"Pay Without Work – Social Wage"

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Abstract

The wage is defined in many national and international legal arrangements, especially in the Constitution, due to the fact that the labor contract is the basic element and because of the social and legal importance it carries. In the first paragraph of Article 55 of our Constitution, is included in the definition of "The wage is for your sake". According to article 1 of Convention concerning the Protection of Wages No. 95, prepared by the ILO and approved by Turkey, " the term wages means remuneration or earnings, however designated or calculated, capable of being expressed in terms of money and fixed by mutual agreement or by national laws or regulations, which are payable in virtue of a written or unwritten contract of employment by an employer to an employed person for work done or to be done or for services rendered or to be rendered". The wage earned by the worker without any work compensation is called "social wage" in the doctrine. "Social wage" can originate from the law or the employment contract. In this study, the concept of social wage will be discussed and the concept will be examined in the place of our working legislation and in the regulatory judgments of our law.

Keywords: Wage, social wage, labor contract

Introduction

The definition of Labor Contract is stated in Article 8 of Labor Law no 4857 enrolled on 22.05.2003 and came into force on 06.2003. As per the definition in Article 8/1 of Labor Law: "Labor contract is the contract where one party (worker/employee) undertakes to do a work dependently and the other party (employer) undertakes to pay a wage".

Once again the Labor contract is defined as "the Labor contract is the contract where the employee undertakes to do a work for a certain or uncertain period of time depending on the employer and the employer undertakes to pay them a wage in terms of time or the work completed," in

Article 393 of the Law of Obligations no. 6098 enrolled on 11.01.2011 and came into force on 01.07.2012.

Within the frame of these definitions, it would be said that a labor contract is composed of factors of performing a work, wage, and dependency (Çelik, 2006: 69; Oğuzman, 1986: 4; Süzek, 2006: 189; Tunçomağ/Centel, 2005: 65; Demircioğlu/ Centel, 2005: 76; Eyrenci/Taşkent/Ulucan, 2006: 54-55; Mollamahmutoğlu, 2005: 205; Akyiğit, 2007, 97; Antalya, 1987: 123; Zevkliler, 2004: 325; Günay, 2006: 325). The wage to be paid to the dependent employer (worker) composes one of two faces of labor contract included in contract type in which the parties encumber each other with debts (synallagmatic contracts) (Güzel, 2005/2: 123). While the worker undertakes to use their Labor under the authority of employer and become dependent on them, they aim to obtain a wage in exchange. Thus the action of paying a wage of the employer constitutes the reciprocity of the action of the worker to do a work.

Concept of Wage in General

As it is the fundamental factor in a Labor contract and due to the social and legal importance it bears, the wage is defined in numerous national and international legal regulations, Constitution being in the first place. The definition, "wage is the compensation of Labor" is included in Article 55, Paragraph 1 of our Constitution. In Article 1 of the Protection of Wages Convention No. 95 drawn up by ILO and approved by Turkey it is stated that "the term wages means remuneration or earnings, however designated or calculated, capable of being expressed in terms of money and fixed by mutual agreement or by national laws or regulations, which are payable by virtue of a written or unwritten contract of employment by an employer to an employee for work done or to be done or for services rendered or to be rendered."

In Article 1, subparagraph (a) of the Wages Equality for Equal Work between Male and Female Workers Convention No.100 wage is defined as "ordinary, root or minimum wages or salaries and all other advantages paid to workers directly or indirectly by the employer in exchange for the Labor of the worker either in cash or in goods."

As for the Article 32/1 of Labor Law, it is stated that "in the general sense the term wages is the amount paid in cash to a person by the employer of third persons in exchange for a work done." Even though a similar definition is included in Article 29/1 of Maritime Labor Law, there is no definition of wages in Press Labor Law and in Law of Obligations.

