Border Crossing
July - December 2024
Volume: 14, No: 2, pp. 167 – 182
ISSN: 2046-4436 (Print) | ISSN: 2046-4444 (Online)
bordercrossing.uk

TRANSNATIONAL PRESS® LONDON

Received: 27 November 2024 Accepted: 4 December 2024
DOI: https://doi.org/10.33182/bc.v14i2.2880

The Worker's Right to Refrain from Fulfilling The Obligation to Work Due to The Non-Provision of Occupational Health and Safety Services Under Turkish Law

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Abstract

The right to life of individuals is guaranteed by the Turkish Constitution and various international treaties concerning human rights. In the event of a serious and imminent hazard in the workplace, workers' refrainment from working is a manifestation of the most basic human right, the right to life. In such hazardous situations, workers cannot be expected to continue their work and their rights cannot be restricted due to their refrainment. In other words, it is a requirement of the modern social state to ensure that the workers, whose rights are guaranteed within the framework of the relevant legislation, acquire their wages and other rights during this period. The Turkish Occupational Health and Safety Law regulates the scope and conditions of this right. Should the employer not comply with their obligation to take the necessary measures to eliminate hazardous situations within a reasonable amount of time after learning, the worker may then be entitled to the right to termination.

Keywords: *Occupational health and safety law; The right to refrain from working; The right to demand a healthy and safe life; Occupational health and safety services; Occupational heath and safety measures*

Introduction

The right to live in healthy conditions, which is protected under the Turkish Constitution and human rights law, constitutes the essence of the right to refrain from working. When occupational health and safety services are not duly provided by the employer, workers should not be expected to endure this situation and endanger their own health. Within this context, this right is regulated under Turkish law by both the Turkish Labour Law No. 4857 (TLL) and the Turkish Occupational Health and Safety Law No. 6331 (OHSL). The right to refrain from working regulated under the TLL is based on the employer's failure to pay wages on time. In contrast, the right within the scope of the OHSL is based on the employer's failure to provide occupational health and safety services, and the latter forms the basis of this study. The study aims to examine the certain terms, conditions and characteristics of this right regulated under the OHSL. It is also discussed whether work accidents and occupational diseases can occur during this period. The question arises whether the inability to restrict the rights of workers could mean that they should be seen as in the ordinary period in terms of social security law.

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1. The Right to Demand Working in Healthy and Safe Conditions

Workers' rights, which began to be recognized in Western countries following the industrial revolution, have also gained legal protection in Türkiye over time (Gözlügöl, 2002: 445). The first section of the European Convention on Human Rights, titled "Rights and Freedoms", begins with the regulation as follows: "Everyone's right to life shall be protected by law[2]." Similarly, according to Article 17 of the Turkish Constitution, "Everyone has the right to life and the right to protect and improve their corporeal and spiritual existence." The most important aspect of the protection of workers' right to life in labour and social security law is not requiring them to continue to work when a serious and imminent hazard occurs (Sümer, 2021: 2013). Furthermore, it is stated in the literature that a worker exercising their right to refrain from working cannot later change their mind, waive their right, and return to work (Engin, 2003: 92). In this sense, it is important for the worker who will exercise their right to refrain from working to be sure that exercising their right to refrain from working will not result in losing any rights. As will be examined below, workers exercising their right to refrain from working shall continue to acquire their wages and other rights during this period, and it has also been regulated that their rights cannot be restricted. In fact, a regulation to the contrary would contradict the understanding of the modern social state and could lead many workers to continue working, ignoring their health and lives. Indeed, in modern legal systems, the worker's health and right to life are seen as more important than the act of working (Göktaş, 2008: 215). This regulation in Turkish law is appropriate in terms of serving the purpose of protecting and strengthening fundamental human rights (Mollamahmutoğlu et al., 2022: 1457). In fact, prior to this regulation, it was argued that the worker had the right to refrain from working based on general provisions (Özdemir, 2014: 413). The right to refrain from working essentially protects the physical integrity of workers in its appearance in the OHSL, contrary to the non-payment of wages in the TLL (İşçi, 2022: 9, 10). It should be particularly emphasized that, even if it were not explicity stated, the employer is in any case obliged to take all possible occupational health and safety measures as per general provisions, as long as it is possible in today's technology, and that there are no restrictions on the scope of this matter (Demircioğlu et al., 2021: 161; Ekmekçi & Yiğit, 2024: 367; Kılkış, 2018: 101; Özdemir, 2014: 424).

Employers have undertaken an important duty to protect and supervise their workers in accordance with the rules of Turkish labour law. There is no general and single regulation that expresses this duty in full but rather there are various legal regulations containing it and they appear in relevant parts of the legislation (Süzek, 2022: 412; Narmanlıoğlu, 2014: 320, 321).

According to Article 417/2 of the Turkish Code of Obligations No. 6098 (TCO), the employer must take all necessary measures to ensure occupational health and safety in the workplace. In return, workers must comply with these measures. According to Article 417/3 of the TCO, should the employer's violation of this and other legal or contractual obligations lead to the death, injury or other violation of personal rights of the worker, compensation for

[2] European Convention on Human Rights, https://www.echr.coe.int/documents/convention_tur.pdf, Access Date: 19.10.2024.

these damages may be demanded. In fact, this is a manifestation of the employer's duty to protect and supervise its workers, which is detailed in Article 4 of the OHSL[3].

