CASES OF JOINT LIABILITY ARISING FROM OCCUPATIONAL ACCIDENTS

İŞ KAZASINDAN DOĞAN MÜTESELSİL SORUMLULUK HALLERİ

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Abstract: The duty of care is one of the fundamental obligations of the employer arising from the employment contract. When it comes to the employer's duty of care, the first thing that comes to mind is the obligation to take occupational health and safety measures. If the employer violates its obligations in this regard, the probability of an occupational accident increases. It is possible for the employee who is exposed to an occupational accident to sue the employer for compensation. In addition, if it is clearly stipulated in the law or if certain conditions are met, the employee may also claim compensation from other parties who are jointly liable.

Keywords: Duty of Care, Occupational Accident, Legal Liability, Joint Liability, Tripartite Labor Relations.

Özet: Gözetme borcu işverenin iş sözleşmesinden doğan temel borçlarından biridir. İşverenin gözetme borcu denince akla ilk olarak iş sağlığı ve güvenliği önlemlerini alma yükümlülüğü gelir. İşverenin bu konuda yerine getirmesi gereken yükümlülüklerine aykırı davranması halinde iş kazasının meydana gelme olasılığı yükselir. İş kazasına maruz kalan işçinin zararını tazmin etmesi için işverene dava açması mümkündür. Ayrıca kanunda açıkça öngörülmesi halinde veya birtakım şartların sağlanması halinde işçi müteselsil sorumlu olan diğer kişilerden de tazminat talebinde bulunabilecektir.

Anahtar Kelimeler: Gözetme Borcu, İş Kazası, Hukuki Sorumluluk, Müteselsil Sorumluluk, Üçlü İş İlişkileri

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INTRODUCTION

One of the fundamental obligations of the employer arising from the employment contract is the duty of care. The scope of the duty of care is discussed in Article 417 of the Turkish Code of Obligations No. 6098[1]. Accordingly, "The employer is obliged to protect and respect the personality of the employee in the service relationship and to maintain an order in the workplace in accordance with the principles of honesty (Art. 417/1).

According to the provision on the employer's occupational health and safety measures, "The employer is obliged to take all necessary measures to ensure occupational health and safety in the workplace and to keep the tools and equipment in full" (Art. 417/2). Within this framework, it is necessary to ensure that occupational health and safety measures are taken in the most appropriate manner for the conditions of the day, taking into account scientific developments and technological inventions.

If an occupational accident occurs in the workplace as a result of failing to take occupational health and safety measures, the employer may be held liable for the occupational accident. As a result of an occupational accident, the employer may face legal, administrative and criminal liabilities. However, legal liabilities arising from occupational accidents differ from other liabilities in that they may bring up the responsibilities of the employee's current employer and other persons together.

The employee being a subcontractor employee, being sent to another employer's workplace to work within the scope of a temporary employment relationship, the transfer of the workplace to another employer or the transfer of the employment contract may legally put the employee in a relationship with more than one employer. In the presence of these tripartite employment relationships, which are referred to in the doctrine as tripartite relationships in labour law, it may be possible for the employee who has suffered an occupational accident to apply to other employers within this tripartite relationship

[1] RG, 04.22.2011, 27836.

in some cases, in addition to the current employer, for compensation for his/her damages.[2]

In the study, the concepts of occupational accident and joint liability are discussed in general, and then the effect of subcontracting, temporary employment relationship, transfer of workplace and transfer of employment contract, which are described as tripartite relationship, on the joint liability of employers arising from occupational accident is evaluated.

I. OCCUPATIONAL ACCIDENTS AND JOINT LIABILITY IN GENERAL

A. The Concept of Occupational Accident and the Nature of Legal Liability

1. Occupational Accident in General

In the broad sense, the concept of "accident" is defined in legal theory as a sudden and unintentional event that leads to the occurrence of a loss. An accident in the narrow sense, on the other hand, excludes damage to property and covers only involuntary violation of bodily integrity or death. Accordingly, in order for an accident to occur in the narrow sense, there must be a sudden and unintended event coming from outside, as a result of which bodily integrity must be violated and there must be a causal link between the event and the result.[3]

The concept of occupational accident is addressed in different ways in the Social Insurance Law No. 5510 [4] and Occupational Health and Safety Law No. 6331[5]. Law No. 5510 defines occupational accident by listing the situations that may result in an occupational accident. Accordingly, accidents that occur while the employee is at the workplace, due to the work being carried out and when the

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2 On tripartite relationships in labor law, see. Osman Güven Çankaya/Şahin Çil, İş Hukukunda Üçlü İlişkiler, Yetkin Yayınları, Genişletilmiş 3. Baskı, Ankara 2011, p. 15.

