



The Principle of “Ultima Ratio” in Termination of Employment Contract in Turkish Labour Law

Türk İş Hukukunda İş Sözleşmesinin Feshinde Son Çare -Ultima Ratio- İlkesi

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Abstract

The risk of the employee losing his job against the employer's right of termination is considered in this study, which found this right of termination to be limited in contemporary labour law systems. One aspect of this limitation is job security. In the job security system, the existence of a valid reason is examined during the judicial review of the termination. However, in some instances, the valid reason is not sufficient per se. Termination based on a valid reason should be proportional. Pursuant to the principle of proportionality, termination should be applied as a last resort. The principle of ultima ratio is examined not only in terms of termination based on business requirements, but also in terms of termination-based employee's incapacity or behaviour. This study aims to explain the status of the principle of ultima ratio in Turkish Labour Law which means that termination should be applied as a last resort. Furthermore, focus is laid on the precedents by also examining the decisions of the Supreme Court on the matter.

Keywords

Ultima Ratio, Job security, Termination of employment contract, Valid termination, Valid reason

Öz

Modern iş hukuku sistemlerinde, işverenlerin fesih hakkı karşısında işçinin işini kaybetmesi tehlikesi dikkate alınmış ve fesih hakkı sınırlandırılmıştır. Bu sınırlandırmanın bir boyutu da iş güvencesidir. İş güvencesi sisteminde, yapılan feshin yargı denetimine tabi tutulması sırasında geçerli bir nedenin var olup olmadığı incelenir. Ancak kimi durumlarda tek başına geçerli bir nedenin olması yetmez. Geçerli nedene dayanılarak yapılan feshin ölçülü olması gerekir. Ölçülülük ilkesi gereğince de feshin son çare olarak başvurulması gerekir. Başlangıçta yalnızca işletme gerekleri için geçerli olduğu kabul edilen son çare ilkesi giderek diğer geçerli fesih sebeplerinde de uygulanır olmuştur. Bugün için işletme gereklerinden kaynaklanan fesihlerde değil, işçinin yetersizliği veya davranışları nedeniyle yapılacak fesihlerde de son çare ilkesine uyulup uyulmadığı araştırılmaktadır. Bu çalışmada, feshin son bir çare olarak başvurulması anlamına gelen ultima ratio ilkesinin Türk İş Hukukundaki yeri açıklanmıştır. Ayrıca Yargıtay'ın konu hakkında verdiği kararlar da incelenerek uygulama örnekleri üzerinde durulmuştur.

Anahtar Kelimeler

Son çare, İş güvencesi, İş sözleşmesinin feshi, Geçerli fesih, Geçerli neden

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I. Introduction

By very nature, an employment contract is one which causes perpetual obligation and which urges one party to undertake to perform work dependently and the other party to pay remuneration. Termination of this contract is considered within the boundaries of principles such as the protection of personal rights, free will, and the freedom of the employer to make decisions about his/her business, and it is recognized as a right for both parties. However, termination with notice particularly poses certain risks for the employee who works dependently of the employer. Therefore, in today's labour law approach, the employee's use of termination with notice is not subjected to any limitation. However, there are several limitations imposed on the employer for the use of this right.

The fact that the employee works dependently of the employer is an important factor that distinguishes the employment contract from other private law contracts. This dependency on the employment contract also demonstrates that the parties are not equal. The employee who is a non-equal party should be protected in particular. One of the aspects that this protection gives rise to is the termination of the employment contract. A balance between the managerial power of the employer and the employees' job loss should be established in an employment contract. This balance gave rise to the concept of “job security”. Job security protects employees from arbitrary dismissals. This protection is achieved by termination only by following certain procedures, providing a valid reason and subjecting this reason to a judicial review.

The principle of ultima ratio has been one of the principles required for termination to qualify as valid. In principle, applying the rule of termination by the employer as a last resort means taking all measures for ensuring the continuity of the employment contract. As a consequence of this, if it is not possible to keep the employee in a workplace despite the employer taking all expected measures, the termination will happen as long as the termination procedure is complied with and a valid reason is provided. Thus, an important legal meaning and the legal consequence are attributed to the principle of ultima ratio.

II. The Concept of Ultima Ratio in Termination

A. Definition and Importance

One of the principles in the termination of an employment contract with a valid reason, which limits the right of termination of the employer and allows the judge

to conduct a review of arbitrariness over the valid reason, is the principle of ultima ratio. Ultima ratio is a Latin phrase and has the meaning of the last resort or the last measure to be considered or applied¹. This principle, in particular in German law, is an important principle applied to termination of contract arising from the employee or the workplace².

