

of business, in case an employee initiates a Reinstatement Lawsuit within the prescribed term, employment contract of subject employee shall be deemed to continue during the proceedings. If the court rules that the termination was groundless, the transferor employer would either reinstate the employee back to work or pay him/her the reinstatement compensation together with the amount for the time he/she is not reinstated to work until the issuance of the labour court's final ruling. Regardless of the fact that the work-

place where the subject employee is employed is transferred during the proceedings, or the possibility that the defendant employer is in the process of liquidation upon the transfer of business and does not have any other workplace to reinstate the employee to work, such would not be regarded as impossibility of performance for the purposes of reinstatement to work, it would be clearly expected that the employee be reinstated to work by the transferee employer.

Disclosure of Business Malpractice (Whistleblowing) under the Turkish Labour Law & Duty of Fidelity

Gülce SAYDAM

Whistleblowing is a new issue gaining attention in the theory and application of labour law. Whistleblowing can be defined as "revealing of faults in the workplace to the public" or "disclosure of business malpractice, illegal acts or omissions" by the employees. Whistleblowers inform employees' superiors, related public authorities or media about matters such as abusive, negligent or illegal activities carried out by the employer.

Currently, there is no specific protection for whistleblowers under Turkish legislation. Thus, due to the lack of specific legal regulation we refer to the general principles of law to determine the limits of disclosure of business malpractice, illegal acts and omissions.

Whistleblowing is to some extent founded in the right to petition under Article 74 (1) of the Turkish Constitution providing that citizens and foreigners have the right to file an application to the competent authorities and Grand National Assembly of Turkey with regard to requests and

complaints related to their own and/or public interest. There are also some provisions under the Turkish Criminal Law that impose the obligation to notify an act constituting a crime to the competent authorities if one is aware of such crime. However, the scope of Article 74 (1) of the Turkish Constitution has an excessively broad scope while provisions under the Turkish Criminal Law only cover specific infringements and certain incumbents as regards whistleblowing.

Whistleblowing & the Duty of Fidelity

The intersection between whistleblowing and the Turkish Labour Law is the employee's duty of fidelity. The duty of fidelity is considered an ancillary obligation. Ancillary obligations are mainly related to employee's conduct with regard to the protection of his/her employer's interests and arise either from the Turkish Labour Law or from the rule of good faith regulated under Article 2 of Turkish Civil Law. In accordance with the law, an employee is under an obligation to fulfil his/her ancillary obligations as well as performing his/her main duties.

The duty of fidelity includes non-disclosure of any information of a confidential nature concerning the business of the company which the employee became aware of during the course of his/her employment with the company to third persons as well as the avoidance of any conduct which may be detrimental to the employer or the workplace, avoidance of committing to dishonest acts, notification to the employer of any misconduct at the workplace, the performance of the duties in a diligent manner, and an employee's non-competition obligation.

However, an employee's duty of confidentiality becomes an issue in case trade/business secrets which the employee is aware of include information regarding acts contrary to law. For instance, in the event that an employee becomes aware of the fact that there is malpractice at the workplace regarding accounting issues, the employee notifying his/her superiors in the company, to competent authorities outside the com-

Article 18 (3)(c) of the Turkish Labour Law states that recourse to competent administrative or judicial authorities or participation in proceedings against an employer in order to pursue the rights or fulfil the obligations arising from the legislation or contract cannot be considered a valid reason for termination of an employment contract. This provision derives from Article 5(c) of ILO Convention 158 Termination of Employment Convention 1982, which states that the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities shall not constitute valid reason for termination.

Other than that, the Turkish Labour Law also provides a level of protection to employees as

Article 25 (2)(b) of the Turkish Labour Law states that if the employee makes groundless accusations or notifications against the employer affecting his honour or dignity; and Article 25 (2) (e) of the Turkish Labour Law states that if the employee commits a dishonest act against the employer such as a breach of trust, theft or disclosure of the employer's trade secrets, the employer may terminate the employment contract for just cause without the need to comply with notice periods regulated by law. This provision can be interpreted that the employee is afforded a degree of protection as any accusation or notification which has a justified ground would cause the effected terminations unjust, and thus the employee would benefit from legal protection.