2. The Worker's Right to Refrain from Working

Firstly, workers have the right to complain and report to the competent authorities when occupational health and safety measures are not fulfilled (Mollamahmutoğlu et al., 2022: 1452). On the other hand, the rights of workers within the scope of occupational health and safety can be divided into two categories: The right to refrain from working and the right to terminate the employment contract for just cause. The regulation of "non-payment of wages on time" in Article 34 of the TLL grants workers the opportunity to refrain from working as well[4], and its scope, conditions, and basis differ from the regulation of the right to refrain from working in the OHSL. This study focuses on the right to refrain from working due to the non-provision of occupational health and safety services regulated in Article 13 of the OHSL.

2.1. Legal Basis of the Right to Refrain from Working

Within the context of the OHSL, the right to refrain from working might occur "as long as there is a serious and imminent hazard to their life and health." (Aydınlı, 2005: 17) The right to refrain from working is specified to the situation of being faced with a serious and imminent hazard in Article 13 of the OHSL. It should be stated that this right is essentially based on the employer's duty to look after the worker, and while the scope of this duty may vary according to each employment relationship, it undoubtedly includes taking appropriate measures to protect the worker's health (Mollamahmutoğlu et al., 2022: 697; Narmanlıoğlu, 2014: 320-323).

The first recognition of the right to refrain from working at an international level was with the establishment of the International Labor Organization (ILO) (Mollamahmutoğlu et al., 2022: 1452). The ILO Convention dated 03.06.1981 was accepted with Law No. 5038 dated 07.01.2004 and entered into force on 22.04.2005 in Türkiye. In the "ILO Convention No. 155 on Occupational Health and Safety", the necessity of granting workers the right to refrain from working in cases of non-compliance with the legislation and practices of the party states, and the internal regulations and occupational health and safety measures of the enterprises, was stated clearly and in detail[5].

According to Article 8/3 of the Council Directive on the Introduction of Measures to Encourage Improvements in the Safety And Health of Workers at Work of the European Union dated 12.06.1989 and numbered 89/391/EEC[6], the employer is obliged to warn all workers who may face a serious and imminent hazard as soon as possible, to take all necessary measures for protection, to take action and provide instructions to ensure that workers stop working and/or leave the environment where the hazard has occured and move to a safe area.

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[3] The primary obligations are as follows: "Taking occupational health and safety measures, making/having a risk assessment, establishing an occupational health and safety board, training and informing". For more details see: Ekmekçi & Yiğit, 2024: 367-385.

[4] Otherwise, this situation would constitute a violation of the prohibition of forced labor. For more details see: İşçi, 2022: 13 ff.

[5] ILO Convention No. 155 on Occupational Health and Safety, Articles 13 & 19/f, https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C155, Access Date: 19.10.2024.

[6] EU Monitor, https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vhckkmbs3qy5, Access Date: 19.10.2024.

It is also clearly stated that if the serious and imminent hazard continues, the employer must, as a rule (except for suitably justified exceptional cases), request that the workers stop working.

2.2. Subject of the Right

If and when there is a right, there must also be a person who is the rightholder (Dural & Sarı, 2022: 191[1072, 1073]). A worker who is faced with a serious and imminent hazard may exercise the right to refrain from working, regardless of whether they are a subcontractor worker or a worker under a temporary employment relationship (Ekmekçi et al., 2022: 414). As a rule, the OHSL includes all types of "workers" without making any distinction between public and private sectors (Article 2/1) (İnciroğlu, 2014: 812)[7]. In particular, the Regulation on Occupational Health and Safety in Temporary or Fixed-Term Work[8] guarantees that employers cannot exhibit an attitude contrary to the equality of their workers in terms of occupational health and safety. Accordingly, in accordance with the view that we also share, subcontractor workers can exercise their right to refrain from working against the primary employer by complying with the procedure in the law (Akın, 2013: 244, 245), and a temporary worker can do the same. However, it would be appropriate for the temporary worker to notify their own employer of the situation, due to their duty of loyalty to them (Caniklioğlu, 2008: 132).

