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THE RIGHT TO PAID ANNUAL LEAVE IN THE TURKISH LABOUR ACT NO.4857

Sevgi DURSUN ATES

Selcuk University, Turkey

Abstract

The concept of resting has been researched by scholars of many disciplines. The right to rest in legal significance is a right needed by employees in order to remove fatigue due to working life and maintain their health. The right to rest holds an important place in sources of Turkish labour law. The vacation which provides possibility to rest for workers is one of the main affairs in working life. Right of paid annual leave is an inalienable ,economic and social right, assured by Constitutional Law. Employees overcome their physical and mental fatigue during their paid annual leave and they are not concerned about means of livelihood due to their wages be paid during this period. Productivity of a rested employee increases, conversely the number of work accidents decreases by reason of paid annual leave. Thus, in the micro level economic interest of the employers can be preserved and in the macro level it will make a significant contribution to national economy and public health. In this study we assess paid annual leave within the frame of Turkish Labour Act No.4857. In this respect; the aim of the right of paid annual leave has been defined and explained and its legal qualification and imperativeness have been underlined at first in the scope of national legislation After indicating basic principles of the right for paid annual leave, the entitlement conditions for the paid annual leave and the ways of implementation of this leave, has been evaluated within the framework of the Labour Act No.4857. Furthermore, the paid annual leave periods, basic principles regarding the application of the leaves and the leave fees has been assessed under this part. And then, the duration and the period of the paid annual leave , dates of taking of paid annual leave has been described. Due to its importance, paid annual leave should be taken during the employment contract, with wage as leave. In this context, principles to be considered in calculating the vacation duration and the days which can not be counted towards the vacation are discussed. Finally, in the last part of study, we will present penalties against non-compliance.

Keywords: Turkish Labour Law, Right of Paid Annual Leave, Employment Contract, Employee, Employer

1. Introduction

The right to paid annual leave is a basic right adopted through the Constitution towards the aim of providing the employees to rest whereby the “rights to paid annual leaves are provided for by the relevant laws under the Constitution (Sümer, 2015:150; Eyrenci&Taşkent&Ulucan, 2014:301 Süzek, 2014:838).

The regulations under the Labour Act no.4857 regarding the employees’ paid annual leaves are covered within the 50th Article of the Constitution, as per Article 53 and the remaining provisions of the Act and the applicable Paid Annual Leave Regulations.

The paid annual leaves which enable the employees to rest for a certain period of time and on a periodical basis during each working year provide them to rest without any worries of income thus maintain their health and work power. On the other hand, the employer and society also have their own benefits. During the period of paid annual leaves, the employees should not incur by and suffer from any loss of income. (Sümer, 2015:150; Eyrenci&Taşkent&Ulucan, 2014:301; Tulukçu, 2012:233)

In accordance with article no. 57/1 of Labour Act; the Employer is obliged to pay each employee who is supposed to take his or her annual leave prior to the beginning of his or her paid annual leave in cash or in the form of an advance payment. It is prohibited for the employee to work against payment during the period of his or her paid annual leave. If it is determined that the employee works in any jobs against payment in the meantime, the wage he was paid for the period of leave by the employer may be recollected by the employer (Labour Act, Article no: 58). Furthermore, the right to paid annual leave can neither be waived unilaterally nor can it be renounced.

2. The Conditions for Entitlement to Paid Annual Leaves

2.1 The employee’s obligation to have been working for at least one year

In order for employees who work at establishments covered under Labour Act no. 4857 to exercise their right to paid annual leave, he or she must have been working for at least one year of service, including the trial period, starting from the date on which he/she actually started working at that establishments (Labour Act, article 53/1). In other words, Employees in establishments covered by the Labour Act, who have completed at least one year of service since their recruitment, including the trial period, must be granted annual leave with pay. The beginning of this period of time named as waiting period is not the day on which the employment contract was executed, yet it is the date on which the employee actually began working (Sümer, 2015:150; Tulukçu, 2012:256-257; Çöğenli, 1983:94; Akyiğit, 2008:1796; Narmanlioğlu, 2014:703; Mollamahmutoğlu&Astarlı, 2012:1167; Süzek, 2014:839; Çelik, 2013:367).