There exist various definitions of wages in doctrine. According to a definition made in doctrine wage is; "an income consists of the money and payments in kind provided to workers in exchange for the work they do"

(Esener, 1978: 162) According to another description; "wage is a monetary debt to be paid for employees and another source of income that earns their and their family's keep along with being the crop of their Labor for workers" (Saymen, 1954: 487). In a more detailed description made in doctrine wage is "a type of income comprised of money or advantages having monetary value provided to workers by employers or third persons in exchange for a service performed except the situations where a wage should be paid to one even if they don't work" (Centel, 1988: 58) .

Elements of Wage

Payment in Exchange for Work

In exchange for performing the work, which is one of the factors in the contract and one of the fundamental liabilities of workers6, the liability of employers to pay a wage comes into question.

Worker accepts in advance to be subject to the system in the workplace and the general working conditions to perform the work specified in the contract. This is to say that the worker is obliged to fulfill the liability of performing the work he undertook which is their essential liability of action under the conditions of the workplace. The liability of performing the work can be described as the worker's allocation of their Labor to the employer by being subject to the working conditions in the workplace. An employer can determine how the liability of performing the work shall be fulfilled basing on the managerial authority, in compliance with law, contract, professional qualities and customs and in good faith. The worker is obliged to follow the instructions given by the employer (Çelik, 2006: 122; Süzek, 2015: 274; Tunçomağ/Centel, 2005: 94) .

Worker's stand-by presence for work is regarded as the performance of work as a rule. But it is not possible to regard all standby situations as the performance of work. In order for the standby situation to be regarded as the performance of work, this situation must be based upon the Labor contract and should be assessed as work in terms of economy (Tunçomağ/Centel, 2005: 49; Centel, 1988: 60; Reisoğlu, 1968: 60). In case the worker is ready to work with respect to these attributes, the employer shall be liable to pay wage.

Payment by Employer or a Third Person

Wage is described as "The amount provided and paid in cash by an employer or third persons to a person in exchange for a work by and large" in Article 32 of Labor Law. It is stated in Article 83 of Law of Obligations that "the debtor is not obliged to pay their debt in person unless the payee doesn't benefit from the debt to be paid by the debtor in person." Therefore, even though the liability of worker with respect to performing the work is a

liability to be administered in person, the liability of the employer to pay the wages is not a personal action to be taken and it could be fulfilled by the employer or by a third person.

Payment with Money or with a Benefit Having Monetary Value

Wage is described as "The amount provided and paid in cash by an employer or third persons to a person in exchange for a work by and large" in Article 32, Paragraph 1 of Labor Law. On the other hand, it is stated that "The wages cannot be paid with a bill to order (bond), coupon or a note claiming that it represents the functional currency in the country or by any other means," in Article 32/III of Labor Law. Furthermore, it is regulated in Labor Law that the payment with respect to wages should be made in Turkish Liras and how the payment should be made if it decided that the payment will be made in foreign currency (Article 32/II, Labor Law). With regard to this provision, "As a rule, wages shall be paid in Turkish Liras either in the office or by depositing it into a bank account. If it is decided to pay the wages in foreign currency, it can be paid in Turkish Liras in accordance with the rate of exchange on payment day".

Types of Wage

Basic Wage

Expressed as basic wage, net wage, base pay, root wage and wage in general, it is the amount to be paid to a worker in exchange for the work they perform. Basic wage is described in Article 32 of Labor Law as "the amount paid in exchange for work".

In case the wage to be received is not specified when calculating the right of workmanship, basic wage shall be based on. Basic wage is the base and overall wage is an exception (Süzek, 2015: 280; Narmanlıoğlu, 1998: 215; Mollamahmutoğlu, 2005: 215). But it is clearly specified that the overall wage shall be based on in some cases. For example, the overall wage is used as a base when calculating severance and notice pay.

Broad Wage

Broad wage is the wage calculated by adding the interests having monetary value stemming from either the contract or the law to basic wage (Centel, 1988: 117; Mollamahmutoğlu, 2005: 371).