The principle of ultima ratio, which is not explicitly included in the legal regulations in Turkish law, is set forth in the decisions of high court and doctrine as explained below. This principle means being able to terminate when the reason for the termination cannot be eliminated by any measures other than termination³. In other words, the employer should resort to the termination of the contract only if he/she does not have the possibility of achieving his/her purpose with less severe measures. Therefore, with respect to the principle of ultima ratio, it should first be determined whether the result desired to be attained could be reached with less severe measures⁴. Thus, the employer will be able to apply the termination process provided it is based on a valid reason if he/she cannot prevent the employee from losing his/her job in the workplace despite taking all the available measures⁵.

The idea of terminating the employment contract only as a last resort first arose from the decisions of the German Federal Court. The Federal Court proposed some alternatives to the termination of a particular contract and invalidated the employer's application to terminate the agreement while such alternatives were available. Later, these alternatives were added into the law with the amendments made to the German Law on Protection against Termination in 1969 and 1972. It is stipulated in German Law that termination notices will be invalid while it is possible to implement the alternatives mentioned⁶. Pursuant to this principle, which is also covered under the principle of proportionality in German Law, termination should be applied when it is appropriate and necessary to prevent damages that could occur in the operation of the business and it is proportional with respect to the purpose sought in this sense⁷.

1 **Ali Güzel**, "İş Sözleşmesinin Geçerli Nedenle Feshinde Ultima Ratio (Son Çare) İlkesi ve Uygulama Esasları", A. Can Tuncay'a Armağan, İstanbul, Legal, 2005, p. 61.

2 **E. Murat Engin**, İş Sözleşmesinin İşletme Gerekleri ile Feshi, İstanbul, Beta, 2003, p. 91; **Nuri Çelik/Nurşen Caniklioğlu/Talat Canbolat**, İş Hukuku Dersleri, 31. ed., İstanbul, Beta, 2018, p. 518.

3 **Gülsevil Alpagut**, "İş Sözleşmesinin Feshi ve İş Güvencesi", 3.Yılında İş Yasası: Seminer Notları, Bodrum, Toprak İşveren Yayını, 2005, p. 26.

4 **Polat Soyer**, "Feshe Karşı Korumanın Genel Çerçevesi ve Yargıtay Kararları Işığında Uygulama Sorunları", Legal İş Hukuku ve Sosyal Güvenlik Hukuku 2005 Yılı Toplantısı: İş Güvencesi Kurumu ve İşe İade Davaları, İstanbul, Legal, 2005, p. 51.

5 **Ali Güzel**, "İşletmesel Kararların Keyfilik Denetimine Tabi Olması ve Geçerli Nedenle Fesihte Son Çare (Ultima Ratio) İlkesinin Gözetilmesi", Çalışma ve Toplum Dergisi, Vol.4, 2005, p. 172.

6 **Mustafa Alp**, "Hizmet Akitlerinin Sona Ermesi Ve İşçilik Alacaklarının Güvencesi", İstanbul Barosu, Galatasaray Üniversitesi İş Hukukuna ve Sosyal Güvenlik Hukukuna İlişkin Sorunlar ve Çözüm Önerileri 2002 Yılı Toplantısı, İstanbul, İstanbul Barosu Yayınları, 2002, p. 104.

7 **Engin**, İşletme Gerekleri, p.91; **Alpagut**, İş Sözleşmesinin Feshi ve İş Güvencesi, p. 226.

Termination is the biggest risk that the employee could face in the job security system. Therefore, taking measures to maintain the employment contract instead of termination will prevent this risk from occurring. The job security system primarily looks out for the interests of the employee. Protecting the job of the employee, which is a means of livelihood, is of great importance. On the other hand, job security is also important as far as the employer's economic interests are concerned. It is possible for an employer who does not terminate the contract in accordance with the provisions in the law to face compensation. Moreover, this system also has a social aspect with regards to unemployment⁸. Therefore, not complying with the principle of ultima ratio that is acknowledged in the job security system causes the employee to lose his job and for the employer to incur an additional cost. On the other hand, in a work system where this principle is applied consistently, the employee will not have the fear that he/she might lose his/her job at any time. Thus, work harmony between the employee and the employer will not get disrupted and this will increase productivity. In summary, generally, the things that could be said about the importance of the job security system could also be repeated for the principle of ultima ratio.