Subcontractor workers and temporary workers are not specifically regulated in the OHSL obligations (Ekmekçi et al., 2022: 368, 398). However, pursuant to Article 7/9 of the TLL, "the employer employing temporary workers is obliged to provide the training sessions stipulated in the 6th paragraph of Article 17 of the OHSL and to take the necessary measures in terms of occupational health and safety, and the temporary worker is obliged to participate in these sessions[9]." Additionally, the aforementioned "Regulation on Occupational Health and Safety in Temporary or Fixed-Term Work" has been issued on the matter (Ekmekçi et al., 2022: 399-411; Yiğit, 2019: 156). It is also necessary to mention that there are various obligations for subcontractors, apart from the explicit OHSL regulation on the establishment of a Board (Occupational Health and Safety Board in accordance with OHSL Article 3/1-(k))[10]. Therefore, the obligations arising from occupational health and safety are also valid in such employment relationships. Although it is not directly included in the OHSL, it has been stated that these workers may exercise their right to refrain from working as well (Demircioğlu & Kaplan, 2020: 213, 214). On the other hand, a contrary view criticizes the view that directly makes the the primary employer the addressee of the right to refrain from working, based on the fact that the main person who should take the measures in the workplace is not the primary employer. According to this view, the addressee of the right to refrain from working of subcontractor workers should always be the subcontractor, in other words, it is stated that subcontractor workers cannot refrain from working on the grounds that the primary employer has violated its obligations (Özdemir, 2014: 425, 426)[11]. We do not agree with this view on the basis that we find the justification of equity on which the previous view is based to be

[7] The protection of the health of domestic workers is of particular importance. See: Akkoyun & Dalaman, 2024: 22.
[8] Publication: Official Gazette dated 23.08.2013 and numbered 28744 (Various provisions entered into force on different dates).
[9] For more details see: Yiğit, 2019: 157 ff.
[10] For more details see: Ekmekçi et al., 2022: 375-396; Yıldız, 2022: 78 ff.
[11] However, the author is of the opinion that temporary workers may exercise the right of refrainment.

approprite. Indeed, if we assume that there is a situation that endangers all workers in the workplace, in this case, it would be unfair to expect workers to determine which employer's breach of obligation caused this hazard and to act accordingly.

Lastly, according to Article 2/2-(a) of the OHSL, the intervention activities of the Turkish Armed Forces, general law enforcement forces, the Undersecretariat of the National Intelligence Organization, and disaster and emergency units are exempted from the scope of the law. So, for instance, while a fire may pose a hazard to a worker working 9-5 in a law office, it cannot be considered a hazard for a firefighter. This is not to say they might never face hazardous situations. When a firefighter is, for instance, deprived of the clothing they should wear and/or the tools they should use while responding to a fire, this is a hazard. However, they still would not be able to resort to the right to refrain, due to their exemption from the OHSL. Defending a contrary view here would not be possible, since the legal regulation is extremely clear.

2.3. Conditions of the Right

The conditions for the right to refrain from working can be summarized as i. the occurence of a serious and imminent hazard and ii. work not having been suspended. It should be noted that before the OHSL came into force, the right of the worker to refrain from working due to the failure to provide occupational health and safety services was regulated within the scope of the TLL. The repealed article 83 of the TLL required a "close, urgent and vital" hazard (Mollamahmutoğlu et al., 2022: 1454; Özdemir, 2014: 414). Additionally, the repealed article 83 of the TLL referred to the hazard that would harm the health of the worker or endanger their physical integrity in terms of occupational health and safety "in the workplace." However, this criterion has been lifted in the OHSL regulation[12]. Within this context, it is no longer required for a serious and imminent hazard to absolutely occur in the workplace in order for the worker to exercise their right to refrain from working (Önol, 2022: 209). As can be clearly seen, this regulation increases protection for workers. On the other hand, it is also in line with the needs of the age we live in.

2.3.1. Serious and Imminent Hazard

According to the definition in Article 3/1-(p) of the OHSL, the concept of "hazard" should be understood as "the potential for harm or damage that exists in the workplace or may come from outside, and that may affect the worker or the workplace." In the literature, this concept is defined as "undesirable circumstances that a person's life and health may face in the future, where irreparable damages may occur." In such hazardous situations, it has been stated, in accordance with the view that we also share, that no one should be required to continue working; otherwise, this would mean that the rights of that person are not being recognized (Narmanlıoğlu, 2014: 420).

As can be seen from the provision, the hazard must be both serious and imminent. The concept of seriousness indicates a higher risk level compared to normal, while the concept of

[12] Additionally, Article 3/1-(p) of the OHSL, which regulates the definition of the concept of "hazard", includes the phrase "… that may come from the outside."

imminence indicates a minimal time remaining prior to the occurrence (Mollamahmutoğlu et al., 2022: 1454).

When this provision is interpreted word by word, the result will be that if the hazard is serious but not imminent, in other words if it is a long-term hazard, the worker must continue working. This condition has been criticized in the literature due to the importance of hazards that are not imminent but vital (Süzek, 2022: 945; Mollamahmutoğlu et al., 2022: 1454, 1455; Subaşı & Yiğit, 2018: 145; Sarıbay Öztürk, 2015: 65). The opposite view is that the nature of the right to refrain from working is more compatible with short-term, in other words, "imminent" or sudden hazards rather than hazards whose effects will spread over a long period, such as occupational diseases (Ekmekçi et al., 2022: 416). This is because, upon any notification by the worker regarding a serious and imminent hazard, the employer or the Board, if any, will take the necessary actions immediately. The right to refrain from working is based on this underlying logic. Although it should be noted that this view does not completely exclude occupational diseases, stating that there is no obstacle to the worker exercising their right to refrain from working if some occupational diseases, the effects of which occur in a relatively shorter time compared to others, meet the conditions of serious and imminent hazard. However, it should be accepted that workers cannot exercise their right to refrain from working in terms of serious but not imminent hazards due to the current regulation (Sümer, 2021: 204).