The term "broad wage" is being used as a concept including overtime work, weekends, pay for national holiday and vacation pay, premiums, bonuses, commissions and social benefits along with basic wage (Çelik, 2006: 133; Süzek, 2015: 280). Additional pays included in broad wages can arise from the law, Labor contract, workplace practices or collective Labor agreement.

Social Wage

The wages originating due to the impact of social thoughts that the worker has a right to receive without performing any work are called "social wages" in doctrine **(**Süzek, 2015: 307) . It can arise from Social Wages Law or Labor contract (Centel, 1988: 217; Eyrenci/Taşkent/Ulucan, 2006: 122; Narmanlioğlu, 2010: 627).

Social Wages Originating from Law

Wages Paid Due To Forced Causes in Articles 24/III and 25/III. Of Labor Law

It is stated in Article 24, Paragraph III of Labor Law that "the Labor contract can be terminated by the worker provided that there are forced causes in worker's workplace to necessitate the business interruption for more than a week". As it is seen, in order to the right of the worker to terminate the Labor contract for justifiable reasons to arise, the forced causes in the workplace should continue at least for a week. The forced cause condition stated in this provision does not occur around the worker but it is related with workplace and makes it impossible to work in the workplace for a period lasting more than a week and allows the worker to terminate the contract for justifiable reasons.

It is stated in Article 25, Paragraph III of Labor Law that the employer can immediately terminate the contract for justifiable reasons provided that a forced cause occurs in the workplace which prevents to work in the workplace for more than a week. The forced causes stated in this provision don't occur in the workplace but occur around the worker beyond worker's command, such as fire, earthquake, and epidemics (If the forced cause preventing the work in workplace occurs in the workplace, the right to terminate the contract for justifiable reasons belongs to worker but not to employer. Hence Supreme Court Assembly of Civil Chambers described this matter in a judgement as: "…as it is seen in Article 17 that if the forced cause occurs because of the worker, right of termination without notice belongs to employer and as seen in Article 16 if it occurs in relation with workplace, right of termination belongs to worker. In that case worker can't use the right of termination without notice if forced cause relates to them and employer can't use if it is otherwise around." Yarg.HGK, T.21.3.1979, E. 1977/9-876, K. 1979/316 (Oğuzman, No: 10). (Aktay/Arıcı/Kaplan, 2011: 190). The worker is not able to perform their liability to perform the work due to the temporary impossibility to perform without their fault and as a result of the said events (Yuvalı, 3/2012: 16). In case a forced cause occurs with regard to the worker, the employer may use their right of termination at the end of one week that they should wait for if they wish or may wait for the forced cause to disappear and doesn't terminate the contract. But they are not

obliged to pay any kind of wage to the worker within this period (Süzek, 2015: 516) .

If a worker cannot work or cannot be made work due to the forced causes stated in Articles 24 and 25, Paragraph (III) under Article 40 of Labor Law, there is a provision stating that the employer pays half-wage per day up to one week during this waiting period *(Decision od 9th Civil Chamber of Supreme Court concerning the subject: "In reference to the information and documents in the file, defendant employer sent out the workers including the claimant to unpaid leave due to economic crisis. Even though this request was accepted as it is without the consent of the claimant worker for an unpaid leave between the dates of 01.03.1999-14.03.1999, Article 34 of Labour Law no. 1475 was not taken into consideration. This article stipulates to pay half-day wage per day to the worker who could not work due to forced causes up to one week. In this respect, it should be contented with ensuring the amount to be found after calculation as the worker has the right to be paid half-wage for a period of one week". 9. CC, 13.11.2000, 2000/11076 E., 2000/16101 K)*. The half-wage paid for 7 days at most during which the worker is not able to work because of forced causes can be named as "a social wage originating from law". Because worker or employer are not able to terminate the Labor contract during this period, Labor contract is still valid but due to reasons rooted in worker or employer, the worker cannot fulfill their liability to perform a work for 7 days. But even if they don't work during the period of 7 days, Article 40 of the Law regulates to pay half-wage to the worker as a mandatory provision *(But if labour contract is terminated before the occurrence of forced cause, they are not entitled to be paid half-wage "social wage". 9. CC, 16.03.1993, 1993/3548 E., 1993/4348 K.)* .