If a trial period was provided for under the employment contract, the trial period should be taken into consideration in calculating the waiting period . Thus, it can be dictated that the trial period starting from the day when the employee has actually started to work in the

establishment is involved in the one-year employment under the same employer to qualify for paid annual leave (Eyrenci&Taşkent&Ulucan, 2014:302; Tulukçu, 2012:258). Turkish Labour Law does not entitle the employees whose durations of work at the workplace is less than one year to a proportionate right to paid leave (Eyrenci&Taşkent&Ulucan, 2014:302; Süzek, 2014:845; Çelik, 2013:367). In other ways, in case of work for less than one year, implementation of a prorated leave term is not possible. This means that the completion of one year of employment is a requirement for having utilization to paid annual leave (Eyrenci&Taşkent&Ulucan, 2014:302)

In order for the employee to be entitled to the right of paid annual leave, it will not make any difference whether the employment contract is for a definite or an indefinite period or not. Additionally, the employees working under an employment contract on call or for a partial period of time will also exercise their right to paid annual leave just like full time employees and they must not be subjected to more different procedures and treatment in comparison to a comparable full-time employees solely because his/her contract is partial time, unless there is a justifiable reason for differential treatment. Entitlement to paid annual leave after having worked for one year for the employees working under an employment contract on call or for a partial period of time will be estimated based on the entire term of their contract (Sümer, 2015:151; Tulukçu, 2012:273-275; Mollamahmutoğlu&Astarlı, 2012:1168).

Article 54 of Labour Act states that ; “The employee shall use his/her annual leave with pay computed for each year of service within the following year of employment. The length of the one-year service which must elapse for the employee’s entitlement to his upcoming paid annual **leave** shall commence from the day on which his/her entitlement to his/her previous annual leave became effective, to be computed towards the following year”. That is to say the employee shall use his/her paid annual leave computed for each year of service within the following year of employment. The Employee is entitled to an paid annual leave to be exercised within the next year against each year of service at the establishment. One year period of work required to be completed for the Employee’s next year of paid annual leave rights will start to be calculated on the day on which the employee’s previous right to paid leave has started until the next year of service.

In determining the period required in order to be entitled to paid annual leave, the durations of time whereby the employee has worked at any establishments owned by the same employer will be added up. In other words, in the computation of the length of service required to qualify for paid annual leave, the total periods during which the employee has been employed in one or more establishments of the same employer shall be considered jointly. Even the durations of time whereby the employees have worked at the establishments owned by the same employer without being under this law should be calculated for the people employed at the establishments within the frame of Labour Act no. 4857. (Labour Act54/1). This much that, any length of time spent by an employee in an establishment was included in the scope of this Act besides any length of time previously spent by the same employee in an establishment belonging to the same employer but not covered by this Act shall also be taken into consideration for the fulfillment of the one-year requirement.

It has to be indicated that the scope of the works performed at one or more establishments owned by the same employer also encompasses the durations of time whereby the employee has worked in between. In a word, employees' works which had been employed in one or more establishments belonging to the same employer covered by intermittent works. For instance, if an employee having left this workplace after having worked there for seven months starts working at another workplace, and then after a long period, he returns to start working at the same workplace, after working for five additional months, he shall be entitled to paid annual leaves (Sümer, 2015:151; Tulukçu, 2012:266; Mollamahmutoğlu&Astarlı, 2012:1172; Narmanlıoğlu, 2014:711).

Establishment transfer is a transaction which changes the employer of the employees working in the relevant workplace. Article 6 of Labour Act states that; " When, due to a legal transaction, the establishment or one of its sections is transferred to another person, employment contracts existing in the establishment or in the section transferred on the date of the transfer shall pass on to the transferee with all the rights and obligations involved. In the calculation of all the entitlements based on the employee's length of service, the transferee (new employee) must act, in regard to the transactions concerning the employee, according to the date on which the employee had started work under the transferor (previous employer)." Thus, transfer of the whole or a part of such establishment must be based on a legal transaction (e.g. sale; lease, donation etc.) for applying the article. For instance, when employer sells his firm, the employees' approval is not required for the transfer of their employment contracts to the new owner of the firm. It is the transfer of establishment. In the existing case, the employees will be transferred from the establishment of the transferor employer to the establishment of the transferee employer, but it is the transfer of the employees and not the establishment. However, only the employees whose employment contracts are effective on the date of the transfer may take advantage of the protection provided. In other words, the transferor employer's rights and obligations arising from the mentioned employment contracts as of the transfer date are transferred to the transferee employer with the same terms and conditions. Accordingly, the rights and obligations arising from the employment contracts that had been terminated by the transferor employer before the transfer and those deriving from the employment contracts executed after the transfer are not subject to Article 6.

