz Atalay/ Muhammet Özokes, *Medeni Usul Hukuku Ders Kitabı*, 2. Baskı, Ankara 2014, p.241

⁴ Ersin Erdoğan, "7036 Sayılı İş Mahkemeleri Kanunu'nda Öngörülen Zorunlu Arabuluculuk ve Hak Arama Özgürlüğü Açısından Değerlendirilmesi". *Legal İş Hukuku ve Sosyal Güvenlik Hukuku Dergisi*, Y: 2017, C: 14, N: 55, p. 1215.

According to the Article 20 of the Labor Law, there is a need to apply for a mediation request for disputes of extradition, and the duration of the application must be within one month from the date of notification. The old regulation and if the result of the mediator action can not be obtained, within two weeks, a court order could be filed at the labor court. The possibility of applying the special tribunal to the party before the court changed before the law was also protected in the new regulation. If the court decides to reject the procedure due to non-appeal of the mediator, it can be applied to the mediator within 2 weeks from the date of finalization of this decision. It is in this case that the Court of Justice will be given definitively to the Court of Justice.

B. Arrangement of Termination Result Made With Invalidity (Article 21)

Two different regulations have been introduced under Article 21 of the Labor Code. In these cases, it is the ruling that the worker shall be based on the remuneration not to be awarded in the event that the worker fails to start the work despite the fact that the work contract is terminated regardless of the valid reason and the invalidation of termination is determined by court or special arbitrator⁵.

The other regulation is related to the possibility of the parties having to make a decision to start work on the basis of the forced mediation activity. If the parties decide to start work, the final amount of the date of commencement of work shall be determined in accordance with the total amount of the wages and other rights to be paid to the worker and the non-initiation compensation to be paid in case the worker is not started. In the case of failure to comply with this provision, an agreement was reached between the legislative parties. On the other hand, the obligation to apply to the employer within 10 working days from the notification of the court or arbitrator's decision in the old regulation has also been abolished and parallel to the previous regulation, it has been stated that the worker's failure to start work on the prescribed date will constitute a valid termination and the employer will only be responsible for its legal consequences.

C. Authorization of the State (Article 91)

Regarding the competence of labor inspectors, Articles 91 and 92 of the Labor Law No. 4857 have been amended to limit these authorities⁶. It has been stated that the State fulfills its duties related to working life as stated in Article 91 of the Labor Code in labor inspectors and that the applications of the workers concerning the individual receivables arising from the law of labor and labor and collective labor agreements may be carried out on condition that the employment contract continues. In addition to this, in addition to the clause "the officers of the regional directorate examining the workers' complaints" and "the officers of the regional directorate responsible for examining the workers complaints" in the third paragraph, which are included in the second paragraph of Article 92 of Law No. 4857, In this context, while the employment contract is in progress, it has been decided that if the work inspector related to the worker is determined, he can not go to the mediation related to this receivable.

D. Additional and Provisional Article Regulations

With respect to the additional requirements arising from the third clause of the Labor Law and the work contract, the time limits have been changed. According to the law, the period of time limit is foreseen to be five years regardless of the annual allowance fee arising from the employment

⁵ Muhittin Astarlı, "7036 Sayılı İş Mahkemeleri Kanunu'nun 4857 Sayılı İş Kanunu'nun İş Güvencesi Hükümlerinde Öngördüğü Değişikliklerin Değerlendirilmesi". *Sicil İş Hukuku Dergisi*, İstanbul 2017, N: 38, p. 52.

⁶ Kar (2018), Ibid p. 25

contract, the severance indemnity, the indemnity due to termination without due process, the indemnity arising from the indemnity, The provisional period of time limit of five years shall be provided in the event that such provision is requested in the end of the business relationship after the date of entry into force of this Temporary Article 8; but it is stipulated that the old regulation will prevail in terms of the statute of limitations which had begun to be processed before this substance entered into force. On the other hand, if the rest of the time-limit, which has been started for processing, is over 5 years, the estimated 5-year statute of limitations will apply.

Conclusion and Evaluation

Current developments in business law have been mainly based on mandatory mediation arrangements. Besides this, the amendments made under the Law on Unions of 6356 and the Law on Mediation in Legal Disputes No. 6325 are noteworthy. It seems that the amendments made under these two laws focus on the revision of the legislation that was left in periods when the mediation regulations were not in force as a result of the new developments stemming from the finding of more application areas compared to our legal system and the appeal proceedings were fully active. When it is considered that all of the enacted regulations are brought by the Labor Courts Law, the law regulates only matters other than the procedural laws, the labor courts and the procedures to be envisaged here; In this respect, it is almost as if it is considered as a bag law. These regimes, which are procedural laws for business proceedings, would be better suited to the legal system than we would have considered independent and separate from other regimes.