3 İştar Cengiz, "İşverenin İş Kazasından Doğan Hukuki Sorumluluğu", *TAAD*, Y. 9, Issue. 34, p. 128.

4 RG, 16.06.2006, 26200.

5 RG, 30.06.2012, 28339.

employee is sent to a place other than the workplace on duty, during the time he spends without performing his main job are considered within this scope. In addition, an occupational accident is defined as an event that occurs during the transportation of the worker to and from the workplace by a vehicle provided by the employer and during the period when the breastfeeding female worker is on breastfeeding leave, and which renders the worker physically or mentally disabled immediately or later (Art. 13/1 of the Law No. 5510). Law No. 6311 defines an occupational accident as "an event that occurs in the workplace or due to the execution of the work, which causes death or damages the bodily integrity mentally or physically" (Art. 3/1-g).

In terms of social insurance law and occupational health and safety legislation, the definition of occupational accident has been defined, whereas the definition of occupational accident, which is a special application of the breach of the employer's duty of care, is not included in the Labour Law No. 4857[6]. The definition of occupational accident in terms of individual labour law is found only in the doctrine. Accordingly, an occupational accident is defined as a mental or physical injury to the employee as a result of an event that occurs suddenly as a result of the work he/she performs while under the control of the employer or as a result of an external cause.[7] Here, unlike an occupational accident, especially in the meaning of social insurance law, the accident must be related to the work performed, must occur as a result of it, and moreover, there must be a causal link between the work performed and the accident.[8]

Taking occupational health and safety measures at the workplace is an obligation that falls within the scope of the employer's duty of care for the employee. The employer must protect the life, health and

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6 RG, 10.06.2003, 25134.

7 Ali Güzel/Ali Rıza Okur/Nurşen Caniklioğlu, Sosyal Güvenlik Hukuku, Beta Yayıncılık, İstanbul Yenilenmiş 19. Bası, 2021, p. 377-378; Fikret Eren, "Borçlar Hukuku ve İş Hukuku Açısından İşverenin İş Kazası ve Meslek Hastalığından Doğan Sorumluluğu", Ankara Üniversitesi Hukuk Fakültesi Yayınları, Ankara 1974, p. 10; taken from Cengiz, p. 128; Can Tuncay/Ömer Ekmekçi, Sosyal Güvenlik Hukuku Dersleri, Beta Yayınevi, İstanbul 2021, p. 391.

8 Gaye Burcu Yıldız, "İşverenin İş Kazasından Doğan Sorumluluğu", *Toprak İşveren Dergisi*, Y. 2010, Issue 86, p. 10; Süzek, p. 424; Erdem Özdemir, İş Sağlığı ve Güvenliği Hukuku Dersleri, 1. Bası, Vedat Kitapçılık, İstanbul 2020, p. 297.

physical integrity of the employee against workplace hazards.[9] In the event that the employee dies, becomes disabled or suffers material or immaterial damage as a result of the failure to take the necessary safety measures, the legal liability of the employer will arise according to the general provisions.[10]

2. Nature of Legal Liability Arising from Occupational Accidents

There is no consensus in the doctrine on the legal nature of the employer's liability arising from occupational accidents. Again, the opinions of the Court of Cassation on this issue have always varied until recently. In the doctrine, some authors have stated that the employer's liability arising from occupational accidents is a fault liability, while some authors have stated that no fault is required in the employer's liability.[11]