In accordance with article no. 6/2 of Labour Act; in cases of transfer of the whole of establishment or some part of it, there will be no changes in the paid annual rights of the employees working at this establishment. Thus, in order for them to be entitled to paid annual leave, the previous durations of work will also be considered and estimated in calculating the periods of qualifying for entitlement to paid annual leave (Tulukçu, 2012:266). So, the transferor employer (previous employer) paid annual leave entitlement to employees in terms of time of work can be taken into account in the calculation of the waiting period, and unlike

even if an agreement between two employers who make a transaction, the transferee employer (new employer) is responsible for a contract fee, paid annual leave.

Starting from the transfer date, the transferee employer shall be liable for the rights and obligations arising from the transferred employment agreements. The term of service of the transferred employees must be calculated by the transferee employer, starting from the date on which they first started working with the transferor employer.

In addition to this, in accordance with article no. 7 of the Labour Act, the durations of temporary time whereby the employee has worked at another employer's workplace for a temporary or certain period will be considered in calculating the paid annual leave (Mollamahmutoğlu&Astarlı, 2012:1173). To add more, the same principle applies for the assignment of the individual employment contracts (Akyiğit, 2011:59; Süzek, 2014:840; Tulukçu, 2012:268)

2.2. The nature of the works performed and the establishment being qualified for entitlement to paid annual leave

In order for the employee to be entitled to paid annual leave, first of all, the workplace in question should be duly qualified under Labour Act no. 4857. It is mandatory that the works performed by the employee will be continuous, in a word the employee's work should be continuously and should not be a seasonal or campaign works the durations of which due to their nature, last less than a year (Tulukçu, 2012:254, 276 vd.; Çöğenli, 1983:86; Akyiğit, 2000:139; Mollamahmutoğlu&Astarlı, 2012:1173; Narmanlıoğlu, 2014:708; Caniklioğlu, 2001:1154).

The seasonal workers can neither demand nor require a paid annual leave as per the paid annual leave provisions of Labour Act. Due to their nature of work, rules on the annual leave are not applicable to the seasonal Works.

Furthermore, the works performed by the worker for entitlement to paid annual leave should also be among the continuous works which an employee performs so as to be entitled to paid annual leave. (Çöğenli, 1983:80; Tulukçu, 2012:254). Workers in intermittent employment are not subject to provisions on paid annual leave.

Article 10 of Labour Act stipulates that "the works which last for more than thirty work days are referred to as continuous/permanent works and the works which last for more than thirty days will be referred to as the transitory/intermittent works". Thus, the important factor at this point is the duration of time which should lapse in terms of the nature of the work.

2.3. The cases which an employee will be deemed to have worked in terms of the paid annual

Some periods of one year to be accepted as having been worked through is taken under these provisions, including time, waiting time. In accordance with Labour Act no. 4857, by deeming some periods of time as if worked over the course of it, it was stipulated that the periods in between are included to such waiting/qualification period. Article no. 55 of the Act stipulated the conditions which are deemed as worked over during such time:

a) Days on which the employee fails to report to work owing to an accident or illness (however, time which exceeds the period foreseen in subsection I (b) of Article 25 shall not be treated as worked);

Accordingly to this article, if employee is ill or has an accident when using annual paid leave, the relevant health organizations will granted to him health care permit. In other words, if the employee gets sick or has an accident when the employee exercises his/her right of paid annual leave and he/she is given a leave due to health issues, the leave due to health leave will not be deducted from the paid annual leave. Allowed annual leave may not be intertwined with health permit. Thus, the right to paid annual leave will be suspended.

b) Days on which the female employee is not permitted to work before and after her confinement, in accordance with Article 74 of Labour Act;

Although the women employees' days off work before and after birth are limited to eight weeks, totally sixteen weeks, these periods of time may be extended with a physician's report based on the female employee's health status or the nature of the work. These periods of time extended will be deemed as if worked over such durations under the paid annual leave account. However upon her request, unpaid leaves to be given to a female employee up to six months following the completion of sixteen weeks given to the female employee (or in cases of multiple maternities after eighteen weeks) will not be considered in calculating the paid annual leave.

c) Days on which the employee is unable to report to work through having been called up for military exercises or for the performance of a statutory obligation, other than compulsory military service, (up to a maximum of 90 days in a year).

