

Turkish Constitutional Court Invalidates Certain Provisions of the Employment Law

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The Turkish Constitutional Court has invalidated certain provisions of the Employment Law numbered 4857 ("**Employment Law** ") for being against the principle of equality. The sixth paragraph of article 112 of the Employment Law prevented public institutions to recourse to subcontractors concerning severance payments made to subcontractor's employees in case there were no provisions within the agreement regarding the right to recourse, and the first sentence of temporary article 9 of the same Law stated that lawsuits regarding the right to recourse will be dismissed.

Pursuant to article 11 of the Law dated 21 February 2019 and numbered 7166, paragraph 6 was added to article 112 of the Employment Law. In accordance with this article, public institutions were not able to recourse to sub-contractors for the severance payments which were made to sub-contractor's employees if there were no clear provisions regarding the right to recourse within the agreement signed between the public institution and the sub-contractor.

Furthermore, pursuant to article 12 of the Law numbered 7166, provisional article 9 was added to the Employment Law. This article stated that all lawsuits which were initiated by public institutions against sub-contractors regarding the right to recourse were to be dismissed.

Within the scope of the above-mentioned provisions, public institutions were able to apply to sub-contractors by way of recourse only when the agreement signed between them had a clear provision regarding the right to recourse.

The Constitutional Court has stated that:

- As per article 2 of the Employment Law, the primary employer and the sub-contractor will be held jointly liable against the subcontractor's employees' rights which arise out of the Employment Law, employment agreement and collective labor agreement,
- As per article 167 of the Turkish Code of Obligations numbered 6098 ("**Turkish Code of Obligations**"), except for the circumstances stated within the law, main employers who have paid more than their share, have the right to apply to sub-contractors by way of recourse and claim severance payments which they have paid to subcontractor's employees,
- Sub-contractors who perform in the private sector and sub-contractors who perform for public institutions have similar legal positions concerning the use, terms, and boundaries of the right to recourse, within the scope of Employment Law and Turkish Code of Obligations.

Additionally, while sub-contractors who perform in the private sector could always be subject to recourse claims, prior to the invalidation of related provisions, sub-contractors who perform for public institutions could only be subject to recourse if there was a clear provision within the agreement. If the agreement did not include any provision regarding the right to recourse, sub-contractors could not be held liable. In this regard, the Constitutional Court stated that there were separate regulations applied in favor of subcontractors who perform for public institutions.

In order to be able to apply separate regulations in favor of a party between two similar parties, such regulations must be based on an objective and reasonable cause. However, there were no justifications or explanations concerning invalidated provisions within the Employment Law's preamble.

In light of the above, the Constitutional Court stated that separate regulations between sub-contractors were not based on an objective and reasonable cause and decided to invalidate the related provisions of the Employment Law as they were against article 10 of the Constitution of the Republic of Turkey titled "Equal Protection of Law."

As these provisions are now invalidated, public institutions acting as main employers can now recourse to sub-contractors for the severance payments they have made, even if the agreement between the public institutions and the sub-contractor does not include a clear provision regarding the right to recourse.

The full text of the Constitutional Court's decision numbered 2019/42 E., 2019/73 K and dated 19 August 2019 which has been published in the Official Gazette number 30916 on 15 October 2019 is available at this [link](#) (only available in Turkish).

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