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DISCRIMINATION COMPENSATION IN TURKISH LABOUR LAW[1]

TÜRK İŞ HUKUKUNDA AYRIMCILIK TAZMİNATI

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ABSTRACT

The prohibition of discrimination that exists to establish the justice is indicated by the principle of equality. The principle of equality in labour law obliges the employer to treat equally to all the employees who are in similar situations unless judicious and justifiable reasons. In that manner, discriminatory attitudes that the employers might be exposed to are forbidden. Employer has to respect both prohibition of discrimination and equal treatment rule in employment relationship in labour law.

Discrimination is prohibited in documents of international and Council of Europe and in European Union (EU) Law and Turkish Law. Prohibition of discrimination is regarded as a requirement of the principle of equality in Turkish Law. Turkish Labour Law and other laws include the provisions concerning prohibition of discrimination. The principle of equality is beased on the Constitution of the Republic of Turkey and Turkish Labour Act no 4857. In Turkish Labour Act no. 4857, there is a direct legislation and a sanction about not discriminating employees because of the reasons of their sexes, religions, communions, political views, philosophic thoughts etc. and compensation about discrimination. The employer must comply with the principle of equality. Accordingly, the employer can not discriminate among the employees who are in the same position while establishing personel relations, managing the work life, embodying the working conditions, distributing the job responsibilities and terminating the employment contract and finishing the relationship as long as the employer do not have a fair and a justifiable reasons to do that.

The article 5 of Labour Act no.4857 states that employers are forbidden to discriminate and regulates the burden of proof privately in the case of assertion of discrimination. Furthermore it constitutes judicial and criminal enforcements in order to implement the prohibition of discrimination properly. Discrimination Compensation which is one of the compensation paid by the employer to the employee occurs the violation of the employer's principle of equality. The sanction which shall be implied in case of the infringement to the equality principle must be effective, dissuasive and proportionate. .Change of the burden of proof, claim of discrimination compensation distinct from other compensations and most importantly, impose sanction the obligation of equal treatment of Turkish Labour Law is an important regulation.

In this study we assess discrimination compensation within the frame of Turkish Labour Act No.4857. In this respect; employer's equal treatment liabilty, prohibition of discrimination has been defined and explained and its legal qualifications have been underlined at first in the scope of national legislation. After indicating the entitlement conditions for the discrimination compensation and burden of proof and quantity of this compensation has been evaluated within the framework of the Labour Act No.4857. Moreover, some important regulations regarding the principle of non- discrimination in international law are also taken into account in this study alongside domestic resources of law. Finally, in the last part of study, basic terms concerning the subject are examined, and subsequently which treatments may constitute discrimination compensation in workplace are discussed.

Key words: Labour Law, Principle of Equality, Equal Treatment, Discrimination Compensation, Employee-Employer Relations.

ÖZ

Ayrımcılık yasağı adaletin tesisi için var olup, kendisini eşitlik ilkesiyle göstermiştir. İş Hukuku'nda eşitlik ilkesi, iş ilişkisinde işverenin benzer durumda olan çalışanlarına haklı ve makul bir neden olmadıkça eşit davranma hükümlülüğü getirmiştir. Bu anlamda işçinin maruz kalabileceği ayrımcı tutumlar yasaklanmıştır. İş Hukukunda da işveren işçilerine karşı hem ayrımcılık yasağına hem de eşit işlem yapma borcuna uygun davranmalıdır. Ayrımcılık, uluslararası ve Avrupa Konseyi belgelerinde, Avrupa Birliği (AB)

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Hukuku ve Türk Hukuku'nda yasaklanmıştır. Türk Hukuku'nda ayrımcılık yasağı, eşitlik ilkesinin bir gereği olarak kabul edilmiştir. İş Kanunu ve diğer yasalarda ayrımcılık yasağına ilişkin hükümlere yer verilmiştir. Ayrımcılık yasağı başta Türkiye Cumhuriyeti Anayasası olmak üzere 4857 sayılı Türk İş Kanununda yer almaktadır. 4857 sayılı Türk İş Kanununda, işçilerin cinsiyet, ırk, din ve mezhep, dil, siyasi görüş, felsefi düşünce ve benzeri nedenlere dayalı olarak ayrımcılığa tabi tutulamaması ve ayrımcılık tazminatına ilişkin doğrudan bir kural ve yaptırım bulunmaktadır. İşveren eşitlik ilkesine uygun davranmalıdır. Dolayısıyla işveren, işveren haklı bir neden olmadıkça, iş ilişkilerinin kurulmasında, işin sevk ve yönetiminde, çalışma koşullarının düzenlenmesinde ve iş ilişkilerinin sona ermesinde aynı durumda işçiler arasında ayrım yapamaz. 4857 sayılı İş Kanunu'nun 5. Maddesi iş ilişkisinde işverenin doğrudan ve dolaylı ayrım yapamayacağını belirtmiş ve ayrımcılık iddialarında ispat yükünü özel bir biçimde düzenlemiştir. Ayrıca ayrımcılık yasağının etkili bir biçimde uygulanmasını sağlamak amacıyla hukuksal ve cezai yaptırımlar getirmiştir. İşveren tarafından işçiye ödenen tazminatlardan biri olan ayrımcılık tazminatı, işverenin eşit davranma borcunun ihlali sonucunda ortaya çıkar. Ayrımcılık yasaklarına ve eşit işlem yapma borcuna aykırılık durumunda öngörülen yaptırımların etkili, caydırıcı ve yapılan ihlalle orantılı olması gerekmektedir. İspat yükünün yer değiştirebilmesi, ayrımcılık tazminatının diğer tazminatlardan bağımsız istenebilmesi ve en önemlisi de eşit davranma yükümlülüğünün yaptırıma bağlanarak Türk İş Hukuku'nda yer alması önemli bir düzenlemedir. Çalışmamızda, ayrımcılık tazminatı 4857 sayılı Türk İş Kanunu çerçevesinde değerlendirilmiştir. Buradan hareketle çalışmamızda ilk olarak; ulusal mevzuat kapsamında, işverenin eşi davranma yükümlülüğü ve ayrımcılık yasağı açıklanmış, bunların hukuki niteliği üzerinde durulmuştur Daha sonra ayrımcılık tazminatına hak kazanmak için gereken şartlar, ispat yükü ve bu tazminatın miktarı 4857 sayılı İş Kanunu, çerçevesinde değerlendirmeye tabi tutulmuştur. Ayrıca, bu çalışmada uluslararası hukukta ayrımcılık yapmama ilkesine ilişkin bazı önemli düzenlemeler ulusal kaynaklarla birlikte ele alınmıştır. Son olarak, çalışmanın son bölümünde, konuyla ilgili temel terimler incelenmiş ve daha sonra hangi davranışların işyerinde ayrımcılık tazminatı oluşturabileceği açıklanmaya çalışılmıştır.