B. Limits

The legal basis for the principle of ultima ratio arises from the principles of good faith, not abusing rights, contract commitment and trust. According to this, each party makes every effort to ensure the continuity of the contract and the other party's fulfilment of its obligations in particular. When the relevant principle is adapted to the employment contract, it is concluded that the employer should make all efforts to ensure the continuity of the contract and the employee should make all efforts to fulfil his/her obligation to work⁹. Indeed, maintaining the contract is fundamental in the job security system and termination of the agreement is an exception¹⁰. Moreover, the principle of ultima ratio is also closely related to the principle of good faith. The principle of good faith has a regulating character and can be directly applied to every legal relation¹¹. Everybody is obliged to comply with this principle when exercising their rights and fulfilling their obligations. The principle requires a fair and reasonable employer to make necessary efforts to maintain the employment contract before the termination of the contract. Thus, the right of termination of the employment contract is a right that should be exercised within the frame of the principle of good faith.

8 **Gülsevil Alpagut**, "Yargıtay Kararları Işığında İş Güvencesi ve Çalışma Koşullarında Esaslı Değişiklik", *Bankacılar Dergisi*, Vol.65, 2008, p. 89.

9 **Ali Güzel**, "İş Güvencesine İlişkin Yasal Esasların Değerlendirilmesi", İstanbul Barosu, Galatasaray Üniversitesi İş Hukuku ve Sosyal Güvenlik Hukukuna İlişkin Sorunlar ve Çözüm Önerileri 2004 Yılı Toplantısı, İstanbul, İstanbul Barosu Yayınları, 2004, p. 76; **Mustafa Kılıçoğlu**, "4857 sayılı İş Kanunu'nun 18. Maddesinin Yorumu", A. Can Tuncay'a Armağan, İstanbul, Legal, 2005, p. 474; **Polat Soyer**, "Küresel Kriz Sürecinde İşletme Gereklere Dayanan Fesihler ve İstihdam Sorunu", *Sicil İş Hukuku Dergisi*, Vol.12, 2008, p. 71.

10 **Sarper Süzek**, *İş Hukuku*, 16. edi., İstanbul, Beta, 2018, p. 593.

11 **Halil Akkanat**, *Türk Medeni Hukukunda İyiniyetin Korunması*, İstanbul, Filiz Kitabevi, 2010, p. 11.

Fundamentally, the source of the principle of ultima ratio also shows the limits of it. Indeed, it should not be overlooked that even the implementation of the principle of ultima ratio has limits. In other words, it is wrong to think that the principle of ultima ratio imposes an unlimited obligation on the employer to choose less severe measures. Expecting the employer to take less severe measures instead of termination can be accepted when it is both legally and practically possible¹². The alternatives of termination should not intensely interfere with the freedom of operational decision.¹³ Similarly, the employer should not be forced into a structure in the workplace that he/she would not be willing to accept. On the other hand, the alternatives that can be used instead of termination should be suitable for the employer to achieve his/her purpose. For instance, it should not be expected from the employer to resort to a very expensive resolution¹⁴. Likewise, the employer does not have the obligation to choose any other alternative if he/she cannot achieve the envisaged purpose with other measures¹⁵. The employer should not be forced to make such a choice even though these measures are more favourable to the employee but do not fit the employer's purpose. As can be seen, implementation of the principle of ultima ratio is not a rule which is absolute and should be accepted in every case. This rule occurs in the cases where the employer has abused his/her right of termination and it is one of the principles that is considered when determining that the termination is legally invalid.

The review of valid termination should be distinguished from the review of the employer's making a decision about his/her business. The operational decision is a reflection of the employer's right to manage. The right to manage is one of the sources of labour law. However, it is inferior to other sources. Therefore, the right to manage is restricted by other labour law sources that are superior to it¹⁶. It is not possible to use the right to manage contrary to law both in regards to the continuity and the expiration of the employment contract. A decision of termination that is based on an operational decision is also subject to a judicial review. Undoubtedly, the employer has the freedom to make a decision on his/her business to protect its economic future. Besides, economic consequences of these decisions will occur over the employer¹⁷. Therefore, operational decision and the purpose of this decision are not directly evaluated in the review of the termination. In the first place, the valid

12 **Soyer**, Feshe Karşı Koruma, p. 52.

13 For detailed information about operational decision, see **Engin**, İşletme Gereklere, p.51 ff; **Bektaş Kar**, "İşletme, İşyeri Ve İşin Gereklere Kaynaklanan Nedenlere Dayalı Fesihlerde Yargısal Denetim", Çalışma ve Toplum Dergisi, Vol.17, 2008, p. 107 ff.

14 **Süzek**, İş Hukuku, p. 594; **Engin**, İşletme Gereklere, p. 92; **Hamdi Mollamahmutoglu/Muhittin Astarlı/Ulaş Baysal**, İş Hukuku, 6.edi., Ankara, Turhan Kitabevi, 2014, p. 1013; **Alp**, Hizmet Akitlerinin Sona Ermesi, p. 105.