When the employee's employment contract continues, on the days off work due to the employee's assignment because of mobilization/drills or any other codes other than reasons of compulsory military service, the days off works will be considered in calculating the period of one year that should pass in order to be entitled to one year of paid annual leave. However maximum 90 days will be considered in a year instead of the entire duration passed.

d) Fifteen days of any period during which the employee has not worked because of the temporary but interrupted suspension of operations for longer than one week owing to force majeure, on condition that he has subsequently resumed work;

Accordingly to this article, if the workplace was closed temporarily due to force majeure circumstances for more than one week without interruption, fifteen days of the duration which the employee spent without working will be considered in relation to entitlement to paid annual leave, provided that the employee starts working again.

e) Periods reckoned as having been worked, envisaged in Article 66;

f) Weekly rest days and national and public holidays;

The national holidays, weekly rest days and public holidays will not be considered as the days of the paid leave period if they correspond to the period of leave in calculation of the paid annual

leave period. The wages relating to the weekly rest days, national holidays and public holidays which correspond to the period of paid annual leave will be paid separately.

g) Half-days of leave granted in addition to Sundays to employees working in radiological clinics, in accordance with the regulation issued under Act No. 3153;

h) Days on which the employee is unable to report for work because of having to attend meetings of mediation and arbitration boards, acting as an employees' representative on such boards or before a labor court, serving as an employees' or union representative on boards, committees or meetings organized under the relevant legislation or attending conventions, conferences or committee meetings of international organizations dealing with labor matters;

i) Up to three days' leave on the occasion of the employee's marriage and up to two days' leave on the occasion of his parent's, spouse's, sister's or brother's or child's death;

j) Other leave granted by the employer;

k) Annual leave with pay granted to the employee in pursuance of the application this Act.

The paid annual leave period given to the employee as per the labour act will be considered as if during this period, it was worked in terms of the paid annual leave period.

3. The Periods of Paid Annual Leave

The periods of paid annual leave were determined based on the employee's seniority (length of service of the employee) and age (Mollamahmutoğlu&Astarlı, 2012:1175; Süzek, 2014:844). The periods of paid annual leave stipulated under the Labour Act are the minimum durations and they may be increased with collective labour contracts or labour agreements (Labour Act53/6).

If there are contracts to be concluded including the condition that the periods of leave to be granted will be less than the statutory periods of leave stipulated by the Labour Act will be null and void. The unilateral release executed by the employee in this regard will not be accepted. (Akyiğit, 2000:270; Çelik, 2013:372)

Paid annual leave is not determined based on the date on which the employee took his/her paid annual leave, instead, this will be determined based on his/her seniority on the date on which he/she earned the entitlement to paid annual leave. The employees having worked for at least one year starting from the date on which he/she started at this workplace will be given the required paid annual leave provided that he/she will be deemed to be working within trial/probation period.

Length of the annual leave changes in accordance with the length of service/seniority of the employee. As per article 53/4 of Labour Act, the length of the employee's annual leave with pay shall not be less than;

- a) Fourteen days for the employees having worked from one year to five years (also including five years),
- b) Twenty days for the employees having worked for more than five years and less than fifteen years,
- c) Twenty-six days for the employees having worked for fifteen years and more (fifteen included).

Moreover, the paid annual leave periods of the employees who work underground will be increased on a four days increase basis (Labour Act53/4).

However the period of paid annual leave given to employees aged eighteen and less or fifty and over may not be less than twenty days. . (Labour Act53/5).

These determined minimum annual leave periods can be extended by the employment contracts.

In accordance with the fifth clause of Labour Act, article no. 56, "The national holidays, weekly rest days and public holidays will not be considered as the paid leave period if they correspond to the period of leave in calculation of the paid annual leave period". Meaning that they shall be added to the leave period. In this case, it is understood that the day indicated under the law refers to "workday" (Çöğenli, 1983:122; Köseoğlu,1997:104; Mollamahmutoğlu&Astarlı, 2012:1179; Tulukçu, 2012:310).

Periods of Other paid and unpaid leaves or sick or rest leaves allowed by the employer will not be deducted from the periods of annual period leave (Labour Act56/4). In addition to this, in accordance with article no. 59/2 of the law; if the employment contract is terminated by the employer, the permission to seek for a new work with notification of termination will not overlap with the periods of annual leave.