Anahtar Kelimeler: İş Hukuku, Eşitlik İlkesi, Eşit Davranma, Ayrımcılık Tazminatı, İşçi-İşveren İlişkileri.

1. INTRODUCTION

The principle of equality and prohibition of discrimination is a fundamental element of all human rights. The concept of equality is among the essential elements of the employment relationship. It refers to the obligation of equal treatment which is one of the duties of the employer that arise from the contract of employment, means the obligation of the employer not to behave differently among his/her employees unless there are just causes, to prevent unjust discrimination and arbitrary behaviors. However, an employer can discriminate as well as act differently if there are just causes.

Obligations which are related to the employer are also implement to the representatives of the employer. In this regard, representatives of the employer are also obliged not to make discrimination and to commit the obligation of equal treatment (Akbulut&Tulukçu, 2015:62).

Legal foundations of the obligation of equal treatment and prohibition of discrimination in the Turkish labour law are the "Principle of Equality" included in the 10.article of the Constitution of Republic of Turkey and the "Principle of Equal Treatment" which is included in the 5.article of the Labour Act no 4857. The principle of equality is envisaged in the 10.article of the Constitution, and it is specifically regulated in the 5.article of the Labour Act no 4857. Duty of equal treatment in the labour law concretizes as a duty of employer to not make discrimination among his/ her employees.

In the first paragraph of the 5.article of Labour Act no 4857, by including the " It is illegal to discriminate against someone in the employment relationship on the basis of language, race, colour, gender, disability, political opinion, philosophical belief, religion, sect and similar reasons" expressions, prevention is tried to be ensured against discrimination, in the 6.paragraph of the law, sanction is determined which shall be implemented for the ones who are violating this rule. This prohibition of discrimination covers the establishment, implementation, termination of the contract and employer's right to management. (Taşkent, 1981:88). Besides, employer is not obliged to treat equally while terminating the employment contracts of the employees. In deed, personal characteristics and status of the employee is a basis in the termination of the contract of employment which forms the personal relationship (Sümer, 2016:91).

Employer is obliged to not discriminate against more than one employees (with the same qualifications) working in the same place and in the same period (Çelik, 2006:5). Sanction determined for the violation of the principle of equal treatment (which is included in the Labour Law) is the discrimination compensation. Employer must not discriminate against the employees during the courses of recruitment, employment or termination of the contract of employment.

2. EQUAL TREATMENT OBLIGATION OF THE EMPLOYER

One of the employer's obligations in the employment relationship is the equal treatment obligation. This both limits a number of behaviours of the employer and brings obligations. In fact, the essence of these rules is based on human rights and freedoms and this brings out the equal treatment obligation of the

employer. As a result of internality among the prohibitions of discrimination, principle of equality and equal treatment obligation of the employer, it would be appropriate to evaluate those concepts together.

2.1. Legal Characteristic and Basis of Equal Treatment Obligation of the Employer

Equality constitutes the essence of life with dignity, besides it also prevents the discrimination among the ones under similar curcomstences unless there are objective and just causes (Kaya, 2009:1). The principle of equality, on one hand requires the rules of law to be general (formal equality), on the other hand requires equal treatment to the individuals (material equality) (İnceoğlu, 2001:48). The principle of equal treatment is a way of emergence of the principle of equality which is valid in all of the legal fields (Tuncay, 1982: 5). While the principle of equality is related to a right and a situation, the principle of equal treatment is related to an obligation and action (Ertürk, 2002:96).

The principle of equality prohibits arbitrary discrimination among the employees by bringing out the obligation of equal treatment unless there is a reasonable and objective (legal) reason (Yıldız, 2008:65, 207; Ulucan, 2013:372-373; Ertürk&Gürsel, 2011:431).