The terms and conditions of the right to refrain from working will vary depending on whether the hazard is preventable or not. Whether all these criteria are met will be investigated and examined on a case-by-case basis (Mollamahmutoğlu et al., 2022: 1455). Although the meaning of the concept of prevention in "preventable" hazard is not specifically stated in the law, "prevention" is defined in Article 3 titled "Definitions" as "all measures planned and taken to eliminate or reduce risks related to occupational health and safety at all stages of the work carried out in the workplace."

Contrary to the OHSL, TLL does not require an application to the Board. This is because, first, the entity defined as the Board is subject to and is established in accordance with the OHSL. Furthermore, the right in the TLL is based on the non-payment of workers' wages and so, it is not necessary to determine the existence of a hazard as it is in the OHSL. In other words, it should not be considered as a situation that requires determination by an independent party with objective criteria. Whether the wage has been paid is not a situation on which different opinions may arise, but an absolute reality that can be easily determined by everyone. It is both necessary and sufficient to leave the determination of this situation to the workers. In this sense, the requirement for application to the Board in the OHSL should not be interpreted as a situation that "makes it difficult for workers to exercise their rights", but a necessary step.

2.3.1.1. Preventable Hazard (Application to the Board)

Firstly, according to Article 22 of the OHSL, employers with fifty or more workers in the workplace are required to establish a Board[13]. In other words, this Board, according to Article

[13] The types of workplaces in which the establishment of a Board is mandatory are regulated in OHSL Article 22/1. Accordingly, two conditions are sought: Fifty or more workers in the workplace and continuous work lasting more than six months.

2 of the OHSL titled "Definitions", refers to the "Occupational Health and Safety Board." On the other hand, according to Article 22/2-(ç) of the OHSL, employers with fifty or fewer workers in the workplace are not obliged to establish a Board. This rule is criticized in the literature because the decision would then be left to the employer in such workplaces (Özdemir, 2014: 418).

As a rule, in the event of encountering a serious and imminent hazard, the worker will first request the employer or the Board, if any, to take the necessary measures regarding the situation. It is not possible for them to reach the conclusion on their own that the situation is hazardous and stop working (Kılkış, 2018: 168). If there is a Board in the workplace, it is important that this application is directed to them first. It should be stated that if there is no Board in the workplace, the application to be made to the employer can also be directed to the employer representative instead of the employer (Ekmekçi et al., 2022: 419; Mollamahmutoğlu et al., 2022: 1455)[14]. In addition, according to the Regulation on Occupational Health and Safety Boards[15], if there is an exercise of the right to refrain from working stipulated in the OHSL, the Board must meet urgently and make a decision (Article 8/1-(ğ)). In this case, the "ordinary" meeting times specified in article 9 of the Board will not be taken into account (Article 9/3) (Mollamahmutoğlu et al., 2022: 1455).

Here, the requirement for such a notification is essentially based on the view that, in addition to providing the employer with the opportunity to take action, whether a situation violates occupational health and safety measures should not be determined according to workers' personal evaluation but in accordance with objective principles (Mollamahmutoğlu et al., 2022: 1455; Engin, 2003: 91).

Additionally, "immediately informing the employer or worker representative when they encounter a serious and imminent hazard to health and safety in the machinery, devices, vehicles, equipment, facilities and buildings in the workplace and when they see a deficiency in protective measures" is also regulated as an obligation for workers in Article 19/2-(c) of the OHSL.

Although there is no formality required for the application to the Board, it is recommended that it be made in writing for ease of proof (Ekmekçi et al., 2022: 418; Özdemir, 2014: 417; Demircioğlu & Kaplan, 2020: 209, 210; Sarıbay Öztürk, 2015: 79).

It should also be noted that workers' stopping of work until the employer takes the necessary occupational health and safety measures cannot be considered a strike (Sarıbay Öztürk, 2015: 157).

Finally, neither the repealed article 83 of the TLL nor the current Article 13 of the OHSL has specified a clear time period for the Board or the employer/employer representative to make a decision. It was stipulated during the period of the repealed law that the Board would meet on the same day and make a decision. The current OHSL Article 13 includes the phrase "urgently." Although a six-day period was specified in the draft law, this period has not been enacted. The time period for the Board to meet urgently or for the Board/employer to make

[14] According to OHSL Article 3/2, employer representatives are considered as employers within the scope of the law.
[15] Publication and entry into force: Official Gazette dated 18.01.2013 and numbered 28532.

an immediate decision should be evaluated on a case-by-case basis (Demircioğlu & Kaplan, 2020: 210).