Before the Law No. 6098 entered into force, according to those who advocated the view of fault liability, the main principle in the law of liability is that the liability is based on fault. Liability without fault is a type of liability that may arise only in exceptional cases, if it is clearly stated in the law. Therefore, the employer's liability arising from an occupational accident should be considered as a fault liability.[12] According to the view advocating faultless liability, since there was no regulation regarding the employer's liability for the duty of care in service contracts during the period of the former Law, the provisions of the Code of Obligations No. 818[13] should be applied, but it was stated that the fault-based regulations of this law were not in accordance with the protective nature of labour law. For this reason, it was stated by this opinion that this legal gap should be filled with the provisions on strict liability.[14] Again, some of the authors of this opinion relied on the

9 Sarper Süzek, İş Hukuku, Beta Yayınevi, 20. Baskı, Ankara 2020, p. 409; Levent Akın, İş Kazasından Doğan Maddi Tazminat, Yetkin Yayınları, Ankara 2001, p. 46.

10 Nuri Çelik/Nurşen Caniklioğlu/Talat Canbolat/Ercüment Özkaraca, İş Hukuku Dersleri, Beta Yayınevi, Yenilenmiş 34. Bası, İstanbul 2021, p. 434.

11 Çelik/Caniklioğlu/Canbolat/Özkaraca, p. 435 et seq, bkz oradaki yazarlar; Süzek, p. 413 et seq. See the authors there.

12 Yıldız, p. 5 et seq; Akın, p. 97 et seq; Süzek, p. 417 et seq.

13 RG, 29.4.1926, 359.

14 Eren, p. 89 et seq; İlhan Ulusan, Özellikle Borçlar Hukuku ve İş Hukuku Açısından

fact that Article 77 of the İK (Labour Law) (now Article 4 of the İSGK (Occupational Health and Safety Law) and Article 417/2 of the TBK (Turkish Code of Obligations)), which obliges the employer to take all kinds of measures regarding occupational health and safety, requires strict liability.[15]

Although the Law No. 6098 entered into force in 2012 and introduced certain regulations regarding the liability of the employer, the doctrine still does not reach a consensus on the nature of the legal liability.[16] The Court of Cassation has rendered many different decisions before and after the enactment of Law No. 6098. However, it is understood from the recent decisions that the Court of Cassation accepts that the employer's liability arising from occupational accidents is a fault liability.[17]

a. Fault Liability (Objectivized Fault)

Currently, the predominant view in the doctrine regarding the legal liability of the employer arising from occupational accidents is that this liability is a fault liability.[18] This is because the main principle in Turkish law is fault liability. Liability without fault can only arise if it is explicitly regulated in the law.

The TBK No. 6098 also includes regulations regarding the nature of the liability arising from the employer's breach of the duty of care. Accordingly, the compensation of damages arising from the

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İşverenin İşçini Gözetme Borcu, Bundan Doğan Hukuki Sorumluluğu, Kazancı Kitap Ticaret A.Ş, 1990, p. 125.

15 Ulusan, p. 103 et seq; Eren, p. 81 et seq.

16 Ayrıntılı bilgi için bkz. Çelik/Caniklioğlu/Canbolat/Özkaraca, p. 437, see the authors there.

17 Yarg. HGK, 20.03.2013, E. 2012/21-1121, K. 2013/386, (www.kazanci.com, AD. 03.11.2021); "…the employer's liability is fault liability and can be held liable if fault can be attributed …" Yarg. 10. HD, 15.04.2019, E. 2016/15843, K. 2019/3473, (www.lexpera.com, AD. 27.01.2022).

18 Çelik/Caniklioğlu/Canbolat/Özkaraca, p. 439; Süzek, p. 414 et seq.; M. Kemal Oğuzman, "İş Kazası veya Meslek Hastalığından Doğan Zararlardan İşverenin Sorumluluğu", İÜHFM 1969, Vol. XXXIV, Issue. 1-4, p. 337 et seq; Ali Güzel/ Deniz Ugan Çatalkaya, "İşverenin İş Kazasından Doğan Sorumluluğunun Niteliği ve Sınırları", (Karar İncelemesi), *Çalışma ve Toplum*, Issue. 34, Y. 2012/3, p. 157; Nurşen Caniklioğlu, İş Sağlığı ve Güvenliği Kanunu Çerçevesinde İşverenin İş Kazasından Doğan Hukuki Sorumluluğu (İşverenin Sorumluluğu), Prof. Dr. Turhan Esener Armağanı, I. İş Hukuku Uluslararası Kongresi, 2016, p. 47.

