

Labour and Employment Law



Read all about it

Labour and employment law update

“To Penalize or Not to Penalize” – Question Resolved by Appeal Court Finally

Mine Selin Gür

Summary

Following years of conflicting decisions, Court of Appeal General Assembly Resolved the Legal Conflict over Contractual Penalty Clauses in Fixed Term Contracts

The decision

In recent years, increasing demand for flexibility from employers has led to a growing use of fixed term employment contracts in the labor market. This rapid increase has given rise to a number of employment disputes between employers and employees and this trend became a hot issue in labor law discussions in Turkey.

For over 10 years, different chambers of the Appeal Court have reached conflicting conclusions on the legal status of penalty clauses agreed in the fixed term employment contracts in case of an unjustified termination before the agreed end date.

Recently, the Appeal Court’s General Assembly on the Unification of Judgements (“**Assembly**”) decided to review this legal conflict to ensure that laws are interpreted uniformly among the different chambers of the Appeal Court. Finally, a binding decision has been rendered by the Assembly and was published in the Official Gazette on 18 June 2019.¹

Fixed term employment: Background

By way of definition, a fixed-term employment is a non-standard relationship between an employee and an employer that lasts for a particular term or ends on completion of a task as agreed between the parties. Unless otherwise agreed, the employer does not have to give any notice or rely on a justified reason to terminate a fixed term employment relationship; it will end automatically when it reaches the agreed end date.

There are a number of reasons for engaging employees on a fixed-term employment basis.

From the employers’ point of view, one of the main reasons is to have the ability to take certain management decisions in response to potential fluctuations in business fortunes and to adjust the workforce expeditiously by making speedy modifications to the work force.

Other reasons might be replacement of employees who are temporarily absent from work, performance screening before offering a permanent position to an

¹ The Decision of the Appeal Court’s General Assembly on the Unification of the Judgement dated 08.03.2019 and numbered 2017/10E 2019/1K

<https://www.resmigazete.gov.tr/eskiler/2019/07/20190718-11.pdf>

employee or simply a cost saving - in fact, fixed term employment can be a way to avoid potential termination costs by avoiding unfair dismissal claims and its potential costs.²

Under a fixed-term employment contract, an employee's not being entitled to receive notice and severance payments and the inability to benefit from the provisions of job security creates significant disadvantages. Thus, the employer's increasing desire for flexibility creates concerns around financial stability and job security especially for the employees in the early stages of their career.

Due to the vulnerable nature of the employees' and their being subject to market demands, the Turkish Labor Code requires fixed term employment to be limited to exceptional circumstances, so as to avoid abuse and to ensure that employers fulfill their duties with regards to the basic principles of employment law.

Limited to objective conditions

As a result of the abovementioned concerns, the Turkish Labor Code restricts the use of fixed term employment contracts to a specific set circumstances.

According to the Article 11 of Turkish Labor Code, a written contract which is executed between an employer and an employee is called a fixed term employment provided that it is based on objective conditions such as:

- The completion of a specific work task or project
- Completion of the work requires a certain period of time (seasonal work)
- In circumstances where extraordinary conditions arise

Since the use of such contracts must be limited to specific circumstances, they

cannot be used whenever the employer desires but must be justified with an objective reason. Any infringement of the rules on the justification for fixed term contracts leads to the employment contract being considered to have been executed for an indefinite period from the commencement of the employment agreement.

In this case, the employer would not be able to benefit from the advantages of the fixed term contracts provided under law. Perhaps contrary to expectations, hiring an employee under a fixed term contract can result in significant economic liability for employers when not properly managed.

Discussion: Legal Status of Contractual Penalty Clause Upon Premature and Unjustified Termination

As mentioned earlier, a fixed-term contract automatically ends when it reaches the agreed end date. In order to prevent any termination without justified reason before its agreed date, parties may agree on a contractual penalty. In case of an unjustified termination before the agreed date, the parties will be liable for a penalty payment.

Although the contractual penalties are not regulated under Turkish Labor Code, the provisions of the Turkish Code of Obligations and the relevant Supreme Court precedents allow parties to agree on such penalties in a fixed-term employment contract, provided that it is agreed in a written form and applies to both the employer and the employee.

However, the question to be tackled is whether a penalty clause is still applicable in case a fixed term contract is considered as a contract signed for indefinite period because it fails to meet the objectivity criteria required by law.

² Non-standard employment around the world: Understanding challenges, shaping prospects International

In some employment disputes heard before the courts, the defendants asked the court to declare them exempt from the penalty clause by claiming that the contract does not meet the objectivity criteria of a fixed term employment and it should be deemed as an open-ended contract - which makes it impossible to include a penalty clause based on its duration.

For some scholars such as Suzek³, Baycik⁴ or Alpagut⁵, even if the fixed-term contract would be considered as an open-ended contract upon infringement of the rules on justification, the penalty clause should be considered as being valid under the principles of the freedom of contract. Further, the employer itself cannot benefit from its own mistake or misconduct since it would be against good faith principles.

The 22nd Civil Chamber of the Appeal Court rendered its decision on this basis by stating that the will of the parties should be protected in accordance with the Turkish Code of Obligations and the penalty clause should be considered as valid even if the contract itself is deemed as open-ended due to the lack of objectivity required by law.⁶

On the other hand, some scholars such as Ekonomi⁷ and Gumrukcuoglu⁸ argue that the penalty clause of the fixed term employment should not be applicable if the court considers the contract as a contract for an indefinite term. Since the

parties' reason for agreeing on a penalty clause is based on its duration, in case the duration itself is considered inapplicable, the penalty clause should also be null and void.