In terms of the legal nature of the decision, it is "constitutive"[16]. This is because, as a rule, the worker must wait for the decision of the Board/employer/agent to exercise their right to refrain from working. The right to refrain from working may only then arise, if and when the decision has been made (Engin, 2003: 91). At this point, since the Board is a body established by the employer and is affiliated with the employer, it may be questionable whether the Board's decision is fair and objective. In the event that the Board's decision is clearly unlawful, the question of whether the worker who is sincerely concerned about their life and health, should continue working despite the existing hazard, and due to this decision alone, should be examined on a case-by-case basis. At first glance, the conclusion to be reached is that the worker must continue working if the Board makes a negative decision, since the legal regulation is explicity in this direction. However, as mentioned above, if the worker, who believes that the decision has been made completely inaccurately, notifies the employer (or their representative) of this situation, and insists on their request and the decision still does not change, we believe that the worker may then keep refraining from working, depending on the situation.

2.3.1.2. Non-Preventable Hazard

According to Article 13/3 of the OHSL, if the hazard is non-preventable, the worker is allowed to quit their job without having to report the hazard[17]. It is observed that such an opportunity was not provided previously, namely, in the repealed Article 83 of the TLL. In the preamble of the repealed Article 83 of the TLL, it is stated that in case of an urgent and imminent hazard, a written determination must be acquired from the Board (if not, from the employer or its authorized representative) on the subject.

At this point, the concept of "non-preventable" should be clarified. As mentioned above, "prevention" has been defined in the OHSL. Therefore, in our opinion, the concept of non-preventable hazard can be understood as hazards for which it is not possible to take relevant measures. Although the concept of "non-preventable" is not defined in the OHSL, it is stated in the preamble of the provision that this conclusion should be reached "with the worker's belief (…) within the scope of their knowledge and experience." In the literature, it is stated, in accordance with our view as well, that if the worker's belief is "reasonable", in other words, does not come with bad intentions, it should be accepted that the worker has used this right in accordance with the law (Ekmekçi et al., 2022: 420). In addition, it is also stated that the evaluation here should be made by taking into account personal criteria such as "working environment, experience, professional qualification, seniority, age, health status." (Süzek, 2022: 947; Özdemir, 2020: 253; Sümer, 2021: 205) The subjective evaluation here should not be confused with the subjective evaluation of the hazard. The issue discussed here concerns the element of non-preventability, in addition to the hazard.

[16] Constitutive right means that the legal relationship between the parties arises only through the exercise of that right. See: Dural & Sarı, 2022: 120.

[17] This is also defined as their "ex officio right" to refrain from working. See: Yıldız, 2022: 180.

In cases where such hazard is non-preventable, it is regulated that if the worker goes to a "safe area" without applying to the employer or the Board, their rights cannot be restricted (OHSL Article 13/3). According to Article 12/1-(a) of the OHSL, issues such as the allocation of these safe areas and informing the workers are listed among the obligations of the employer.

2.3.2. Work Not Having Been Suspended

For the worker to exercise their right to refrain from working in accordance with the OHSL, work must not have been suspended in the workplace. Due to the nature of the work, it would not be technically possible to "refrain from working" in such a workplace (or, for instance, in the event of a complete shut-down of the workplace) (Mollamahmutoğlu et al., 2022: 1456). According to Article 25 and Article 7/1 of the Regulation on Suspending Work in Workplaces (Regulation)[18], "When a matter that poses a vital hazard to workers is detected in the building and annexes, working methods and forms or work equipment in the workplace; work is suspended in a part or the whole of the workplace until this hazard is eliminated, taking into account the nature of the vital hazard and the area and workers that may be affected by the risk that may arise from this hazard." In addition, according to OHSL Article 25/7 and Regulation Article 7/2, "In workplaces where mining, metalwork, construction works in the very hazardous class, or where work involving hazardous chemicals is carried out or where major industrial accidents may occur, work is suspended if it is determined that no risk assessment has been made."

3. Duration of the Right to Refrain from Working and the Right to Termination

According to Article 13/3 of the OHSL, the right to refrain from working may be exercised "until the necessary measures are taken." Therefore, there is no clear time limit. The worker is entitled to this right until the serious and imminent hazard in the workplace has been eliminated. The time here that the employer requires to take the necessary measures would vary depending on the case at hand.

However, if the workers continue to refrain from working, even after the employer has taken the necessary measures, it should be accepted that this right is being abused (Özdemir, 2014: 424) and absenteeism is being committed (Demircioğlu & Kaplan, 2020: 212; Sümer, 2021: 206). Similarly, if, for instance, the hazardous situation has somehow been eliminated before the employer has had the chance to act against it, and the workers continue to refrain from working solely based on the employer's failure to take measures, this should also constitute bad faith and not be protected by law (Mollamahmutoğlu et al., 2022: 1459).

However, it is unthinkable that this period should be excessively prolonged, in other words, that the employer should not take these measures at all and instead employ other workers to continue the work in the workplace. At this point, Article 13/4 of the OHSL provides workers with the opportunity to terminate against the employer not taking measures to eliminate the serious and imminent hazard in the workplace. In the event that the employer does not take the necessary measures despite workers' request in accordance with Article 13/4 of the OHSL, workers then acquire the right to terminate their employment contracts in accordance with the law they are subject to.

[18] Publication and entry into force: Official Gazette dated 30.03.2013 and numbered 28603.