employer's breach of the duty of care shall be subject to the provisions on contractual liability (Art. 417/3 TBK). The liability for breach of contract referred to in the article is a type of liability based on fault.[19]

The law stipulates that the employer must take all necessary measures in terms of the duty of care (Art. 417/1 TBK). Although this provision, which is one of the bases of those who advocate the no-fault liability view, mentions that all kinds of measures must be taken, it is not possible to reach a conclusion that would exclude the liability here from being a fault liability.[20]

Another provision of the law that points out that the employer's liability is a fault liability is the special liability provision regarding hazard liability. Accordingly, no fault shall be sought in the liability arising from the operation of an enterprise that poses a significant danger (Art. 71 TBK). The fact that the legislator has determined the source of the employer's liability to be fault liability is clearly understood from the fact that it has specially regulated the cases of strict liability in this way.[21]

In Turkish law, the existence of fault is determined according to objective criteria. In this respect, the employer's personal status, level of education, financial status and other characteristics are not taken into account in determining the employer's fault in determining that the necessary attention and care was not taken in taking occupational health and safety measures. The behaviour of a careful, reasonable and responsible employer in a similar situation with the employer is taken as the basis for the determination of fault.[22] As a matter of fact, the Court of Cassation also points out that the determination of the employer's fault should be based on objective criteria.[23]

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19 Fikret Eren, Borçlar Hukuku Genel Hükümler (Genel), 25. Baskı, Yetkin Yayınevi, Ankara 2020.

20 Caniklioğlu, İşverenin Sorumluluğu, p. 47.

21 Caniklioğlu, İşverenin Sorumluluğu, p. 48.

22 Süzek, p. 417; Özdemir, p. 289.

23 "…Articles 4 and 5 of Law No. 6331 and the provisions of the related regulations on occupational health and safety should be considered as criteria that objectify the employer's responsibility …" Yarg. 21. HD, 13.02.2018, E. 2016/12322, K. 2018/1190, (www.kazanci.com, AD. 03.11.2021).

b. Cases Where Fault is Not Required in Liability

The rule in the employer's liability arising from occupational accidents is fault liability. However, in some cases, the legislator has included strict liability regulations against the employer. Pursuant to article 71 of the TBK, the owner and operator shall be liable in the event of damage arising from the operation of an enterprise that "poses a significant danger". Although strict liability is not explicitly mentioned in the article, it is accepted that there is a state of strict liability from the purpose and arrangement of the provision.[24]

In the event of an occupational accident occurring in a workplace that falls within the scope of the provision on hazard liability, the employer shall not be liable for any fault of the employer, and shall be liable for the occupational accident in accordance with the provisions on strict liability. In order for the liability to arise, it will be sufficient to establish a causal link between the typical hazard of the enterprise and the damage.[25]

In addition to the hazard liability, the Law also provides for the liability of the employer for the acts of his employees (art. 66) and the liability for the acts of the auxiliary persons (Art. 116). In these cases, which are, by their nature, a form of strict liability, the injured party may apply for the strict liability of the employer.[26] If the employer has left the taking of occupational health and safety measures at the workplace to the auxiliary persons, the employer will be liable for the acts of the auxiliary persons even if the employer is not at fault.[27] Again, according to the Highway Traffic Law No. 2918[28], it is also possible for the employer to be held strictly liable.[29]

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24 Gaye Baycık, "Çalışanların İş Sağlığı ve Güvenliğine İlişkin Haklarında Yeni Düzenlemeler, *Ankara Barosu Dergisi*", 2013/3, p. 132; Çelik/Caniklioğlu/Canbolat/Özkaraca, p. 440; M. Kemal Oğuzman/Turgut Öz, Borçlar Hukuku Genel Hükümler, Vol. 2, 11. Bası, İstanbul 2014, p. 191 et seq.; Eren, Genel, p. 760 et seq.