When the principle of the equality is considered within the scope of the labour law, it can be said that it gains a meaning along with the obligations of non-discrimination and equal treatment of the employer. Because of the requirement of protection of the employee who is in a weak position in terms of economic and social aspects, regulations that protect the employee are arranged along with the obligation given by the Constitution.

It can be said that the obligation of equal treatment prohibits the arbitrary discrimination among the employees and limits the free agency (freedom of behaviour) of the employer. However, saying that the employer will behave equally to his/her employees means crossing the line and under some circumstances indiscriminate equal treatment of the emloyer to his/her employees may constitute a violation against this obligation. The employer has the obligation of different treatment as well when he/ she has different reasons to behave differently among his/ her employees.

The significant point here is to ensure having the employees (who are in equal status) being subjected to the same processes. Thus, fufillment of this obligation is taken into consideration within the framework of a relative sense instead of an absolute sense. In other words, employer can't discriminate unless he/ she has just causes but he/she can discriminate when she/ he has just causes(Tuncay, 1982:5, 120-121; Demir, 2014:23 Ulucan, 2013:373; Kandemir&Yardımcıoğlu, 2014:4).

The principle of equal treatment covers a broad area conecerning both individual and collective employment relationships, equal treatment of the employer to his/ her employees, eqaulity among the members of social insurances and union members. In a narrow sense, it means the non-discrimination among the employees in the workplace and appropriate treatment of employees by the employer who is a party of the employment contract within the individual employment relationships. Accordingly, it can be said that unless the employer has the just causes, he/ she must implement the equal working conditions to his/ her employees and he/ she is obliged to ensure equal treatment (Tuncay, 1982:5-6, 22, vd.).

In conclusion, the principle of equality limits the employer in the labour law by prohibiting the discrimination based on certain reasons and arbitrary discrimination among his/ her employees in similar/ same situations or in same qualification. (Yıldız, 2008:s.65; Süzek, 2016:495). Prohibition of discrimination among the employees and equal treatment as an obligatory consequence of it, already included in the labour law. However, the obligation of equal treatment shall not be evaluated as an obligation of equal treatment of the employer only among his/her employees. Obligation of non-discrimination is a state of the emergence of the formal equality understanding in the obligation of equal treatment (Mollamahmutoğlu&Astarlı, 2012:654).

The principle of equal treatment has constitutional and legal basis in terms of laws. Fundamental bases of the principle of equality in the Turkish Labour Law are consisted of the 10.article of the Constitution and 5.article of the Labour Act (Baysal, 2010:61; Tuncay, 1982 61; Keser, 2004:59-63; Çelik, 2006:4; Ertürk, 2002: 97). Equal treatment obligation of the employer is grounded in the fairness and honesty basic along with the 10.article of the Constitution (Doğan Yenisey, 2006:64).

The principle of equality is expressed with different concepts in the Labour Law such as "equal treatment", "equality of proceeding", "principle of equal treatment", ‘‘and obligation of equal treatment’’ (Gülmez, 2010:239). In the Labour law, the principle of equality is morely concretized as non-discrimination of the

employer among his/ her employees as an obligation under the name of obligation of equal treatment and in other sense the principle of equality is deemed as the obligation of equal treatment in the labour law (Baysal, 2010:61)

The principle of equality which is included in the Constitution constitutes the basis of the equal treatment obligation. According to the 10.article of Constitution with the "Equality before the Law" title, "Everybody is equal before the law regardless of language, race, colour, gender, political opinion, philosophical belief, religion, sect and etc. Women and men have equal rights. The state is obliged to ensure the realization of this equality in life. Measures to be taken with this purpose can't bee deemed as they are against to the principle of equality. Measures that will be taken for the children, elder ones, disabled, widows and orphans of the martyrs of war and duty and veterans, won't be considered as they are contrary to the principle of the equality. No privilege can be granted to a person, family, group or class. State organs and administrative bodies must act in accordance with the principle of equality in all of their proceedings before the law.". Prohibition of absolute discrimination has been introduced with the 10.article of the Constitution. In addition, from the "similar reasons" expression, it can be said that the discrimination prohibitions are not limited to the counted cases; they are counted as an example.

The concept of discrimination refers to segregation, unequal treatment. The legal nature of this concept is included in the definition of the Human Rights Committee which scrutunizes the 26.article of United Nations Convention on Civil and Political Rights which is adopted by Turkey as well. According to this, following is aimed along with the discrimination; "Discriminaton that will prevent the use or recognition of all rights and freedoms which are recognized by everyone and which will prevent the use of those which is actualized on the grounds such as separation, exclusion, restriction or race, colour, gender, language, religion, national or societal origin, property, birth, political or other opinions" (UYAR, 2006:42-43).

Reasons that constitute the subject of the prohibition of discrimination are the reasons which can't be expected or desired to change by the individuals because those are the inherent reasons such as gender, colour, race, religious, philosophical belief and political opinion (Doğan Yenisey, 2006:66; Gülmez, 2010:240; Ertürk&Gürsel, 2011:431). Having those individuals being subjected to a negative, unjust treatment compared to others that don't have these characteristics in a similar similar situation, is discrimination (Yıldız, 2008:80; Zeytinoğlu, 2010:118). Prohibitions on discrimination are the regulations that are brought in order to protect and prevent the individuals from being subjected to a number of negative tratments or being excempted from certain rights because of some of their characteristics (Doğan Yenisey, 2005:976-977). Then discrimination refers to a different treatment towards a person because of a number of personal characteristics and having him/ her being subjected to the injustice as a result of this treatment (Onaran Yüksel, 2000:38).