Wages Paid for Weekends or General Holidays

Weekend and weekend wage for the workers employed by workplaces included within the scope of Labor Law are specified in Article 46 of Labor Law. Pursuant thereto, there should be at least twenty-four hours holiday without a deduction for every worker within a period of seven days before the weekend, provided that they have worked in days specified in Article 63 of Labor Law (a. 46/I). Day wage for the weekend holiday of the worker who deserves the right of weekend holiday shall be paid in full for the off day not necessarily in exchange for work (a. 46/II). Thus the worker is able to use their legal right to rest pursuant to Article 50 of our Constitution. If the worker is made to work during the weekend holiday, the subject of getting paid for the weekend holiday and for the time they work shall come to the fore with regard to the worker. On the other hand, if a worker works during the weekend holiday, it will also result in exceeding

normal weekly working hours. Accordingly, overtime work will be mentioned for the said worker. Since the worker who works during the weekend holiday will be paid both the weekend wage and time-and-a-half overtime wage, it will be necessary to pay the worker for the weekend day they work 2.5 fold of daily wage. Thus the worker will earn the right to rest (weekend holiday) for 24 hours without any deduction provided that he worked in other days of the week and they will receive their wage even though they don't work during that period. This will also provide using the right to rest ensured by Constitution without having any economic concern. In short, the worker will have a full day wage without working. Thus the wage paid to a worker for the weekend can be regarded as a social wage.

Pursuant to our Labor Law, even though the workers don't work in days regarded as national holidays and days of general holiday, their daily wages shall be paid in full without being paid in exchange for a work. If the workers are made to work in the said days, they will also earn the right to receive additional payment for each day they worked (a. 47/I). Therefore the workers working during national holidays and days of general holiday shall be paid a wage in the amount of their two-day wage. Thus the wage paid to a worker for days of general holiday, even though they don't work during that time is a social wage.

Wage Paid During Holidays with Pay

The annual right to paid leave is an economic and social right secured by Constitution. Annual paid leave is described as a leave which releases the worker from the liability to work enables them to rest by receiving the wage paid by the employer in advance (Akyiğit, 2000: 30). The right of paid annual leave is one of the rights unique to workers and this right cannot be renounced. The worker cannot renounce this right during the term of Labor contract even voluntarily and the contracts including renouncement are invalid.

The annual right to paid leave is a right entitled to the worker to rest in proportion to their length of service, the wage of which is paid in advance provided the conditions stated in the Law are met. It is necessary to pay the equivalent of the worker's wage if they had worked during the period of annual leave. Vacation payment is both a social and technical wage and it is one of the exceptions made in the principle of "wage in exchange for work". In short, it is a social wage not paid in exchange for work.

Wage Paid During the Period When Worker Uses Their Right to Refuse Work

The provision in Article 34 of Labor Law states that "the worker whose wage is not paid within twenty days after the payday due to a reason

except force majeure can refuse to fulfill their liability to perform a work…" There are mandatory regulations regarding the payment time of workers' wages in Labor Law. The reason lying behind these provisions is providing the payment of unpaid wages which are regarded as maintenance receivable as they need to live on the wage income regularly and at close intervals (Güzel, 2005/2: 128. 9.CC, 10.02.2005, 2004/13259 E., 2005/3782 K Narmanlıoğlu 2010: 621.) . The main goal of the regulation in Article 34 of the Law is forcing an employer to page wages to workers who use their right to refuse work. Then depriving the worker of wages during this period when a worker doesn't work contradicts with the essence of provision even though it is not clearly stated in the regulation on the protection of wage that the worker will have the right to be paid their wage during the period that they don't work. Supreme Court determined that the worker cannot demand to be paid for the period they refuse to work (9. CC. 10.02.2005, 2004/13259 E., 2005/3738 K.). Nevertheless, there is an opinion that the Supreme Court might assess this issue differently now as they have altered their judgments in favor of workers during recent years (Çil, 2010: 22).