4. Entitled to an Annual Paid Leave

The employee's paid annual leave under clause 4 of article 54 of Labour Act shall be taken by the employee during the next year of service for each year of service. The expression service year means the duration of a service year between the date on which the employee was entitled to a leave and the date of his/her next entitlement to annual leave (Akyiğit, 2000:291; Köseoğlu, 1997:118) Çöğenli, 1983:147, 152; Mollamahmutoğlu&Astarlı, 2012:1183).

If the right to the paid annual leave is not allowed to be used within the next year of service, it is impossible to say that this right has expired. The employee not being allowed to use his/her annual leave due to reasons other than statutory reasons within the service year is a violation of law and in this case, the employee will not be deemed to have lost his/her right in this regard. (Çöğenli, 1983:152-155; Çelik, 2013:367; Mollamahmutoğlu&Astarlı, 2012:1183)

If the employee failed to take the leave due to reasons other than justifiable reasons such as diseases, strikes or lockouts which could prevent taking the leave and if the employee did not take the leave despite the employer's proposal to this end, then the leave cannot be taken any

more; however the employee may claim the remuneration against that (Çöğenli, 1983:152; Mollamahmutoglu&Astarli, 2012:1184, Tulukcu, 2012:333; Çelik, 2013:372).

Another opinion on the contrary can be defined as not letting the right of taking leave within the next year of service which means delaying of the same for a further date that can also be defined as postponing the leave. The right of paid annual leave being postponed to a date later than the regular date of entitlement to this right will cause the employee to need this annual period of resting more and since the employee will be working more, his/her fatigue will increase proportionally. The paid annual leave must be allowed to be taken during the remainder of the employment contract in co-occurrence with the entitlement of leave and salary. (Akyigit, 2000:2969.)

During the period of paid annual leave, in order for the employee rest spiritually and physically and increase his/her working power/motivation by returning to the workplace more healthy, his/her entitlement to such leave should be allowed for a certain period of time and uninterruptedly. As a rule of thumb, the paid annual leave will be allowed to be used once a year without interruption (Labour Act56/1,2). In this regard, it is essential that the right of paid annual leave can be taken without dividing it. The paid annual leave cannot be divided by the employer. However, the periods of leave stipulated under Labour Act article no.53 can be divided into three at most upon mutual agreement of the parties provided that each part is not less than ten days (Labour Act56/3).

As it can be understood from the relevant applicable provisions of Labour Act article no. 4857 and Regulation on Paid Annual Leave regarding the paid annual leave, the authority to determine when the right to taking the paid annual leave can be exercised lies with the employer (Çöğenli, 1983:142; Akyigit, 2000:272; Mollamahmutoglu&Astarli, 2012:1185; Sümer, 2015:154; Tulukcu, 2012:336).

The right to determine the time to allow the paid annual leave to be taken is within the employer's frame of authority. However the employer will use this authority taking into consideration the principle of equality.

In accordance with article no. 6 of Paid Annual Leave Regulations; the employer or employer's representatives may determine when the paid annual leaves may be given as per the certain period of each year and based on the qualifications of the job and its properties in consultation with the paid annual vacation committee (Annual Leave Committee) or its substitutes where such vacation committee are absent. This will be announced at the workplace.

The employer will have to grant up to four days of travel time to employees who will spend their paid annual leaves in provinces other than where the workplace is seated provided that they can document this and the duration of this travel time can be as much as four days.(Labour Act56/6, Regulation. 6). The employer cannot refuse this request (Tulukcu, 2012:317; Mollamahmutoglu&Astarli, 2012:1192). As a result, employees are also allowed to take up to four days' leave without pay, on the condition that the employee provides documentary evidence that she/he is spending his/her annual leave at a place other than where the work place is located

The employer will notify the employer in written form that he or she wants to take the paid annual leave at least one month prior to the date on which the employee wishes to take such paid annual leave which he/she is entitled to. The employer or the employer's representatives will notify this request to vacation committee. The employee will indicate in written form under his/her request for paid annual leave his/her name and surname, registration number if there is any, between which dates he /she wants to take a leave and whether he/she wants a travel time or not. The vacation committee or the employer does not have to be dependent on the date of request for taking a leave made by the employee. However the charts which are to be compiled by the commission in question so as to determine the order of leaves and substitutions will be produced as per the employee's request and his/her current work status. In terms of the requests made for the matching dates; the priorities will be determined taking into consideration the seniority at the workplace and period on which the previous leave was taken (Regulation.15). If the persons who received a travel time return from their leaves without using the period of time in question, the employer may not let the employee start working prior to the completion of the period mentioned.