Contrary to the 22th Civil Chamber of the Appeal Court decisions, the 9th Civil Chamber of the Appeal Court rendered decisions in the same vein as Ekonomi and Gumrukcuoglu and held that the penalty clause cannot be valid in case the contract itself would be deemed as open-ended due to the lack of objective conditions.⁹

Final Decision of the Assembly

Finally, the Assembly reviewed this issue to ensure that laws are interpreted uniformly among the chambers of the Supreme Court and rendered its final and binding decision. In its decision, it is stated that:

In Turkish Labor Law, it is essential that the employment contract is conducted for indefinite duration since it is in favor of the employees. In order for a fixed-term contract to be binding, the parties should meet the necessary requirements being the objectivity criteria required by law.

In case that one of the parties cannot meet the objectivity criteria, the contract should be deemed as signed for an indefinite period from its commencement date. However, this issue is related to the

³ Suzek, S.: İş Hukuku, 16th Edition, İstanbul 2018 p. 729, 730

⁴ Baycik, G.: "İş İlişkisinin Kurulması, Hükümleri ve İşin Düzenlenmesi", Seminar on Discussions on Labor Law and Social Security Law Decisions of the Court of Appeal 2016, İstanbul 2018, p. 185-190

⁵ Alpagut, G.: "İş İlişkisinin Kurulması, Hükümleri ve İşin Düzenlenmesi", Seminar on Discussions on Labor Law and Social Security Law Decisions of the Court of Appeal 2014, İstanbul 2017, p. 43-48

⁶ The decision of the 22nd Civil Chamber of Court of Appeal dated 20.03.2014 and numbered 2013/6500E-2014/6727K ; The decision of the 22nd Civil Chamber of Court of Appeal dated 29.05.2014 and numbered 2013/12632 E.-2014/15162 K.; The decision of the 22nd Civil Chamber of Court of Appeal dated 17.02.2015 and numbered 2013/31698 E.-2015/5108 K; The decision of the 22nd Civil Chamber of Court of Appeal dated 9.11.2016 and numbered

2015/18939 E.- 2016/26066 K

⁷ Ekonomi, M: "Belirli Süreli Hizmet Akdinin Susma ile Yenilenmesi", İş Hukuku Dergisi, Volume:3, Number:3, p. 565-571

⁸ Bozkurt Gümrükçüoğlu, Y.: "Türk İş Hukukunda Belirli Süreli İş Sözleşmeleri", İstanbul 2012, p. 362

⁹ The decision of the 9th Civil Chamber of Court of Appeal dated 15.10.2010 and numbered 2008/41104 E.-2010/29200 K.; The decision of the 9th Civil Chamber of Court of Appeal dated 26.12.2013 and numbered 2011/48912 E.-2013/35045 K.; The decision of the 9th Civil Chamber of Court of Appeal dated 08.07.2014 and numbered 2012/25901 E.-2014/23554K.; The decision of the 9th Civil Chamber of Court of Appeal dated 25.12.2014 and numbered 2014/36059 E.-2014/40181 K.; The decision of the 9th Civil Chamber of Court of Appeal dated 04.04.2017 and numbered 2017/3977 E.-2017/5968 K.

legal character of the contract and the legal status of any penalty clause should be evaluated separately.

In accordance with the principle of freedom of contract under Turkish Law, the parties have the right to sign an agreement and freely determine its provisions without any restrictions, provided that it is not prohibited by law. In fact, in signing a fixed term agreement with a penalty clause, both parties have their own aim; as the employer guarantees employee's performance, while the employee has the protection of job security during the agreed period in the contract. The main purpose of the parties is to dissuade the other party from unjustified termination before the agreed end date.

In light of the abovementioned reasons, the will of the parties at the date of signature should be preserved even if the legal character of the contract changes due to the lack of objective conditions. In other words, the fact that a fixed-term employment contract is to be considered indefinite-term due to the absence of objective conditions should not result in the invalidity of the contractual aim of the parties regarding the penalty clause.

Comments

Over the last decade, the judges of the Court of Appeal and legal scholars have disagreed on whether to consider a penalty clause in an employment contract as valid in case of a substantial change in the legal character of the contract upon premature termination.

It looks like the recent decision of the Assembly aiming to end this conflict will be a turning point to clarify this issue for many legal actors, as well as employees and employers.

On the employers' side, the importance of engaging a fixed term employee properly needs more attention than ever.

For many years, -assuming that it would not backfire on employer- it has been a practice for employers to include a penalty clause into employment contracts as a deterrent to prevent any premature termination. As a result of this approach, the stipulated sum agreed in the contracts has been exorbitant rather than being compensatory according to the loss likely to be suffered if the breach occurs.

Given that any breach at the conditions affecting the legal character of a fixed-term contract would not affect the validity of the penalty clause, employers now face a more significant economic risk by being required to pay the penalty sum on top of the termination and job security costs.

Employers have tended to use fixed term employment contracts to save on labor costs and to have more flexibility in the workplace but now mismanagement of the process may cause a lot more trouble down the road. Ultimately, employers should be more careful in how they frame employment conditions during the hiring process and consider what legitimate benefit they are seeking to protect.



Mine Selin Gür
Associate

mine.sayari@
senguler.av.tr

+90 212 361 50 66

Şengüler & Şengüler is recognized as a leading Turkish law firm which has been in business for nearly 16 years. Our firm is the successor of Scottish International Energy firm Ledingham Chalmers and was originally known for its strong energy, M&A and corporate law practices. The firm provides general support to mainly foreign investors across a number of sectors.

This publication was last updated on February 2020 and is intended as a guide only. The information contained therein is of a general nature and is not suitable as a basis for decisions in individual cases without previous specific advice. In particular, it cannot replace the provision of individual and case-specific legal advice. We do not assume any liability for the completeness and accuracy of the information contained in this publication.

www.senguler.av.tr

© Senguler & Senguler Law Firm

All rights reserved.