Wage of Worker for the Period of Sick Leave

Whether there is an obligation to pay the worker for the period they don't actually work or not is a controversial subject in doctrine. In our opinion, this issue should be assessed by considering whether the worker would receive the "benefit for temporary incapacity" from Social Security Institution during sick leave or not.

If a worker receives the benefit for temporary incapacity, the benefit for temporary incapacity shall be deducted from the monthly wages of workers pursuant to Article 48 of Labor Law (Supreme Court Assembly of Civil Chambers decided that there is no right of payment for sick leaves and only benefit for temporary incapacity shall be paid when law no. 1475 was in force. YHGK, 07.10.1998, 1998/9-638 E., 1998/682 K.; 9.HD, 20.04.2010, 2008/23521 E., 2010/11354 K). But this provision is not mandatory. The contrary might be agreed upon by parties *("…as it is stated that the benefit for temporary incapacity paid for sick leaves shall be integrated in the net wage…" 9 CC, 09.06.2003, 2003/9668 E., 2003/10485 K; "…separate provisions should be stipulated in personal labour contract or collective bargaining agreement for worker to claim payment…" 9:CC, 03.06.1997, 1997/7534 E., 1997/10656 K).*

If the worker doesn't receive the benefit for temporary incapacity, there is an opinion based on the obligatory provision of full payment should be made to the worker and the provision of payment made to female workers during maternity leave in accordance with Article 74/5 of Labor Law should be applied to all sick leaves (Eyrenci/Taşkent/Ulucan, 2006: 25). According

to another opinion, payment should not be claimed for sick leaves but only the workers who receive fixed wages would be paid their wages (INCE, 1998: 148).

Consequently, payment during sick and maternity leaves is the result of the concept of "social wage".

4-Month Idle Time Wage

It is stated in Article 21, Paragraph 5 of Labor Law No. 4857 that worker is obliged to apply to the employer within 10 days following the notification of reemployment decision. Otherwise, termination shall have the consequences of a valid termination. The employer who doesn't take on the worker who applied for reemployment within 1 month shall be obliged to pay employment security compensation amounting the sum of wages for at least 4, at most 8 months and wages up to 4 months and other rights for idle time. When calculating the charge for idle time, period wages following the termination period shall be taken into consideration *(9.HD 20.11.2008, 2007/30092 E., 2008/31546 K).* Furthermore, monetary rights such as transportation fees, bonuses, fuel allowances shall be added to this charge. This is to say that the calculation should be made as if he worker is working during this period. But wages occurring in case they work such as overtime fee shall not be included *(9.HD, 18.11.2008, 2008/32727 E., 2008/31214 K).*

Therefore the amount of 4-month wage that the worker deserves following the reemployment lawsuit could be assessed within the concept of "social wage" which shall be paid to them even if they don't work.

Social Wage Arising from Contract

The conditions where workers deserve to be paid without working can arise from the law, as well as from the contract. For instance, worker and employer might agree on paying the worker in full for sick leaves in the individual Labor contract or in collective bargaining agreement. Or the parties can mutually agree on payment of wage for the period when the worker refuses to work in the contract.

Conclusion

It is regulated in Article 55 of Constitution and in Article 32 and contd. Articles of Labor Law that wage is the value of worker's Labor. Wage is a social fact with respect to public order. It as a mandatory element of the contract. Wage can be described as the amount paid to the worker in exchange for their service with the exception of situations when the workers are paid without working. Therefore it is possible to pay wages without working in situations arising from Law or contract. The wage paid in this situations are called "social wages".

Social wage is a concept expressing the social quality of wages. This is to say that wages move away from economic reality and have a meaning based on human values due to this concept. Understanding of social wage requires the wage should provide a standard of living which befits the dignity of man. Therefore social wage which might be regarded as wages paid during weekend holidays, annual leave and alike regulated in law provide assurance to the worker without working.

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