It should be indicated that even if the employee fails to serve a notification at least one month in advance, the employer or the employer's representative, based on the requirements of the workplace or the employees' number, will determine the dates of leave considering the employees whether or not they have given any notifications. The employee should also abide by the dates of leaves determined accordingly (Tulukçu, 2012:342). This is all to say, employer is not bounded with the start and end dates of the leave demanded by employee, and may determine different dates by taking into account the continuity and regularity of operations in general, order of precedence as regard to seniority, or the special issues pertaining to employer's workplace. But that does not mean employee cannot take his/her paid annual leave in the relevant year.

In articles of the Labour Act regarding the entitlement to paid annual leave, it can be stated that the exercise of this right individually for each employee's perspective is considered as basis. Additionally, the Regulation on Paid Annual Leaves provides for under article 10 the exercise of the right to collective leaves. It was stipulated under the provision in question that the employer or the employer's representative may implement collective leaves within the period between the beginning of April and end of October which includes all or some of the employees.

It is mandatory that the employee will take his paid annual leave on the condition that he/she must rest during such leave. Labour Act prohibits the employee who is enjoying his paid annual leave to work during his/her paid annual leave so as to ensure that the Employee has rested properly in accordance with the relevant applicable article no. 58. The employee working during the period of his paid annual leave contradicts with the purpose of paid annual leave and it is against the employer's benefits, for as much as the employee will return to his/her workplace without resting and his/her efficiency will decrease (Çöğenli, 1983:155; Tulukçu, 2012:356; Mollamahmutoglu&Astarlı, 2012:1193).

If it is understood that an employee on his/her paid annual leave has worked in a job against payment during the period of his/her paid annual leave, the salary he/she was paid by the

employer for the period of paid annual leave may be recollected. It is not an obligation to claim for the paid annual leave, yet it is an opportunity given to the employer. If the Employer has not paid the employee his/her annual leave remuneration in such a way violating article no. 57 of the Labour Act, he/she may avoid paying it.

An employee neither can waive his right of vacation nor can she/he engage in gainful employment during this period. Otherwise they may be asked by their employer to reimburse the annual leave remuneration paid in advance.

The employer is obliged to prove that the employee has taken his/her paid annual leave. This obligation was stipulated under article 56 of Labour Act. Thus the employer will keep leave records which list the employees' paid annual leaves. And employees' paid leave entitlements and the leaves taken should be recorded and the documents in respect to leaves must be signed with both employee and employer.

5.The Remuneration of Annual Leave

The employer should pay each employee having taken his/her paid annual leave wage relating to his/her leave prior to commencement of the leave in advance or by raising as an advance payment (Labour Act57/1). It can be said that this provision was stipulated in order to ensure that the employee can benefit from his/her paid annual leave as required and does not suffer from financial troubles during such leave.

In the same way, "The national holidays, weekly rest days and public holidays will not be considered as the days of the paid leave period if they correspond to the period of leave in calculation of the paid annual leave period and they shall be separately paid." (Labour Act58/last, Regulation 21/4). Under article no. 21/5 of the Regulation, it was set forth that the employees' payments who work on a part-time or on call basis will be paid their wages regarding the periods of time which overlap their periods of leave as the remuneration of paid annual leave.

In calculation of remuneration for annual leave, provision of Article 50 shall also be applied, which is; "The following payments shall not be considered for the purpose of calculating payments in respect of national or public holidays or weekly rest days: overtime and incentive premiums, the wages paid to permanent employees when they are employed outside normal working hours in preparatory, complementary or cleaning operations; and fringe benefits."

Just to clarify, in calculating the remuneration of paid annual leave, the net income will be taken as basis. In calculating this, the daily amount corresponding to such paid annual leave will be found, and then such daily amount will be multiplied with the periods of leave which the employee was given. In determining the compensation against leave; the wages to be paid against overtime work, premiums, benefits and the compensations which the regular employees of the workplace are entitled due to works such as preparation, completion and cleaning performed outside ordinary working hours will not be estimated. (Çöğenli, 1983:157;

Köseoğlu, 1997:137; Aktay, 1998:17; Mollamahmutoğlu&Astarlı, 2012:1187; Akyiğit, 2000:378; Eyrenci&Taşkent & Ulucan, 2014:310; Tulukçu, 2012:357).