However, the obligation of equal treatment in its general sense, refers to preventing the individuals in same/ similar situations from being subjected to a different treatment (horizontal equality), non-discrimination and non-recognition of privilege to individuals unless there are rightful and objective reasons. Meanwhile, different treatment towards the ones in different situations (from an objective point of view) can also occur because of this obligation. (Öden, 2003:190; Yıldız, 2008:260).

In our opinion, as it is rightfully determined in the discipline (Tuncay, 1982:24, 108 vd.; Taşkent, 1981:82; Yıldız, 2008:56-57, 65; Ertürk/Gürsel, S,426; Süzek, İ 2008:25; Öden, 2003:146 vd.), the principle of equality included in the Constitution, is a regulation the covers the prohibition of discrimination due to certain reasons and in general it covers the principle of equality (obligation of equal treatment) as well.

Prohibition of discrimination and obligation of equal treatment have certain stages in terms of private law. It can be said that the obligation of equal treatment has a relative nature for the employer other than the limited reasons in which the prohibiton of discrimiantion is absolute. This obligation does not mean the employer will equally treat all oh the employees. Unless there are employees in same nature or in same/ similar states such an obligation of the employer is not in question. The principle of equality, does not eliminate the personality characteristic of the contract of employment, hence the employer does not have an equal treatment obligation in subjects such as recruitment, wages and termination of the employment relationship according to the contract freedom of the employer. In a word, employer can treat differently as long as he/she does not have an intend of dicrimination.

In fact, this principle does not have an absolute meaning other than the situations in which there is an explicit discrimination. In this sense, it is possible for a number of conditions (that occur to provide positive discrimination) to cause inequality, therefore it might be hard to determine the treatments against

the obligation of equal treatment. Thus, "principle of equal treatment" which is regulated in the 5.article of the Labour Act must be evaluated.

Provision specified in the 5.article of the Labour Act no 4857, is the pattern of the principle of equality of 10.article of the Constitution included in the Labour Law. (Zeytinoğlu, 2010: 120; Ulucan, 2013: 373). 5. Article of the Act is a regulation that binds the employer in each and every stage of the employment relationship.

There are detailed regulations in the act in terms of some types of discrimination. In this context, when and in what respect the discrimination is prohibited, in other words prohibitions of discrimination are regulated. The first paragraph of the 5.article of the Labour Act is related to the general prohibition of discrimination and it prohibits the discrimination in the employment relationship. In the second paragraph of the same article, discrimination because of the type of contract, in the 3.paragraph, prohibitions of discrimination because of gender and pregnancy, sentenced in detail in the following patterns; making an employment contract, constituting the conditions, implementing the conditions, termination of the employment contract. The wage discrimination due to the gender is regulated separately in the fourth paragraph of the 5.article.

Fifth Article of the Labour Act whose title is “Principle of equal treatment’’ has comprehensively regulated the employer's obligation of the equal treatment. Fundamental principle is determined in the first paragraph of the article and according to this; "Discrimination is banned in the employment relationship on the bases of language, race, gender, political opinion, philosophical belief, religion and sect and similar reasons." (İşK.m.5/I). "Similar reasons" expression is included in the provision, hence the prohibition of discrimination is not limited to the counted cases, and the employer can't violate the prohibiton of discrimination because of similar reasons.

According to the 3.paragraph of the 5.article of the Labour Act; "As long as it is not obligatory because of reasons related to the nature of the work or because of biological reasons, the employer can't make a different treatment directly or indirectly becasue of gender or pregnancy while making the contract of employment, constituting the conditions, and implementing those conditions." Pursuant to the fourth and fifth Paragraphs of the same article, " A lower wage can't be given becaue of gender for a work in Similar or Equal value". Implementation of special protective provisions due to the gender of the empoyee, does not justify the implementation of a lower wage.". Pursuant to these provisions, as long as it is not obligatory because of biological reasons or reasons related to the nature of work, it is envisaged by the regulation which is for the prevention of the gender discrimination that the emplyer can't treat differently in terms of wage while establishing the employment contract, wages and working conditions and terminationg the contract due to gender and pregnancy.

Besides, employer's obligation of equal treatment is separately determined in terms of some employment contract types included in the employment legislation. Unless there are essential reasons in the Labour Act, in other words unless there is a reason which makes the discrimation rightful, it is sentenced that the employee can't be subjected to a different treatment because of making employment contracts with certain or uncertain periods or with full or part time periods (Labour Act, art.5/2).

Another regulation in the Labour Act related to the principle of equality is the 18.article of the Act. In the provision; membership of an employee to a union or participation of the employee in the activities of the union within the working hours along with the consent of the employer and subjective features of the employee related to the race, colour, gender, marital status, familal obligations, pregnancy, birth, religion, political opinion and similar reason won't constitute a valid reason for termination (Labour Act art.18/a, d).