The inclusion of clear regulations on the duties and powers of the labor courts under the law has been a positive development. Although the provisions on the application of HUMC and HMK regulations which are in the nature of the general procedural law in the absence of a provision in the law since the time of the covenant law have been included in the labor courts law, it is appropriate to include in detail the separate duties and powers of the covenant as in other procedural laws. Under the amendment, we are of the opinion that the business courts are in the first place and in the places where there is no court of business, it is necessary to evaluate positively in terms of ensuring compliance with the other laws, even if there is no need for judicial review of court proceedings. The fact that the work laws specified in Article 5 of the Law on the application area of the Law have been explicitly covered as well as the obligations under the Law of Obligations have been a necessity; termination of the employment contract and service contract distinction should be seen as an extremely accurate arrangement. As a matter of fact, the fact that there was no determination in the law of labor courts in this respect was a favorable arrangement to create doubts as to whether the general civil service law courts were in charge of the business relations fulfilled in accordance with the provisions of the TBK service contract.

In this respect, the Law No. 7036 on Labor Courts seems to have equality in terms of business relations with the employment contract and the service contract by eliminating the doubts. In addition, parallel to the general practice that the application of the law, the application of the law, and the precise decision are exceptional, by removing the facts of the labor disputes as a rule from the appeal and appeal examination, the appeal and appeals can be appealed.

It is also necessary to address the regulation of "mediation as a condition of trial" brought under the law. In the case of this new method, in which the legislator has adopted as a method to avoid increasing the number of files, it will be necessary to resort to mediation in a "compulsory" manner by removing the possibility of direct application to labor courts if the parties are parties to disputes. In our opinion, it is an extremely appropriate choice for the legislator to assess and disseminate

alternative dispute resolution methods in the face of business disputes and other disputes. At this point, we should not point out that dissemination of mediation and arbitration arrangements in terms of legal disputes is in place because both the workload of the judiciary allows the disputes of the parties to be resolved in a friendly manner without any disagreement. Alternative solution methods also provide savings in time and material resources by serving as one of the basic principles of the civil code, "the principle of procedural economy"⁷. Mediation, as it is known, is an alternative method of dispute resolution, aimed at resolving disputes between the parties, with the support of an impartial third party, where both parties are reconciled, bringing together the disputed parties to speak and negotiate⁸. The law which contains the basic rules and regulations regarding mediation in Turkish Law is the Law on Mediation in Legal Disputes No. 6325 and it is stated in Article 3 of the Law that the parties are free to apply for mediation, to continue the process, to conclude the process and to give up the process. As can be seen, "aged" is one of the basic elements of the mediation in terms of the law no.

6325 which is the basic legal regulation on mediation. However, the mandatory mediation practice envisaged by the Labor Court Law ignores the element of agility which constitutes one of the most basic points of the mediation, and seems to have come out of the parties' will. From this point of view, although it is possible to say that it is a great benefit to support alternative dispute resolution methods, it would be much more beneficial for us to believe that this will be left to parties. It should also be kept in mind that the practice of mediation, which emerges as "necessity", introduces a precondition for resorting to judgments from the main functions of the state, and that the costs of mediation may be left to the parties, and that the mediator may be free of limitations. In our opinion, recognition of mediation as a matter of preference between the parties in a manner consistent with its application; but the application of some incentives in this way (for example, leaving all expenditures on the treasury, especially the mediator fee) and most importantly the training of the parties, especially at the point of consulting the community mediation, will increase the incentive to mediate.

In our previous explanations, with the law no. 7036, only regulations on labor courts were not brought; and that different regulations besides the labor courts and the related regulations are also covered by the law and are not in conformity with the law system. In this context, another law amended by the provisions of the Labor Courts Act has become the Labor Law No. 4857. The amendments made to Law No. 4857 have also been focused mainly on the integration of the mandatory mediation system envisaged in the Labor Code; The most significant change in the scope of the law has been the time-varying time limits⁹. The period of ten years of statutory period foreseen by the general provisions in the compensation claims foreseen in terms of termination indemnity, annual leave allowance, malnutrition indemnity and termination of the employer in contradiction with the principle of equality¹⁰, which have critical prescription for business proceedings, has been changed and the new period has been foreseen as 5 years. Even though the transfer provisions prevent this regulation from harming the parties, we are of the opinion that there is no legal benefit in terms of the workers who

⁷ Zeynep Şişli, "Bireysel İş Uyuşmazlıkları ve Yargısal Çözüm". *Ankara Barosu Dergisi*, Ankara 2012, N: 2012/2, p.48

⁸ Melis Taşpolat Tuğsavul, Arabuluculuk Kanun Tasarısı Çerçevesinde Türk Hukukunda Arabuluculuk. Bahçeşehir Üniversitesi Sosyal Bilimler Enstitüsü Özel Hukuk Programı Yüksek Lisans Tezi, İstanbul 2009, p. 8.

⁹ Nazım Can Işıktaç, "Türkiye'de Arabuluculuk Uygulaması: 7036 Sayılı İş Mahkemeleri Kanunu Işığında Değerlendirme". *Legal İş Hukuku ve Sosyal Güvenlik Hukuku Dergisi*, İstanbul 2017, C:14, N:55, p.1338.

¹⁰ Hasan Özkan, "İş Davalarında Dava Şartı Arabuluculuk". *Legal İş Hukuku ve Sosyal Güvenlik Hukuku Dergisi*, İstanbul 2017, C:14, N:56, p. 1887.

constitute the weak side of the legal relationship and need to be protected with the provision of a shorter period.

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