In terms of public personnel, it is noticeable that they are not granted the opportunity to unilaterally terminate in case of failure to fulfil occupational health and safety measures (Kılkış, 2018: 169). As recognized in the literature, for workers subject to the TLL, the employer's failure to implement working conditions constitutes immediate termination with a just cause in accordance with Article 24/II, subparagraph (f) of the TLL (Süzek, 2022: 948; Kılkış, 2018: 169). According to Article 26 of the TLL, this right must be exercised within six working days from the learning of the reason (Sümer, 2021: 208; Kılkış, 2018: 169). It should be added that since this is a justified termination of the worker, there is no reason why they should not acquire the right to severance pay, provided that they meet the necessary conditions (such as 1 year of seniority in the workplace). However, it is also important that the worker's assessment as to whether the measures were not taken is appropriate (Süzek, 2022: 948).

It is important to note that in order to exercise the right to immediate termination for just cause, one is required to wait for the employer to take the necessary measures for a reasonable period of time after notification. In other words, it is not possible to exercise this right "immediately." Indeed, the first sentence of Article 13/4 of the OHSL clearly mentions the situation where the necessary measures are not taken by the workers "despite their request." Therefore, since the worker is not required to notify the employer (or the Board) of the situation in cases where the hazard is non-preventable, it is clear that the first sentence of Article 13/4 of the OHSL does not apply; in other words, workers do not have the right to immediate termination in cases of non-preventable hazard. This is because the right to termination here is directed at the employer violating occupational health and safety obligations by not taking the necessary measures despite being aware of the hazard. Granting the worker the right to terminate, despite the employer not being aware of the hazard, should not be acceptable. The employer should not be penalized solely because a hazardous situation has occurred. Therefore, the worker's right to immediate termination is specific to the situation where the employer fails to take the necessary measures despite the request (and therefore, only the occurrence of a preventable hazard). It is not considered lawful for the worker to exercise the immediate termination right without waiting for the employer to take the necessary measures in the workplace (Sümer, 2021: 208).

It should be emphasized that, accordingly, the generally accepted view in the literature and our opinion accordingly is immediate termination based on just cause rather than valid cause. However, it should be discussed how the reasonable period that the worker should wait after notifying the employer aligns with the "six working days from the moment of notification" rule, which is the period for termination for just cause in case of violation of good faith and ethics. Firstly, in our opinion, receiving a negative response after notifying the employer will require the six-day period to start directly from the moment of feedback. If the employer remains silent, action should start from the moment the worker understands that their employer will not attempt to take the necessary measures, depending on the characteristics of the case at hand. Namely, this behavior of the employer not taking action after a reasonable period of time should be interpreted as "an understanding that the employer does not intend to take the necessary measures." In our opinion, since the employer will be expected to act relatively quickly in taking these measures due to the serious nature of a hazard, the concept of a reasonable period here should not be too long. Additionally, the nature or magnitude of the hazard does not play a significant role in the evaluation of this period. This is because the measures to be taken do not need to be completed, and the mere observation of the employer

taking action to take measures will prevent the worker from exercising their right to termination. Within this context, it should be stated that the worker has the right to immediate termination pursuant to Article 25/II of the TLL against the employer not taking action within a few days at most despite being aware of the hazard. The exercise of this right should be directly initiated at the point determined by the above-mentioned logic and should be fulfilled afterwards within six working days. The waiting period mentioned here is essentially aimed at preventing the worker from leaving the employment relationship as soon as they encounter the hazard. However, the worker cannot be expected to wait for the employer for long to exercise this right after they are aware of the hazard. After all, although the worker is entitled to their wages during this period, they may choose to end the relationship with an employer who refuses to provide them with a suitable working environment, and may move on to another job offer that is more suitable for them.

4. Wages During the Non-Working Period

It is understood from the wording of the law that the worker is entitled to wages for the non-working period, in other words, do not fulfil their obligation to work. In general, it has been adopted both in Türkiye and in the rest of the world that the worker should be entitled to wages if the act of working cannot be performed due to reasons originating from the employer (Akdeniz, 2018: 60, 61).

This applies to both preventable and non-preventable situations. This is because the last sentence of OHSL Article 13/2 clearly states that wages and other rights are reserved; and the last sentence of OHSL Article 13/3, which regulates the non-preventable hazard situation, clearly states that the rights of workers cannot be restricted due to the behaviors specified in the provision. Article 13/2 of the OHSL covers other rights in addition to wages. Therefore, in our opinion, the worker will also acquire additional wage rights such as bonuses corresponding to the period in which they did not perform the obligation to work. In the future, when calculations such as notice periods and severance pay are made, these periods will also be included in the calculation (İnciroğlu, 2014: 818; Göktaş, 2008: 140)[19]. Sümer is also of the opinion that the periods spent by the worker refraining from working due to non-provision of occupational health and safety measures should be included in the calculation, both when determining the notice period, the annual paid leave period, and when determining seniority in severance pay (Sümer, 2021: 206). In order for the annual paid leave to begin, the worker must actually commence work or at least be ready to work, and this calculation is made based on the duration of the contract (Erkanlı Başbüyük, 2020: 304).