15 **Muhittin Astarlı**, "Genel Ekonomik Kriz Dönemlerinde İşletme Gereklere Nedeniyle Fesih ve Kısa Çalışma İlişkisi", Sicil İş Hukuku Dergisi, Vol.17, 2010, p.81.

16 **Gaye Burcu Yıldız**, "Türk İş Hukukunda Orantılılık İlkesi", Prof. Dr. M. Polat Soyer'e Armağan I, DEÜHFED, Özel Sayı, 2013, p. 686.

17 **Ömer Ekmekçi**, "Değerlendirme", Legal İş Hukuku ve Sosyal Güvenlik Hukuku 2005 Yılı Toplantısı: İş Güvencesi Kurumu ve İşe İade Davaları, İstanbul, Legal, 2005, p. 173.

reasons that are put forward by the employer are reviewed. As a second step, even if a valid reason exists, the proportionality of the termination is examined. Namely, when the termination of the employment contract is reviewed, termination as an operational measure can only be made as a result of an operational decision. Therefore, reviewing whether the termination is applied as a last resort does not interfere with the freedom of operational decision¹⁸. Evaluations which would intervene in the operational decisions should not be conducted while reviewing whether the principle of ultima ratio is followed or not. Indeed, in the Supreme Court decisions, it is emphasised that the judicial review with regards to the termination based on the business requirements is not about the operational decision. As per the Court's decision, a review on whether or not the operational decision is beneficial or fit for the purpose is not conducted. The employer can freely determine the purpose and the content of the operational decision. However, the employer should prove that the measure he/she has taken to enforce the operational decision has necessitated the termination and that the termination is based on a valid reason¹⁹.

It should be noted that examining whether the principle of ultima ratio is applied only becomes an issue when a valid reason for the termination exists. Namely, examining whether termination is being applied as a last resort is only carried out if the reason that the employer gives is based on a valid reason. It is not necessary to examine the principle of ultima ratio when the given reason is not valid. In this case, termination will be deemed invalid since it is not based on a valid reason²⁰.

III. The Implementation of The Principle of Ultima Ratio in Turkish Labour Law

A. In General

The principle of ultima ratio is not explicitly regulated under Labour Law No. 4857. However, it is stated in the reasoning of Article 18 that termination should be applied as a last resort as follows; "It is expected from the employer to consider the termination as a last resort when implementing this practice. Therefore, it should be consistently examined whether there is a possibility to avoid the termination when making a comment in accordance with the concept of the valid reason." Even though the reasoning has such a provision, it is not possible to achieve a conclusion regarding the principle of ultima ratio from the wording of the law. However, as indicated above, the principle of ultima ratio should be acknowledged when the general principles of law and the principles specific to labour law are considered. The dominant opinion in the

18 Astarlı, Genel Ekonomik Kriz, p. 84.

19 Y. 9.HD, 15.6.2015, 9946/12122; 9.HD. 24.9.2008, 30742/24595, (Online), www.kazanci.com, 25.03.2019.

20 Süzek, İş Hukuku, p. 594.

doctrine also acknowledges the existence of the principle of ultima ratio²¹. However, as a counter-opinion, it is stated that the employer does not have the obligation to apply to termination as a last resort since the reasoning of the article is not of binding nature and the principle of ultima ratio is not regulated under the law. Pursuant to this opinion, for instance, the employer is not required to take other measures such as offering a new job or providing training when a part of a workplace is closed down. This would be an excessive intervention in the employer's decisions²².

The Supreme Court sought compliance with the principle of ultima ratio in its decisions as regards to the review of termination²³. Pursuant to the High Court, a valid reason cannot exist if it is possible to achieve the desired purpose with the operational decision by any means other than termination. Termination should not be resorted to when there is the possibility of achieving the purpose by removing overtime, bringing in flexible working arrangements with the employee's consent, extending the time of the work, placing the employee in another job or providing on-the-job training²⁴. The measures that will be taken within the scope of ultima ratio and the practice of the Supreme Court are provided below.

In our law, the principle of ultima ratio first came to the fore with regards to termination based on business requirements. Indeed, in the reasoning of the relevant article of Law No. 4773 under which the job security system first came into force, it is explained that the employer is expected to consider termination as a last resort when making a termination arising from the business. Again, in the reasoning of the relevant article, cancelling overtime, shortening the working period with the employee's consent, introducing flexible working arrangements and providing on-the-job training are listed as the measures within the scope of ultima ratio. The Supreme Court has started to search for termination criteria based on the business requirements for reasons based on employees. As for today, the principle of ultima ratio is also applied to termination of employee's due to incapacity or behaviours²⁵.