Since Article 25 (2) which enumerates immoral, dishonourable and malicious misconduct, is not a restrictive clause and allows wide interpretation, the above stated provisions may be interpreted to offer protection to those making accusations or notifications based on factual information. Thus, in case an employer terminates an employment contract for just or valid cause provided that the employee (whistleblower);

- acted honestly and with genuine good faith,
- did not act for personal gain,
- has a reasonable belief that the disclosure is substantially true, and
- initially raised the relevant facts internally, unless this cannot be reasonable expected, and made the facts known externally in appropriate manner commensurate with the situation or directly made the facts known externally provided that internal reporting is not possible or does not lead to corrective action;

Provided the above conditions are pres-

A

n employee's duty of confidentiality becomes an issue in case trade/business secrets which the employee is aware of include information regarding acts contrary to law.

pany or to the media of such malpractice may not be regarded as a violation of his/her duty of confidentiality arising from the employment relationship. Hence, the employee may disclose his/her company's confidential information in the event that such information constitutes a crime or if public interest requires disclosure. On such an occasion, public interest prevails over the employer's interest in maintaining confidentiality. There are also several decisions of Court of Appeals which provide public interest takes precedence over an employee's duty of confidentiality. For instance, in one of its rulings, the Court of Appeals held that a Company partner and accountant who files a complaint before the official authority stating the Company is not complying with tax obligations does not violate the duty of confidentiality.

Protection for Whistleblowers under the Turkish Labour Law

The Turkish Labour Law protects employees against invalid or unjust dismissals through affording employees that are covered by job security provisions the right to claim reinstatement to work or payment of compensation by the employer.

ent, the employee (whistleblower) shall benefit from the provisions of the Turkish Labour Law which protect the employee against invalid or unjust dismissal. Thus, to some extent, the Turkish Labour Law offers protection to employees (whistleblowers) whose employment contracts are terminated due to disclosure of business malpractice, illegal acts or omissions.

Moreover, the Turkish Labour Law has also foreseen provisions protecting employees who are discriminated against, suspended, demotivated, transferred, socially excluded, threatened or harassed etc. by the employer due to whistleblowing. Article 10 of the Turkish Constitution on equality principle, and Article 5 of the Turkish Labour Law on prohibition of discrimination against employees in an employment relationship, would protect the employees from

any discriminatory or derogatory treatment of employers, in case they have lodged any factual compliant or accusations against their employers. The Turkish Labour Law has also foreseen the sanctions to apply in the event of violations. If the employer violates equal treatment principle and applies differential treatment to employees due to above reasons, the employee may demand compensation up to her/his four months' salary plus other claims which s/he was deprived of.

The provisions of the Turkish Labour Law stated above are indirectly related to protection of whistleblowers. Thus, currently Turkish labour courts resolve this issue by evaluating the relation between duty of fidelity of an employee and employer considering the specifics of the present case.

Execution of Contracts on Cessation of Employment In Light of Job Security Provisions of Turkish Labour Law

Ahu Pamukkale GÜNBAY

The parties may draw up and terminate a contract depending on the principle of freedom of contract. The contract drawn up to terminate another contract by mutual understanding is called cessation (rescinding) contracts.

In order to terminate an employment contract, the cessation contract may be constituted upon proposal of one party to the employment

contract to the other party. Execution of cessation contract by employee and employer is not a unilateral or a resignation offered by the employee. In other words, concentration of wills in termination of an employment contract cannot be deemed as one party termination.

Please note that the employers started to execute cessation contracts after the enactment of the Labour Law numbered 4857 (the "Labour Law")