It is important for workers to have the assurance that if they exercise their right to refrain from working, this will not result in any loss in their wages. This is because causing a worker who is at risk of having their physical integrity and health negatively affected to worry about their wages would be a practice that is incompatible with fundamental human rights (Aksoy,

[19] Göktaş states that the refrainment periods will be considered as worked and therefore, taken into account not only in the notice period and severance pay calculations, but also in the calculation of annual paid leave and weekly holidays (if the "employer's default" view is adopted in terms of the legal nature of the right). However, Article 55 of the TLL titled "Instances considered as worked in terms of annual leave" are limited and do not include the right to refrain from working. It should be mentioned that there are different opinions in the literature regarding the legal nature of the right to refrain from working. These can be classified as force majeure, necessity, fundamental security right, defence of non-payment, and employer's default. The first three views are generally not accepted. For classification and detailed information see: Göktaş, 2008: 215-221.

2020: 501). On the other hand, it is stipulated in Article 438/2 of the TCO that the amount the worker saved up, acquired from another job or deliberately gave up acquiring during this period should be offset from the wage to be paid, yet there is no clear doctrinal consensus on this issue (Göktaş, 2008: 230). In our opinion, the acceptance that it should be offset seems to be appropriate, since there is no situation or regulation that would require the provision in question to be understood otherwise.

Additionally, according to Article 13/4 of the OHSL, public personnel will be considered to have "actually worked" during the period in which they exercise their right to refrain from working.

5. Prohibition on the Restriction of Rights

As explained above, it is clearly stated in the OHSL that the exercise of workers' rights to refrain from working cannot lead to any restrictions, including wages. It must be stated that workers exercising their right cannot face any legal sanctions for this reason as a consequence. Similarly, in accordance with Article 8/4 and the last paragraph of the Council Directive 89/391/EEC of the European Union mentioned above, a worker who leaves the workplace and/or the hazardous area in the event of a serious, imminent and non-preventable hazard cannot be put in a disadvantaged position due to this behavior[20]. Furthermore, it has been pointed out that they should be protected from any harmful and unjust consequences in accordance with the legal legislation and practice.

6. Offering a Different Position

It is also controversial in the literature whether a different position offer can be made by the employer to a worker planning on exercising their right to refrain from working. Some authors reject such a solution since it would complicate the application and purpose of the right. Those who hold this view state that the worker cannot be expected to fulfil their obligation to work since the employer has not fulfilled the preparatory actions (in this context, occupational health and safety measures) (Akyiğit, 2001: 2107; Başbuğ, 2013: 26). On the other hand, it is also stated that an offer that does not constitute a fundamental change in working conditions can be made, and that the worker's rejection of this offer would constitute a breach of the duty of loyalty (Süzek, 2022: 946; Süzek, 2005: 616; Sümer, 2021: 206; Akın, 2005: 322; İnciroğlu, 2014: 818; Güldiken, 2022: 134; Karacan, 2007: 220). In this regard, Süzek states that, provided that there is no change in the wages and other working conditions to the detriment of the worker, the employer can make a similar position offer that is not hazardous. Süzek furthermore states that it would be unlawful for the worker to reject this offer, in violation of the rule of honesty, and that this situation would grant the employer the right to terminate the employment contract with just cause (Süzek, 2022: 946).

We believe that such a solution can be adopted to protect the balance of interests between the worker and the employer. The worker's rejection of a position that does not pose a risk in terms of occupational health and safety and is of a similar nature (does not constitute a fundamental change) would be against the rule of honesty and should not be protected by the legal system. In addition, the regulation stipulating "to give a different position according to

[20] It should be noted that the last sentence of Article 8 provides for an exception to this rule as "the worker's negligence."

their profession or situation, provided that there is no decrease in their wages" in OHSL Article 25 and Regulation Article 13, which regulate the suspension of work, can also be applied here by analogy[21].

7. Assessment of Worker's Refrainment in Terms of Social Security Law

The social security status of the worker during this period depends on whether they are "considered" (by law) to have worked during this period. The Supreme Court's precedent is that the periods in which workers are considered to have worked should be added to the insurance period[22].

During this period, the worker is ready to perform their obligation to work. The worker, who is already entitled to wages, should not be penalized for not being able to perform their obligation due to a situation occuring outside of their will which threathens their life. In this sense, although it can be argued that this period does not fall within the scope of the situations considered as worked, which are limited in Article 66 of the TLL, it should be considered as worked (Mollamahmutoğlu et al., 2022: 1460). Although it is not explicitly stated in Article 66, this period results from the employer's failure to perform preparatory actions and falls within the scope of "the period in which the worker is at work and ready to work at any time but is idle without being employed and waiting for a task" in Article 66/1-(c) (Mollamahmutoğlu et al., 2022: 1460; Akyiğit, 1995b: 196; Narter, 2018: 220; Göktaş, 2008: 231; Erkanlı Başbüyük, 2020: 207; Sarıbay Öztürk, 2015: 139, 140).