The principle of equality and prohibition of discrimination is regulated as a whole along with the 5.article of the Labour Act no 4857 and it can be seen that there is no explicit distinction between the two concepts (Ulucan, 2013:375). Howevert, there is a distinction about this issue in the discipline. According to this; despite the title of the 5.article of the Labour Act is " the principle of equal treatment", there is no opinion that regulates the prohibition of discrimination in the text of the article (Yıldız, 2008:63; Süzek, 2016:; 481; Süzek, 2008:27). In addition, different treatment to the individual without deeming the states of discrimination as a basis, is evaluated in the scope of the principle of equal treatment, in addition to the opinion that deems different treatment because of such characterstics(Alpagut, 2012:48) within the scope of prohibition of discrimination; a discriminative operation that will be made against the employee on the bases of his/ her language, religion, race, colour, gender and etc. is deemed within the scope of employer's obligation of equal tretment, and it is defined that the prohibitions of discrimination has expanded to a great

extent after the acceptance of the Labour Act no 4857 and the employer's obligation of equal treatment contains two concepts (Doğan Yenisey, 2006:66. See also Gülmez, 2010:240; Ertürk&Gürsel, 2011:431).

Despite the existence of detailed regulations concerning the prohibitions of discrimination, there is no provision that directly regulates the employer's obligation of equal treatment in the narrow sense.

In our opinion principle of equal treatment in the scope of the labour law, is a principle that contain the employer's prohibition of discrimination and obligation of equal treatment to the employees who are in same/ similar states.

It can be said that the tangible regulations included in the Labour Act are related to the fundamental rights and freedoms of the employee except the prohibitions of discrimination in terms of the types of contract which is regulated in the 2.paragraph of 5.article of the Act. From those, gender and pregnancy, union reason and disability are determined by special and explicit provisions. In the art.1/ I section of the Labour Act which is regulated in parallel with the provisions included in the 10.article of the Constitution, prohibition of ban based on following reasons are incldued; language, race, gender, political opinion, philosophical belief, religion and sect and similar reasons. Here, "and similar" expression is required to be evaluated within the framework of the fundamental rights and freedoms of the individual (Doğan Yenisey, 2006:65).

2.2. Implementation Conditions of the Employer's Obligation of Equal Treatment

To be able to talk about the employer's obligation of equal treatment, existence of a set of conditions is required. These are; existence of an employment relationship among the employer and the employee, employees that work in the same workplace, a community of employees in a workplace, treatment of the employer in a collective nature and unty in time in terms of treatments.

2.2.1. Existence of an Employment Relationship between the Employer and the Employee and Being the Employees of the Same Workplace

To be able to talk about the employer's obligation of equal treatment, first of all there should be a legal relationship between the employer and the employee as a rule, in other words there should be an employment relationship. (Mollamahmutoğlu&Astarlı; 2012:662, Süzek, 2016:484; Ekin, 2013:165). Otherwise, such an obligation of the employer won't be in question.

The employer is obliged to equally treat his/ her employees that work in the same workplace. Implementations in the workplaces of different employers won't be the subjects of the obligation of the equal treatment in the same workplace (Sümer, 2016:89; Tuncay, 1982:148; Yıldız, 2008:179).

2.2.2. Existence of a Community of Employees in the Workplace

In order to determine whether the employer acts in accordance with the obligation of equal treatment or not, more than one employee, in other words at least two employees must be found for making a comparison (Tuncay, 2007:28). However, in the workplace where the employee works or in workplaces where there are more than one employees and other employees don't carry the title of the employer, a community of employees can't be established, therefore employer's obligation of equal treatment is not in question in such cases (Mollamahmutoğlu&Astarlı, 2012:662). Since it is required for the employees working in the workplace to possess the title of employee to mention the obligation of equal treatment, when the prohibitions of discrimination are in question, the employer could have acted against the discrimination prohibitions even if a single employee is working in that workplace. (Yıldız, 2008:186; Ekin, 2013:166).

2.2.3. Treatment of the Employer in a Collective Nature According to Law

There should be collective implementations for the emergence of the employer's obligation of equal treatment. Treatments which are in collective nature according to law, are the general and objective implementations with regards to a community of employees in the workplace. In case of exlusion of one or more than one employees from those general implementations, infringement of the obligation of equal treatment can be in question (Tuncay, 1982:150; Mollamahmutoğlu&Astarlı, 2012:663). For instance, if a premium (which is a collective implementation) is not granted to one or some employees, violation against the obligation of equal treatment can be claimed. However, treatments of the employer such as implementing a wage increase for one or more employees are actualized by conidering the personal qualifications and the work they do and it is made within the scope of freedom of contract, therefore

whether there is a violation of the obligation of equal treatment or not shall be evaluated (Yıldız, 2008:188). Another opinion that deems those kinds of implementations of the employer as an individual behaviour rather than a collective one, and as a transaction based on the freedom of contract, which is a thought that recommends not evaluating the personal proceedings within the scope of the principle of equal treatment (Mollamahmutoğlu&Astarlı, 2012:663).

In our opinion, what is required here is that while the employer makes different individual implementations to some of the employees, those implementations should be based on rightful and objective reasons and they should not be arbitrary.

2.2.4. Unity in Time

In order to talk about employer's obligation of equal treatment, it is required for the implementations of the employer to be made within the same period of time in the workplace. It is not possible to compate the previous implementation with the implementations of today, thus they can't be deemed as a violation of this obligation (Tuncay, 1982:150). We need to explain that the concept of same period of time refers to the period when the working conditions of the employees (who are comparible in the workplace) continue in the same pattern (Yıldız, 2008:190).