It is emphasized in the doctrine that the measures which the Supreme Court introduced when reviewing the termination sometimes exceed the purpose of

21 **Nuri Çelik**, *İş Güvencesi*, İstanbul, Beta, 2003, p. 8; **Tankut Centel**, *İş Güvencesi*, İstanbul, Legal, 2013, p. 113; **A.Can Tuncay**, "Geçerli Nedenle İş Sözleşmesinin Feshi ve İşe İade Davaları", TÜSIAD İş Kanunu Toplantı Dizisi IV, İstanbul, 2007, p. 24; **Münir Ekonomi**, "Yeni İş Kanunu Çerçevesinde İş Sözleşmesinin Feshi ve İş Güvencesi", TÜSIAD İş Kanunu Toplantı Dizisi I, İstanbul, 2005, p. 50; **Çelik/Caniklioğlu/ Canbolat**, *İş Hukuku*, p. 518; **Süzek**, *İş Hukuku*, p. 593; **Güzel**, *Son Çare İlkesi*, p. 70; **Soyer**, *Feshe Karşı Koruma*, p. 51; **Alpagut**, *İş Sözleşmesinin Feshi ve İş Güvencesi*, p. 227; Engin, *İşletme Gereklere*, p. 91.

22 **Ömer Ekmekçi**, "Yargıtay'ın İşe İade Davalarına İlişkin Kararlarının Değerlendirilmesi", *Legal İHSGHD.*, Vol.1. 2004, p. 168.

23 Y. 9.HD, 28.4.2008, 2007-33518/10645, *Legal İHSGHD.*, Vol.19, 2008, p.1123; Y. 9.HD, 16.12.2004, 27003/279998, **Güzel**, *Keyfilik Denetimi*, p.159; Y. 9.HD. 22.3.2007, 36997/8174, (Online), www.calismatoplum.org, 20.03.2019.

24 Y. 9.HD, 3.4.2014, 761/11250, 9.HD. 5.12.2005, 35749/38673 (Online), www.calismatoplum.org, 20.03.2019.

25 **Süzek**, *İş Hukuku*, p. 594; **Tuncay**, *Geçerli Nedenle İş Sözleşmesinin Feshi*, p. 24; **Alpagut**, *İş Sözleşmesinin Feshi ve İş Güvencesi*, p. 227;

the principle of ultima ratio²⁶. The High Court ruled in one of its decisions that termination cannot be valid since measures such as reducing representation and marketing expenses, and making savings in the fees for telephones provided to the representatives were not taken. This decision was criticized in the doctrine on the basis that the above-mentioned measures were not alternatives to termination, and that the relevant measures were not less severe for the employer and did not fit the employer's benefits²⁷.

The principle of proportionality is also the main principle used as a base in the implementation and content of the principle of ultima ratio in Turkish law. The principle of proportionality arises from the implementation of righteousness and trust rules. This principle, which first arose in public law, is also acknowledged in private law. Whether or not there is a reasonable relationship between the means and the purpose is examined in the course of the review of proportionality. The review of proportionality in private law is the comparison of two values which run counter to each other and which the law protects²⁸. The principle of proportionality should be considered when exercising constitutive rights because these are the rights which are being granted by the law and which provide the power to intervene in the third party's rights protected by law in private law. Specifically in terminations based on business requirements, the principle of proportionality is frequently resorted to when deciding between eliminating the need for labour and maintaining the employment relation.

It could be said that the principle of ultima ratio should be applied in the Turkish law both within the meaning of Article 2 of the Civil Code and in accordance with the existence purpose of the job security system. However, the implementation of this principle should not be of an absolute character and it should be evaluated by the judge in regards to the facts of each termination. In our country, due to the impact of economic crises, there has been an increase in the number of employees who request termination of the employment contract or urge the employer to do so by not accepting the alternatives asserted by the employer with a view to getting notice pay and severance pay. Accordingly, the purpose of the principle of ultima ratio should not be perceived as the absolute continuity of the employment relation. It should not be forgotten that one of the required criteria for the principle of ultima ratio is that the use of the alternatives asserted prior to the termination should be equally convenient for the employer, and that the employer should also be achieving the result desired to be attained with termination by means of relevant alternative measures. On the other

26 **Fevzi Şahlanan**, "Bireysel İş İlişkisinin Sona Ermesi ve Kıdem Tazminatı Açısından Yargıtay'ın 2003 Yılı Kararlarının Değerlendirilmesi" Yargıtay'ın İş ve Sosyal Güvenlik Hukukuna İlişkin 2003 Yılı Kararlarının Değerlendirilmesi, Ankara, 2005, p. 98; **Soyer**, Feshe Karşı Koruma, p. 54; **Tuncay**, Geçerli Nedenle İş Sözleşmesinin Feshi, p. 24.