Even if we accept that the employment contract is suspended during this period, the social security rights of the worker must be protected (Başterzi, 2007: 93-95; Sarıbay Öztürk, 2015: 143, 146). Firstly, invalidity, maternity, old age and burial insurance premiums must be deducted. This is because it is sufficient to be considered as having worked for these types of insurance (Güldiken, 2022: 139). The question is whether the work accident and occupational disease insurance premiums should also be deducted during this period.

An author states that work accident and occupational disease premiums should not be deducted during non-working periods (Göktaş, 2008: 232). This is because when the worker is not actually working, they are not at any risk in terms of work accidents and occupational diseases. However, in terms of the other types of insurance listed above, it is sufficient to be "considered as having worked" and since "actual work" is not required, premiums should continue to be deducted from these types of insurance. In contrast, the view arguing that work accident and occupational disease premiums should be deducted bases this on the employer's default in accepting the work, and the worker being prevented from working, due to the employer's unfair behavior (Akyiğit, 1995a: 24; Akyiğit, 1995b: 197).

Since it is practically impossible for a person to have a work accident during a period when they are not at work, it may seem more appropriate at first glance not to deduct work accident and occupational disease premiums; however, this solution is not appropriate. Similarly, occupational disease, although it shows its effect over a long period, can only occur as a result of work-related activities. However, in the Turkish legal system, premiums are deducted in blocks (Özkaraca, 2020: 15, 16; Yetik, 2018: 17; Öztürk, 2016: 42). Therefore, it is not possible

[21] For an opposing view see: Özdemir, 2014: 423, 424.
[22] The Supreme Court 10th Private Law Department 9713/12521 10.10.2006 (Göktaş, 2008: 23177).

to make separate evaluations for each of illness, maternity, work accident and occupational disease. In any case, the premiums should be paid (deducted) in full by the employers during this period. At this point, it should also be reiterated that the hazard does not necessarily have to occur in the workplace.

Additionally, Article 61 of the TLL expressly stipulates that work accident and occupational disease premiums shall not be paid (deducted) during the annual paid leave. While there is an opinion that accepts the application of this provision by analogy here (Başterzi, 2007: 189), the opposing view rejects this due to the exceptional nature of the provision (Akyiğit, 1995a: 21[23a]; Akyiğit, 1995b: 197; Güldiken, 2022: 138). In addition, it is possible that the worker may suffer a work accident or occupational disease directly at the time a hazardous situation occurs in the workplace, in which case the premiums would absolutely have to be deducted (Güldiken, 2022: 139, 140).

According to the Social Insurance and General Health Insurance Law No. 5510, which is lex posterior and lex specialis, annual paid leave is not included in the premium exemptions. It is also clearly stipulated here that the provisions foreseeing premium exemptions in other laws will not be taken into account. Therefore, in practice, although the worker is not in the workplace while they are on annual paid leave, work accident and occupational disease premiums are still being deducted (Sarıbay Öztürk, 2015: 145, 146). With this similar approach, if we look at the practice, these premiums are also deducted during the refrainment period, since otherwise employers run the risk of employing unregistered workers (Güldiken, 2022: 141). Indeed, there are authors in the literature who state that premiums should be deducted during this period, without any distinction between the types of insurance (Sümer, 2021: 206; Sarıbay Öztürk, 2015: 146).

Conclusion

The most important duty and obligation of the employer, after paying wages, is perhaps looking after its workers. Considering the fact that workers, who are on the weak side of the employment relationship, put their personalities under commitment, both physically and mentally, we believe that it should be considered as one of the primary duties of the employer. Within the context of occupational health and safety law, it is a requirement that workers be entitled to certain rights against the employer not fulfilling their obligations arising from occupational health and safety. In addition, this right finds its basis in the right to demand a healthy life. Since the right to refrain from working regulated in the OHSL is a manifestation of this basic human right, it was argued that this right existed based on general provisions before the regulation in question was even introduced.

The reason why workers must first notify the employer or the Board when a serious and imminent danger occurs in the workplace is first, to inform the employer of the situation and ensure that they take action, but also due to the need for an objective assessment of the hazard. Should the employer not take the necessary measures despite the notification, workers may then refrain from working. However, notification is not required in cases of non-preventable hazard.

The legislation regulates that wages and other rights related to the non-working period will be protected and that rights cannot be restricted. In return, the worker must continue to work

when the occupational health and safety services in the workplace have been fulfilled. Otherwise, the worker carries the risk of violating the duty of loyalty, which may lead to the termination of their contract for just cause, due to their being absent without an excuse or permission. In return, it is possible for the worker to terminate the contract for just cause based on the employer's failure to provide the necessary occupational health and safety services, and we believe this rule applies exclusively to preventable hazards with a notification requirement. This right must be used within six working days after a reasonable period of time has been waited for the employer to begin taking the necessary measures. The reasonable period here will need to be evaluated on a case-by-case basis.

Finally, the requirement that the hazard "must absolutely occur in the workplace" has been lifted with the new OHSL regulation. We find this to be a positive change, considering the fact that, in the developing work, the boundaries of the concept of "workplace" have gone beyond physical units, and that the regulation has essentially helped increase protection for workers.

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