The annual leave remuneration of employees who are not paid daily, monthly or weekly but who are remunerated according to an indefinite period of time or amount of money, such as a piece-rate, commission, profit sharing or percentage, must be calculated on their average daily earnings by dividing the total wages earned during the previous year by the number of days actually worked during that year. If the employee has been granted a raise in pay within the previous year, the annual leave remuneration shall be computed by dividing the total wages earned between the date of the month in which the employee uses his leave and the date when his pay was raised by the number of days worked within that period. For employees working on a percentage basis, remuneration for annual leave must be paid by the employer in addition to any amount of money derived from current percentage earnings.

Under provisions of regulation on Labour Act and Paid Annual Leave, it was also stipulated that the remuneration of paid annual leave is some kind of a wage. In this regard, as a requirement of the remuneration of paid annual leave, it is clear that the payment of such the remuneration of paid annual leave should be done as per the applicable rules of wage.

The only rule to the exception of not paying the paid annual leave in monetary term (leave cannot be sold) is when the employment contract terminates or expires. (Ekonomi, 1987:354; Köseoğlu, 1997:142; Tulukçu, 2012:371). Even if the employer and the employee have made a contract which sets forth that the paid annual leave will be paid with payment during the term of the contract, these contracts will not be valid and it will not be possible to compensate leave in monetary terms. In case of expiry of the employment contract, there are no options other than paying for the paid annual leave remuneration

Under article no. 59 of Labour Act, in order for the employee to claim for the remuneration of paid annual leaves which he/she was entitled to, yet did not take, it is sufficient that the employment contract was terminated due to any reason whatsoever. Other than that, it will not make a significant difference whether the termination was made by the employee or the employer or whether the termination was for a definite or indefinite period of time (Akyiğit, 2000:386; Eyrenci&Taşkent & Ulucan, 2014:311-312).

If the employee's paid annual leaves were determined by the employment contract in such a way that exceeds the minimum periods stipulated by the Labour Act, the employee will be paid his/her remuneration of annual leave over the increased durations of leave (Eyrenci&Taşkent & Ulucan, 2014:312; Süzek, 2014:850-851).

No paid annual leave was provided for under Labour Act in a way proportionate to the period of service after having completed the qualifying period to paid annual leave. An employee who has not completed one year of service as of the date of expiry of the employment contract will not require/claim any proportionate compensation to his/her period of service. However it may be resolved that the payment to be made in proportion to the period of work as per the contract (Akyiğit, 2000:391-392). If the employment contract expires, it was clearly stipulated under article 59 of Labour Act that remuneration of paid annual leave payable to the employee "...

upon the expiry of his/her employment contract will be over the remuneration on which contract has expired”.

Since the claims of wages against paid annual leaves are remunerations in legal terms, they are subject to lapse of time in five years (Akyiğit, 2000:655; Mollamahmutođlu, 2008:958). The date of commencement of this term is the date on which the employment contract expires (Labour Act59/1). Paid annual leave receivables will be subject to legal interest (Sümer, 2015:156 ; Çelik, 2013:378; ayrıca bkz.Tulukçu, 2012:386 vd.).

The obligation of proof relating to the payment of paid annual leave lies with the employer who also bears the obligation of keeping records of annual leaves (Tulukçu, 2012:393; Eyrenci&Taşkent&Ulucan, 2014:313 ; Mollamahmutođlu&Astarlı, 2012:1190) . Also, employees’ paid leave entitlements and the leaves taken should be recorded and the documents in respect to leaves must be signed with both employee and employer

The employee whose employment contract was terminated will be compensated for all his/her paid annual leaves which he/she was entitled to yet not paid for within the timeout duration of 5 years, provided that he/she files a lawsuit within this period of time indicated above. The employers’ actions taken towards eliminating the employees’ accumulated records of leaves from past years via internal guidelines, internal communiqués etc. are violations of legal practices (Özdemir,2010: 277). Neither the employee nor the employer can waive his/her entitlement to paid annual leave. When the employee has retired or when his/her employment contract has expired, his/her receivables against leaves will be deemed as wages in legal terms.