27 **Şahlanan**, 2003 Yılı Kararları, p. 98; **Soyer**, Feshe Karşı Koruma, p. 54.

28 **Yıldız**, Orantılılık İlkesi, p. 682.

hand, when reviewing the compliance with the principle of ultima ratio; an appropriate review for the case at hand should be conducted and the concrete measures that could be resorted to instead of the termination should be examined and explained²⁹.

B. The Measures Taken within the Principle of Ultima Ratio and the Practice

Valid reasons for termination should primarily exist in order to consider termination as valid. These reasons can be related to the employee or to the business. If the employer can achieve the desired purpose of the termination in any other way, then this way should first be utilized despite the existence of a valid reason for termination. Accordingly, the principle of ultima ratio means that termination is inevitable despite the employer doing his/her best to keep the employee in the workplace³⁰. The employer should resort to measures other than termination before termination. These measures are explained in the doctrine and in the judicial decisions. It should be noted that these measures vary as to whether the reason for termination relates to the employee or to the business. Particularly, in the reasons arising from the business, the measures that could be taken as a last resort are more diverse than the reasons arising from the employee.

In the first place, measures that could be taken in cases of termination arising from the behaviour and incapacity of the employee are those that avoid the implementations that could have an adverse effect on the employment³¹. In this regard, the employer should examine the conditions for the employee to keep working in the workplace. The employer is obliged to transfer the employer to a vacant position if the workplace has such a vacancy. Hiring another employee from outside and dismissing the employee cannot be accepted if there is a job that is suitable for the employee³². However, such an obligation does not exist if the relevant employee is not qualified for the position in a professional and personal sense³³. A decision of the Supreme Court can be given here as an example. In the case in point, an employee who had fallen short of the standards required for being a flight attendant due to being overweight had his contract of employment terminated. However, the High Court decided that it should be examined whether it was possible to assign this person a position in ground handling services³⁴. This decision was criticized on the grounds that it is necessary to preserve the delicate balance between protecting the employee from termination and

29 Çelik/Caniklioğlu/Canbolat, *İş Hukuku*, p. 518; Engin, *İşletme Gereklere*, p. 92; Kar, *Yargısal Denetim*, p. 125.

30 Centel, *İş Güvencesi*, p. 113.

31 Güzel, *Son Çare İlkesi*, p. 73.

32 Süzek, *İş Hukuku*, p. 595.

33 Alpagut, *İş Sözleşmesinin Feshi ve İş Güvencesi*, p. 227.

34 Y.22.HD. 18.6.2012, 11598/23353, Fevzi Şahlanan, "İşçinin Fiziki Yetersizliği Nedeniyle İş Akdinin Feshi", *Tekstil İşveren Dergisi*, Ocak 2014, p. 2.

the employer's right to manage while operating the job security system³⁵. In another case, an employer who was working as a regional manager in the workplace, had his/her contract terminated upon closure of certain departments including the department in which he/she was working. The Court of Appeal found that eighty persons were hired as medical promotion officers following the termination and decided to examine whether this job was offered to the employee under the principle that termination is the last resort³⁶.

Another decision of the Supreme Court on termination due to the employer's competence is highly interesting. In the relevant case, the plaintiff employee was working as a driver of a local public transport vehicle. The employee was admitted to psycho technical evaluation after having frequent accidents and it was determined that he/she was incompetent in visual continuity, visual perception, speed distance prediction and vision on traffic tests. After all evaluations had been completed, it was indicated in the report given by the experts that the driver was lacking the basic skills and abilities to use a vehicle and thus it was risky for the employee to work. The contract of the employee, who had been involved in eleven accidents in five years, was terminated for this reason. The High Court, after indicating that it was not appropriate to employ the employee as a driver, decided that as the defendant employer was a large public body with a large number of employees, the possibility of the plaintiff working in another unit should be examined upon consideration of his education and experience³⁷. However, in doctrine, this decision of the Supreme Court was referred to as the intervention of the judiciary in the employer's right to manage. Pursuant to this opinion, this assessment of the court will also neutralize the law. Therefore, pursuant to the existing job security system, not only the incapacity of the employee but also the unavailability of another job in the workplace in which the employee can be employed will be necessary for terminating the employment contract. Such a ruling does not comply with the legal regulation on the job security system³⁸. However, there are also opinions which consider the decision accurate within the principle of ultima ratio and stress the importance of the continuity of the employment contract in the job security system³⁹.

