Transfer of Employment Contract under New Turkish Code of Obligations

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Introduction

Transfer of an employment contract, which is the change of employers in the employment relationship, is a frequently used method in Turkey. It is especially common within holding and group companies, since it provides the permanent transfer of a qualified workforce between companies. Even though it is accepted by doctrine and the Court of Cassation’s decisions, a transfer of employment contract is not prescribed in the Labour Code, contrary to the transfer of undertaking and temporary employment relationship. After the Turkish Code of Obligations No.6098 entered into force on 01.07.2012, as a result of renewal and adaptation, a transfer of employment contract became a legally regulated notion under Turkish law.

Pursuant to the Turkish Code of Obligations article 429; “Employment contract may be transferred to another employer permanently, only by way of the employee’s written consent. Upon the transfer, transferee shall be the new employer of employment contract with all of its rights and obligations. As it is, employee’s starting date of employment under the transferor is taken into consideration in terms of all entitlements based on the employee’s length of service”. Therefore, it is now possible under the law for an employment contract to be transferred permanently to another employer, with all of its rights and obligations.

Consent of the Employee

Following the transfer, the employment relationship ends between the employee and transferor, while the employment contract with the transferee (new employer) continues without an interruption. Thus, the need for an experienced workforce of the transferee is met by the protection of the continuity of the employment relationship. Meanwhile, the transferor does not endure the consequences of termination and the employee does not lose his rights derived from the seniority period. In this regard, the employee’s consent is the essential element of the transfer of the employment contract. Upon the written consent of the employee, all rights and obligations are transferred to the new employer without undergoing a change. Even if the employee objects to the transfer, this shall not constitute a just or valid reason for the termination of the agreement.

1 In case of a substantial alteration, the transferee is obliged to obtain the consent of the employee under article 22 of Labour Code No.4857. Accordingly, such alteration may be made only after a written notice is served by the employer to the employee. Changes that are not in conformity with this procedure and not accepted by the employee in written form within six working days, shall not bind the employee.
Therefore, only the written consent of the employee is accepted under Turkish law for the transfer of the employment contract. Within this scope, a transfer of the employment contract occurs as a \textit{sui generis} tripartite agreement. It is concluded by the participation of the employee, transferor and transferee, or the written consent of the employee for the agreement between transferor and transferee.

Nevertheless, in practice, there may be cases which lead to the employee’s implicit consent, especially in group companies:

- The first possibility occurs when the employee works for another group company and works for his real employer at the same time. For instance, an accountant of the company may start to work as an accountant of another group company. As long as he has an employment relationship with his real employer, there is no transfer of the employment contract, but rather joint employment.

- The second possibility occurs when the employee starts to work in another group company by obeying the instructions of his employer and performs his duties only under this group company. Under these circumstances, the employment relationship ends \textit{de facto} between the employee and employer that is the party of the employment contract and it continues between the employee and new employer.

However, implicit consent is insufficient under the Turkish Code of Obligations article 429, so a transfer of the employment contract, which ensues a serious outcome such as change of employer, cannot be valid based on an implicit or oral consent of the employee under Turkish law.

**Reserving the Right to Transfer**

There may be provisions in the employment contract or common personnel regulations regarding the employee’s acceptance of temporary or permanent employment in another holding company or another workplace. It is possible that such provisions can be interpreted differently depending on their content and lead to various consequences.

- If the provision includes merely the employee’s acceptance of a workplace change, the employment contract cannot be transferred based on this provision, because transfer of the employee to another holding company is not prescribed explicitly. However, provisions which consist of the employee’s transfer to different workplaces under the same company are valid as a rule. Only restrictions related to the compliance with good faith and equity may be applied to said provisions.
If the provision prescribes the permanent transfer of the employee to another employer, the employment contract can be transferred based on such provision. Here, the employer reserves his right to negotiate a transfer of contract with another employer and perform the transfer in terms of the employee’s prior written consent.

Reserving the right to transfer is limited to only foreknown and pre-specified employers. As a rule, it is not valid except for holding and group companies. Based on this provision, a transfer to newly established holding companies cannot be performed only by the negotiation of employers. On the other hand, it is valid between holding companies under the condition that the basic characteristics, financial capability and workplaces of these companies, stay the same.

In case the transferee holding company has financial difficulty or its area of activity or workplace changes during the period after conclusion of the employment contract, written consent of the employee must again be obtained. Furthermore, if there will be a transfer of employees within the same status, the transferor must also take into account the special conditions and private life relationships of the employee and must primarily transfer employees who volunteer as well as single and childless employees, instead of those married with children. In addition, unused rights to transfer for a long time can be accepted as underwhelmed. For example, after 10 years of employment under the same employer, an employee should not be transferred to another employer without his new written consent.

**Liability within the Scope of Transfer**

Upon the transfer of the employment contract, the transferor shall not be liable for the claims and obligations after the date of transfer. Since he is the new party of the agreement, the transferee is liable for the claims and obligations as of the transfer date. Such liability exemptions include protection from:

- **Severance payment:** The Court of Cassation rules state that severance payments must be calculated over the total duration of the employment contract, considering the time period passed under the transferor. Also, according to the Court’s decisions, the last transferee shall be liable for the total amount of severance payment calculated over the employee’s last amount of salary. On the other hand, it is offered in doctrine that joint liability of the transferor and transferee related to the transfer of undertaking under Labour Code No.1475\(^2\) article 14/2 must be applied by analogy. Accordingly, liability of the transferors is limited to the duration of the employment contract and the employee’s level of salary at the date of transfer.

- **Notice payment:** Liability of the transferee from the notice payment is accepted by both the Court of Cassation and doctrine. The starting date of employment under the transferor must be taken into consideration for the calculation of the notice period and notice payment.

\(^2\) It is the former Labour Code, under article 14 titled ‘severance payment’, that is solely in effect.
Paid annual leave: Since paid annual leave derives at the end of the employment contract and the contract is not terminated upon the transfer, the last transferee is responsible payment of paid annual leave.

Nevertheless, liability from the employee’s claims which became due, but unpaid before the transfer, is debated. According to doctrine:

- Firstly, it has been put forward that since there is no clear legal regulation, each employer shall be liable only for the period of their employment contract. So, the transferee shall not take over the employee’s claims, which became due before the date of transfer.

- To the contrary, it is defended that article 6/3 of Labour Code No.4857, which states, “the transferor and transferee shall be jointly liable from employee’s claims which became due before the transfer and which must be defrayed on the date of the transfer. The liability of the transferor is limited, however, to the 2-year period following the date of the transfer”, shall be applied by analogy since there is a similar tripartite relation in the transfer of undertaking. Thus, the transferee shall take over all rights and obligations derived from the contract and he shall be responsible for all of the employee’s claims before the date of transfer. As a result, the transferor and transferee shall be jointly liable for the rights and obligations before the date of transfer, while the liability of the transferor may be limited to a 2-year period following the date of transfer. However, it is also possible not to restrict the joint liability of the transferor.

Conclusion

Transfer of an employment contract is a process which provides for change of employer and continuation of the agreement. As a rule, it favors the employee compared to the termination of a contract, but with serious consequences. Therefore, the rights of the employee must be protected against the changes of employer under the guise of a transfer of contract, undertaking, etc.

Within this scope, the employee’s written consent and implementation of joint liability of transferee and transferor for the employee’s claims, which became due but unpaid before the date of transfer, are important means for securing the employee against new employer(s) whose financial stability and ability to pay such claims is unknown. As a result, the transfer of an employment contract is a proper solution, as long as it protects the employees with consequences appropriate under the law.

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