3. LEGAL SANCTION OF THE CONTRADICTION OF THE EMPLOYER'S OBLIGATION OF EQUAL TREATMENT: DISCRIMINATION COMPENSATION

3.1. Generally

In the Labour Act no 4857, legal liability of the employer (who acts against the obligation of equal treatment) is regulated. According to this;when the employer acts agaisnt the principle of equality during the employment relationship/ termiantion of employment relationship, the employee can request for a suitable compensation in the amount of his/ her wage up to four months and he/she can request for the compensation of some other rights from which she/ he was excluded (Labour Act.art.5/6). Compensation of discrimination is a sanction which is brought for the employer who does not comply with the prohibition of discrimination.

Except for those compensations that are specified in the Labour Act, if the conditions exist, employee may request for a material and immaterial compensation from the employer. Indeed, in the Labour Act art. 5/6, provision that envisages the employee can request for the compensation other rights from which he/ she was excluded, it is in a nature that contains the compensation requests according to the general provisions(if exist) in addition ot the labour rights from which he/she was excempt from (Mollamahmutoğlu&Astarlı , 2012:673).

3.2. States that Grant the Right to Discrimination Compensation

In order to be entitled for discrimination compensation, states in which the obligation of equal treatment can't be implemented absolutely and states in which the obligation shall be implemented absolutely, shall be examined under separate headings.

3.2.1. Situations in which the Obligation of Equal Treatment can be Implemented Absolutely

3.2.1.1. In Issues Related to the Right to Management

Right to management is the right of being able to regulate the execution of the work and behaviours of the employees in the workplace, on condition not being against the collective bargaining agreements and employment contracts, instructions that will be given by the employer. (Taşkent, 1981:11; Süzek, 2016:83). Employer's right to management is being limited dur to the obligation of equal treatment and general and intanible instructions with regards to the determination of the working conditions are given in this framework. Employer's obligation of equal treatment, not making an arbitrary discrimination among the employees, includes the obligation of compliance with this in the absence of reasonable and objective reasons. Consequently, employer is obliged to act pursuant to the principles of equality, equity in his/ her proceedings.

The employer is obliged to equally treat the employees and not make arbitrary discrimination among them with respect to the working conditions, smoking ban, entry- exit controls, overtime work, holiday and night work, distribution of the workload among the employees, implementation of the disciplinary rules, unless there are rightful and reasonable reasons related to those(Sümer, 2016:90; Mollamahmutoğlu&Astarlı,

2012:656). It should be noted that sometimes non-discrimination of the employer is related to the employees in same qualification and under some circumstances it is related to all of the employees.

3.2.1.2. In the Granting of Social Aids (Assistances)

One of the absolute implementation fields of the employer's obligation of equal treatment is social aids. It should be said that the social aids can be given to all of the employees or to a certain group. So, some social aids can be provided to the ones from the employees who have a number of qualifications. It is not possible for the employer to discriminate among the employees of this group. So, while granting the social aids, the employer can't discriminate between the employees in terms language, religion, race, gender family, sect and political opinion (Sümer, 2016:90). However, here the acts of the employer made towards the employees on his/ her will are in question here, however implementation of those are mentioned instead of the obligation of equal treatment in aids based on employment or collective bargaining agreements.

3.2.1.3. In the professional case of the employee

In the second paragraph of fifth article of Labour Act no 4857; it is sentenced that the employer can't make a different operation to the employee who is working for a partial period compared to the employee who works full-time and can't make a different operaton to the employee who works for a uncertain period compared to the employee that works for a certain period, unless the employer has essential reasons to do so.

Prohibition of discrimination included in the 5.article of the Law; for the fixed term employment contracts, "Employee that is hired with an employment contract with a certain period, unless there is a reason that will make the discrimination rightful, can't be subjected to a different proceeding just because of his/her employment contract is periodic, compared to the equivalent employee who is hired with a permanent employment contract." Along with the above specified (Labour Act art.12/1) provision, for the part-time employment contracts, "Employee that is hired with a part-time employment contract can't be subjected to a different proceeding just because his/ her contract is a part-time one, compared to the equaivalent employee, unless there is a rightful reason for discrimination. Divisible benefits of the employee (part-time) related to the wage and money, are paid in proportion to the working period of a full-time employee. (Labour Act, art.13/2) It was regulated in detail by the above specified provision.

3.2.2. Situations in which the Obligation of Equal Treatment can't be Implemented Absolutely

The principle of equality is not in question for the employees who are working under different working conditions. Distinction can be made among the employees in this situation. However, this should be in proportion to the qualification of the work and objective measures.

3.2.2.1. In the Wage of the Employee

The employer is not obliged to act equally while determining the wages of the employees, other than the laws and other mandatory provisions. In fact, distinction can be made when the qualifications of the employees are taken into consideration. Therefore, it is possible to allocate different wages for the employees depending on reasons such as expertise, age, rank, ability, education (Sümer, 2016:91; Mollamahmutoğlu&Astarlı, 2012:656; Süzek, 2016:487; opposite Tuncay, 1982:213). However, it is explicitly regulated in the Law the lower wage can't be allocated for the same work or work in same value because of gender of the employee (Labour Act art.5/4).