In cases of termination arising from reasons given by the employee or the business, if the employer has more than one workplace, it should also be examined whether it is possible to employ the employee in the other workplace as a last resort⁴⁰.

35 **Şahlanan**, İşçinin Fiziki Yetersizliği, p. 4.

36 Y. 9.HD. 31.3.2014, 791/10660, (Online) www.legalbank.net, 20.03.2019.

37 Y. 9. HD, 12.6.2007, 8740/18743, (Online) www.legalbank.net, 20.03.2019.

38 **Fevzi Şahlanan**, "İşçinin Mesleki Yetersizliği Sabit Olmasına Rağmen Çalıştırılabileceği Başka Bir İşe İadesi" , Tekstil İşveren Dergisi, Haziran 2008, p. 3.

39 **Talat Canbolat**, "Psiko Teknik Muayenede Yetersiz Görülen İşçinin Şoför Olarak Çalıştırılması Doğru Olmayacağından Önceki İşyerine, Çalıştırılması Mümkün Olan İşe İadesine Karar Verilmesi Gerekir", Sicil İş Hukuku Dergisi, Vol.9, 2008, p. 75.

40 Y. 9.HD. 12.7.2010, 26822/22726; 9.HD, .4.6.2007, 7926/17965, (Online) www.kazanci.com, 20.03.2019.

It goes without saying that the job in the other workplace should be appropriate to the employee's qualifications. The employer would not be expected to apply the principle of ultima ratio if there is no work appropriate to the employee's qualification in the other workplace. On the other hand, these workplaces should belong to the same natural or legal persons. The employer does not have the obligation to explore employment possibilities in another workplace that is a legal entity which is under the same group of companies⁴¹. It is also not required for the other workplace under question to be in the same line of business or the same city. Particularly in the case of closing down of a workplace, which is a reason arising from the business, it should also be explored whether the employee has the possibility of working in another workplace if the employer has such a place. However, contrary to this opinion, it could be stated that it is the decision of the employer to fulfil the need for the personnel in the workplace by either hiring a new employee or transferring an employee within the business. Pursuant to this opinion, it is the employer who can decide which choice is more appropriate and economic rather than the judiciary. Because it is the employer who completely bears the economic risk that this decision would create⁴².

The High Court explained in one of its decisions regarding the matter that the companies affiliated with the same holding should be considered as different employers and thus the employer does not have the obligation of taking on the employee in these places. It was concluded in the same decision that, considering the employee was working in a department where production had almost completely come to a halt, it would be impossible to employ the employee in the sales and marketing department since sales and marketing is a job that requires training, knowledge and experience⁴³. As can be seen, employing the employee in a new workplace should only come to fore when jobs that are appropriate to the employee's qualifications are available. Termination should be deemed valid when the employee's experience or training is not proper to perform the job.

In another case in the Supreme Court decision, after the holding decided to downsize, the companies affiliated with the holding were affected by this decision and resorted to dismissal after applying austerity measures. The Supreme Court in its decision on the matter stated that first, the purpose of the operational decision cannot be reviewed by the judiciary. It was explained in the decision that the inevitability of the termination would be reviewed within the technical frame rather than by an economic review, namely whether or not it terminated the possibility for the employee to work. In conclusion, the court decision emphasised that the inevitability of the

41 **Süzek**, İş Hukuku, p. 596; **Tuncay**, Geçerli Nedenle İş Sözleşmesinin Feshi, p. 24; **Centel**, İş Güvencesi, p. 114.

42 **Ekmekeçi**, İş Güvencesi Kurumu, p. 173.

43 Y. 9.HD, 24.3.2008, 7977/6091, (Online) www.legalbank.net, 20.03.2019.

termination should be examined in the light of whether or not the decision made by the company had been applied consistently⁴⁴.

With regards to reasons for termination arising from the business, another measure that should be taken within the principle of termination being a last resort is subjecting the employee to on-the-job training⁴⁵. The employer should resort to this measure if the employee can keep working in the workplace after having been trained⁴⁶. For instance, if a product system that is based on new technology is adopted in the workplace, then the continuation of the employment relationship can be ensured by training that would ensure the adaptation to the new technology rather than resorting to termination. However, the relevant training should be reasonable as could be expected from the employer. It cannot be expected from the employer to provide training that would provide a new profession to the employee. This training should be completed in a reasonable period and it should place only a reasonable burden on all concerned. The employment contract of the employee can be terminated on grounds of incapacity if the employee cannot adapt to the job despite the training provided. However, it should be noted that the training provided should be proportional and reasonable for the employer. Training which is a long-term and very expensive is not proportional and reasonable. Again, it should not be expected that the training should be such a training that would bring a new skill or a new profession to the employee.