6. Results of Breaching the Provisions of Paid Annual Leave

The employers who fail to abide by the provisions of Labour Act relating to paid annual leave will be subject to administrative monetary penalties indicated under the following articles. For each employee whose paid annual leave was allocated in such a way that breaches the relevant law, the employer will be subject to the article no. 56 of the Act and for each employee whose paid annual leave compensation was paid in a way breaching the relevant law or incompletely, the employer will be subject to the article no. 57 and for each employee whose paid annual leave remuneration for the leaves he/she was entitled to yet did not take was not paid when his/her employment contract was terminated, the employer will be subject to the article no. 60 and for each employee whose paid annual leave he/she was entitled to was not allowed or incompletely allowed, the employer will be subject to the article no. 103.

Although it is a statutory obligation to have the employee take the paid annual leave within the next year (Labour Act54/4), the sanction against the breaches and violations of this provision was not provided for by the Act. However paying the payment of the paid annual leave compensation in a way that violates the law or paying the same incompletely requires administrative monetary fines whereas not paying paid annual leave compensation or failure to pay in due time have not been mentioned under the act which is a significant shortcoming (Akyiğit, 2008:2373).

The conflicts which may arise if the rights as to paid annual leave fail to be properly met in timely manner as required by the Act can be resolved and settled by way of “resorting to administrative authorities” or “resorting to the judicial system” (Akyiğit, 2000:677)

7. Conclusion

Right to paid annual leave is a right and permission to rest. The employee is expected to rest physically and spiritually in the meantime and relax which are the main benefits of exercising right of paid annual leave. However in order to obtain these benefits of paid annual leave, they have to be granted within certain intervals and the employee should not suffer from any economic losses by payment of his/her compensation relating to the duration of paid annual leave (Mollamahmutoğlu, 2008:941; Günay, 2003:612; Çil, 2007:2759).

Paid annual leave is mandatory under Turkish Labour Law. The right to paid annual leave will be applicable for all employees who work under Labour Act. In order for an employee to be entitled to paid annual leave, he/she will have to work for 1 year also including the probation period starting from the day he/she actually began working. The employer will let the employee whose one year of qualifying period has expired take his/her paid annual leave within the year following his/her entitlement to this.

The actions taken by the employees to abolish the employees’ accumulated leaves from past years by internal guidelines, communiqués etc. is prohibited. It is not possible for the employee to forego his/her paid annual leave or to transfer it. Thus both parties cannot waive their rights and obligations regarding paid annual leaves. Accordingly, the right to paid annual leave pertains public order and it must not be waived for the sake of money. Employee’s request to waive his/her right to vacation and accept pay instead is adverse to the right of rest envisaged by the Constitution.

Letting use of the paid annual leave is under the supervision of the employer. The employer have the authority and the right to determine how and when the paid annual leave can be taken. The employer is the one who is to know the requirements and needs of the workplace and the employees best. Unless there are justifiable reasons which prohibit paid annual leave, the employer should have the employee take his/her paid annual leave that he/she is entitled to, although the employee does not make a claim for it in the due time of entitlement to paid annual leave. If the employee has not taken the paid annual leave despite the employer’s proposal to this end, he/she may no longer take it, yet he/she may claim for the corresponding remuneration.

However when we observe the actual practice, the employees cannot take their paid annual leaves for many years, then they accumulate and they deem this as a compensation which they are entitled to, upon the termination/expiry of their employment contracts. The employers deem the paid annual leave as a right which they may let the employee to take at any time during the term of the employment contract. Such approaches from both parties prevent this right to be exercised in such a way that does not violate the relevant law and also hinder the purpose of the paid annual leave to be reached.

The level of education in Turkey being insufficient, high ratios of unemployment, the employees who do not want to lose their jobs due to the economic crisis suffered can either not claim their rights during the term of the employment contract or prefer to trade their rights of taking a leave against remuneration. The government is responsible from determining the benefits which the rights to paid annual leaves which the Constitution provides for, against the employee, employer, society and economy and assignment of these social rights to the relevant parties. Activities among the employees for raising awareness in this regard are of utmost importance. It is also obligatory that the dissuasive administrative penalties should be given to the employers or employer's representatives who breach the laws and regulations on exercising the right of taking paid annual leaves. Additionally, more efficient inspections should be conducted so as to ensure that this right is exercised during the term of the employment contract in timely manner.

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