Different wage increases of the employees are deemed valid when the employer can justify this course of action. Individual wage increases are in the scope of the freedom of contract. In addition, if a wage increase which is not based on the basis of a grouping or performance assessment is being implemented, then all the employees shall benefit from the ratio of this wage increase (Yıldız, 2008:212, 214).

3.2.2.2. In the Termination of Employment Contract

Whether to implement the obligation of equal treatment or not should be discussed in the discipline as well. A number of writers have defined that employer's obligation of equal treatment is not in question in the termination of the employment contract because the freedom of contract is deemed as a basis, and obligation of the equal treatment can't be implemented in the terminations, except for the terminations with (Sümer, 2016:91; Uşan, 2005:1630-163)bad intentions. But, some writers emphasize that the obligation of equal treatment does not carry a sense in the termination of the contract, and they have a less solid approach towards the thought of the ones in first opinion (Taşkent, 1981:s.83;. Doğan Yenisey, 2006: 60,

64-65; Ekin, 2013:191) Another group of writers think that the employer is obliged to comply with his/ her obligation of equal treatment while terminating a contract (Tuncay, 1981:213-217; Yıldız, 2008:257-258; Ertürk, 2002:112 Süzek, 2016: 491).

In my opinion, the employer's obligation of equal treatment has a limited implementation area in the termination of contract thus, in respect to this obligation, this subject must be evaluated within the framework of preventing the arbitrary terminations by the employer with bad will which are not based on an objective and rightful reasons. In fact, in the basis of the employer's obligation of equal treatment, 10.article of the Constitution and the principle of equity and law of good faith are accepted as a basis.

3.3. Amount of Discrimination Compensation and Burden of Proof

4857 numbered Labour Act's 5.article specifically reguated the sanction against the violation of the employer against the prohibition of discrimination. Pursuant to the 6.paragraph of the 5.article of the Act, "When acted against the provisions of the paragraph which is mentioned above during the employment relationship or termination of it, the employee can request for his/ her rights from which he/she was deprived of in addittion to the appropriate compensation in the amount of his/ her wage of up to four months. Provisions of the 31.article of the 2821 numbered Law on Trade Unions are reserved". This compenation which is specified in the provision is also named as the discrimination compensation. In addition, employee can priorily request for the rights from which he/ she was deprived of other than the compensation of the discrimination which must be paid by the employer who has acted against the obligation of equal treatment.

Discrimination Compensation is a compensation which is not binded to the conditon of damage and the employment contract should not be necessarily terminated to request for it. (Süzek, 2016: 496). Therefore, this compensation can be requested while the employment relationship continues.

Except the right to claim the rights which the worker was deprived, the employee can terminate his/ her contract with a just cause because of not getting his/ her wage, pursuant to the "Non-implementation of working conditions" provision which is inluded in the ii-f paragraph/24 article of the Labour Act or pursuant to the 24/ii-e of the Labour Act (Baysal, 2010:74).

In case of a violation of the prohibition of discrimination, the employer must pay an administrative fine in addition to the compensation. If the discriminative treatment occurs due to a union then this compensation of discrimination will replace with the compensation of union. However, if the legal requirements can be found, the employee can request for a material and immaterial compensation. In the 122.article of the Turkish Penal Code, the discrimination is binded to a penal sanction and it is regulated that imprisonment or administrative fine penalties can be sentenced to an indvidual who caused the discharge or non-recruitment of another individual by making a discrimination(Also see Akbulut B.&Tulukçu N.B., 2015:56 ff.).

In the Labour Act no 4857, it is clearly expressed that "in the employment relationship or termination" this compensation is envisaged, thus in case of a violation of the obligation of equal treatment during the establishment of the employment relationship, this can't be requested. In this case, it is possible for the discriminated employee to request for compensation pursuant to the general provisions. However, in the 3.paragraph of the 5.article of the Labour Act, prohibition of discrimination during the establishment of the employment contract due to gender or pregnancy is specifically regulated, thus in these cases the employee can request for a compensation not only during the employment relationship and the termination of it, he/ she can request for a compensation during the recruitment as well if the employee faces discrimination in this phase (Süzek, 2016:496; Baysal, 2010:75).

Compensation of discrimination is calculated on the basis of the net gross wage of the employee. So additional wages such as premium and social aids related to the money are not considered while calculating this compensation. Compensation of discrimination is limited with the wage of the employee of up to four months, thus it will be decided by the judge by considering the weigh of the discrimination exposed by the employee, the work he/ she conducts, title of the employee, his/ her position in the workplace and rank of him/ her (Mollamahmutoğlu&Astarlı, 2012:674, Doğan Yenisey, 2006:77.). Compensation of discrimination is not compensation in a technical sense; it is the legal sanction of violation of the obligation of equal treatment. Therefore, it would be eneough for the empoyee to be exposed to a treatment or proceeding that constitutees an absolute discrimination to request for this compensation, emergence of an additional damage is not necessary (Yıldız, 2008:329; Süzek, 2008:34).

It is defined rightfully in the discipline that limiting the discrimination compensation with the wage of the employee of up to four months is against the norms of the European Union and it would be appropriate to repel this upper limit along with an amendment (Süral, 2009:247; Yıldız, 2008:328-330).

In addition to this, provision that is regulated in the Law related to the compensation of the discrimination is a relative mandatory provision; hence the amount of the compensation can be increased with the employment contract or collective bargaining agreements (Süzek, 2016:496; Mollamahmutoğlu&Astarlı, 2012:674; Doğan Yenisey, 2006:77; Yıldız, 2008:329).