In the Supreme Court decisions, it is indicated that the employer can resort to measures such as adopting part-time working basis, introducing short-time employment, cancelling overtime, reducing the working hours in the workplace, giving the employee leave without pay⁴⁷, implementing flexible working arrangements in order to ensure the continuity of employment⁴⁸. For instance, if the workplace has a labour force surplus and the termination is made for this reason, then overtime should be terminated⁴⁹. Indeed, in the case of an employer who claims that there is a labour force surplus yet still applies overtime and terminates the employee's employment contract due to the labour force surplus, such a termination can be deemed invalid. However, it should be noted that it is not necessary for the employer to terminate overtime in the entire workplace. In particular, in large workplaces, it is possible to maintain overtime in the departments other than the department where the employees that will be dismissed work.

44 Y. 9.HD. 12.2.2015, 1199/6314, (Online) www.legalbank.net, 20.03.2019.

45 **Engin**, İşletme Gereklere, p. 93.

46 Y. 9. HD, 10.4.2006, 7088/8976, (Online) www.legalbank.net, 20.03.2019.

47 For detailed information see **E. Murat Engin**, "İşletme Gereklere ile Fesih ve Ücretsiz İzin", Legal İHSGHD, Vol.2, 2004, p. 540.

48 Y. 9.HD. 24.2.2016,26193/3803, (Online) www.calismatoplum.org, 20.03.2019.

49 Y. 9.HD, 8.7.2003, 12442/13123, **Tankut Centel**, "Ekonomik Nedenle İşten Çıkarma" Tekstil İşveren Dergisi, Vol.286, 2003, p. 32; 9.HD. 8.11.2004, 12698/25058, Legal İHSGHD, Vol.5, 2005, p. 278.

As in the case of employing the employee in another workplace of the employer, if there is the possibility to place the employee in another job in the same workplace, then this should be chosen first before termination. However, it cannot be expected from the employer to employ the employee in this workplace if there is no available job⁵⁰. On the other hand, the invalidity of the termination should be accepted if the employer does not place the employee in another job fit for him/her yet hires another employee to work there. Not examining whether there is a possibility of employing the employee in another job does not cause the invalidity of the termination per se. What is important for the validity of the termination is whether it is actually and really possible to employ the employee in another job in the workplace⁵¹.

The measures that could be taken as a last resort usually mean making changes in the employee's working conditions. Basically, changing the job or workplace of the employer, giving leave without pay, moving to a flexible working arrangement mean material alterations in the working conditions. It cannot be said that a valid reason for termination exists if the employee can work with the changed conditions. In this sense, measures such as changing the working conditions, reducing premiums and bonuses or even the salary could be resorted to. The consent of the employee is required pursuant to Article 22 of Labour Law if the relevant change introduces a material change against the employee. The measure that was taken as a last resort can be applied if the employee gives consent, yet termination of change could come to the fore when the employee does not give consent⁵².

IV. Conclusion

The general rule within job security is to maintain the employment contract as long as possible and prevent the employee from losing his/her job. Therefore, valid reasons for termination are listed and termination is subjected to a certain form. However, despite the existence of these valid reasons, the employer's termination based on this reason is limited by also introducing certain principles. The principle of ultima ratio, which is also covered under the principle of proportionality and essentially based on the principle of good faith, is one of these principles.

The principle of ultima ratio means that all possible means to avoid termination before terminating the contract should be used and the employment contract could be terminated if it cannot be maintained. It should be also consistently examined whether there is a possibility to avoid the termination. Therefore, certain principles should be resorted to in the course of reviewing termination although this is not regulated under Labour Law. The principle of ultima ratio is a principle that is set

50 **Alpagut**, İş Sözleşmesinin Feshi ve İş Güvencesi, p. 228.

51 **Kar**, Yargısal Denetim, p. 124.

52 **Süzek**, İş Hukuku, p. 597.

forth in the decisions of the Supreme Court and the doctrine although it was not introduced by the Labour Law. This principle, which was first acknowledged for the termination based on the business requirements, has also been applied later to the reasons arising from the employee.

It should also be carefully examined whether the measures that should be taken are expedient when implementing the principle of ultima ratio. The measures which are excessively expensive for the employer should not be considered as a last resort. On the other hand, the employer is not obliged to implement the measures that were taken if the relevant measures do not comply with the purpose desired to be achieved with the termination. The expediency of the measures taken should be evaluated specific to each case.

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