Burden of proof in the discrimination compensation belongs to the employee pursuant to the last paragraph of the 5.article of the Labour Act. According to this, employee is obliged to detect that the employer is acting against the obligation of equal treatment. However, when the employee sets forth a situation that powerfully shoes the existence of the violation, the employer will be obliged to prove that there is no such a violation (Labour Act art. 5/last paragraph).

So, pursuant to the last paragraph of the 5.article, if the employer can't prove directly that the employer acts agains the obligation of equal treatment, but set forths the existence of a violence strongly, employer must prove that there is no such a violation. So, the burden of proof replaces. The burden of proof is replaced in another situation as well other than this situation. According to this; the claim of the employment contract was terminated without showing a reason or after showing an invalid reason, which means the termination of the contract of employment constitutes a violation against the obligation of equal treatment (a claim such as the contract was terminated due to the ethnic origin or political opinion of the employee or due to similar reasons), employer is the party who has the obligation to prove that the termination was made with a valid reason (Mollamahmutoğlu&Astarlı, 2012:675; Süzek, 2016:500).

Discrimination Compensation is subjected to a ten-year statute of limitations pursuant to the 146.article of the Turkish Code of Obligations No. 6098

4. CONCLUSION

The principle of equal treatment which is valid in all legal fields imposes liablities to the employer in terms of Labour Law. Employer's obligation of equal treatment, not making an arbitrary discrimination among the employees, includes the obligation of compliance with this in the absence of reasonable and objective reasons.

The principle of equality which prevents the discrimination of the employer within an employment relationship, also limits the right of the employer to management. Equal treatment of the employer among his/ her employees, is a consequence of the employer's compliance with the prohibition of discrimination. In fact, in the labour law, the principle of equality is a general, independent and objective rule of law, and it has a function in favor of the employee.

The prohibition of discrimination prohibits the arbitrary discrimination among the employees that work in the same workplace. This prohibition is valid before the establishment of the employment relationship, during it and after it, which means till the termination of this relationship. Issues regarding the discrimination arise from the characteristics of the employee that he/ she can't change or it can't be expected from him/ her to change and this should protect this employee from a worse treatment by other employees. Prohibition of discrimination on the bases of language, race, gender, political opinion, philosophical belief, religion and sect which is regulated in the first paragraph of the 5.article of the Labour Act no 4857 shall be considered within the scope of the absolute prohibition of discrimination.

However, the obligation of equal treatment is an obligation that occurs in the end of the establishment of the employment relationship and it prevents the arbitrary implementations of the employer. The obligation of equal treatment does not have the sense that all the employees will be brought to the same state regardless of any difference. Employer's obligation of equal treatment should not be understood as an absolute equal treatment in all states.

After establishing the employment relationship, the employer is under the obligation of equal treatment. However, the presence of the employer's obligation of equal treatment depends on a number of conditions. Those are; existence of an employment relationship among the employer and employees, employees that work in the same workplace of the employer, a community of employees in the workplace, treatment of the employer in a collective nature and those treatments shall be made in the same time period.

However, in case of a violation of the prohibition of discrimination, they have the right to claim for the rights from which they are deprived of except for the wage in amount of his/ her wage up yo four months. Compensation of discrimination which is a legal sanction is the compensation that can be given in the amount of the wage of the employee up to four months of wage which is specified in the 5. Article of the Labour Act no 4857, as a result of violation of the employer's obligation of equal treatment. Limiting the discrimination compensation with the wage of the employee of up to four months is against the norms of the European Union and it would be appropriate to repel this upper limit along with the amendment.

Discrimination compensation is a compensation which is not binded to the conditon of damage and the employment contract should not be necessarily terminated to request for it. However, the compensaation discrimination has an implementation field when the employment relationship continues or when an employment contract is terminated, but this is not deemed as a state in favor of the employee. However, it may arise in case the employer recruits the discriminating people or not recruiting them. However, the 5.article of the Labour Act deos not cover the discrimination made in the establishment of the employment relationship is not included in the scope of the cases that grant the compensation of discrimination. It would be appropriate to consider this state in the scope of the compensation of discrimination.

However, it is required to explain that in the 3.paragraph of the 5.article of the Labour Act, prohibition of discrimination during the establishment of the employment contract due to gender or pregnancy is specifically regulated, thus in these cases the employee can request for a compensation not only during the employment relationship and the termination of it, he/ she should be able to request for a compensaation during the recruitment as well.

In cases where there is a discrimination, the employer must pay an administrative fine in addition to the compensation in case of violation of discrimination and the employee can request for the rights from which he/ she was deprived of, he/ she can terminate the contract of employment immediately. If the discriminative treatment occurs due to a union then this compensation of discrimination will replace with the compensation of union. However, if the legal requirements can be found, the employee can request for a material and immaterial compensation.

As a consequence, not only in the prohibitions of discrimination, in the cases of violation of the obligation of equal treatment, to be able to request for a discrimination compensation and for the employee to be able to request for a discrimination compensation in case of his/ her exposure to discrimination, requesting for a compensation of the discrimination should be regulated explicitly. Besides, it would be appropriate to make a regulation for the removal of upper limit in the amount of discrimination compensation.

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