25 Baycık, p. 134.

26 Caniklioğlu, p. 69.

27 Oğuzman, p. 340.

28 RG, 18.10.1983, 18195.

29 Ayrıntılı bilgi için bkz. Çelik/Caniklioğlu/Canbolat/Özkaraca, p. 442; Çelik Ahmet Çelik, Trafik – İş Kazaları, Seçkin Yayınevi, Ankara 2019, p. 17 et seq; Yarg. 21. HD, 18.10.2016, E. 2015/17528, K. 2016/12750, (www.lexpera.com, AD. 27.01.2022).

B. Joint Liability

The concept of joint liability is regulated under Article 61 et seq. of the Turkish Code of Obligations. Accordingly, the provisions on joint liability shall apply if more than one person jointly causes a damage or is liable for the same damage for various reasons (Art. 61).

As stated in the Law, for joint liability to arise, two different persons must "jointly cause a damage" or "be liable for the same damage for various legal reasons". For example, if two different persons act together and injure a third person, they jointly cause a damage. Again, in the event that an insured person causes damage to a third party, the third party may apply to the person who personally caused the damage due to the tortious act, and to the insurer due to the fact that the insurer has undertaken the damage with the contract. Here, liability for the same damage is in question for different legal reasons.[30]

Joint liability is a liability in favour of the injured party. In this liability, the injured party may apply to any of the harmed parties for the full compensation of the damage. If he/she wishes, it is also possible for him/her to ask for the compensation of the damage with a single request from all of them. Thus, the injured party will be able to demand the compensation of the damages against the one with the best economic situation or the one with the highest power of proof.[31]

Joint liability arising from occupational accidents is no different from other cases of joint liability. At this point, it may be the case that another employee, the employer's representative or another employer is also responsible for the occupational accident suffered by the employee.[32] In such cases, the worker may apply to all of the jointly liable parties for the full amount of the damage, regardless of their titles. In this respect, it is sufficient that the conditions of joint liability stipulated in the Law are met.[33]

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30 Eren, Genel, p. 915; Oğuzman/Öz, p. 294.

31 Ayrıntılı bilgi için bkz. Eren, Genel, p. 925 et seq; Yarg. 21. HD, 12.11.2018, E. 2016/19679, K. 2018/8140, (www.lexpera.com, AD. 26.11.2021)

32 Yarg. 9. HD, 18.01.2021, E. 2019/4999, K. 2021/1253, (www.lexpera.com, AD. 27.01.2022).

33 Yarg. 10. HD, 19.4.2016, E. 2014/24954, K. 2016/6004, (www.lexpera.com, AD. 26.11.2021).

II. JOINT LIABILITY ARISING FROM OCCUPATIONAL ACCIDENTS

A. Principal Employer - Subcontractor Relationship

1. Principal Employer - Subcontractor Relationship in General

Subcontracting is regulated in paragraph 6 of Article 2 of the Labour Law. In addition, the Regulation on Subcontracting[34] has been put into force in order to provide more detailed regulations. A subcontracting relationship is defined as the relationship between the employer who hires workers for auxiliary works related to the production of goods or provision of services in his/her workplace or for works that require specialization due to the necessity of the work, the business and technological reasons, and employs his/her workers assigned for this work exclusively for this workplace, and the employer from whom the work is received (Art. 2/6). As can be understood from the definition of subcontracting, in order for a relationship to be considered a subcontracting relationship, there must be two employers who employ workers at the workplace. The sub-employer must be performing the work received from the principal employer at the principal employer's workplace. A part of the goods produced or services provided at the workplace or an auxiliary work must be transferred to the sub-employer. The main work transferred to the subcontractor must be a work that requires specialization due to business requirements and technological reasons. The sub-employer must have dedicated a group of workers to this work, in other words, the sub-employer must not employ the same workers at other workplaces (Art. 2/6). The condition of requiring specialization for technological reasons will only be required for the subcontracting of the main work by dividing it, and no similar condition will be required for auxiliary works.[35]

Article 2/6 of the Labour Law provides the definition and conditions of subcontracting, and Article 2/7 provides the presumptions of

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34 RG, 27.09.2008, 27010.

35 Münir Ekonomi, "Asıl İşveren Alt İşveren İlişkisinin Kurulması ve Sona Ermesi", Türk İş Hukukunda Üçlü İlişkiler, Legal Vefa Toplantıları (II), Prof. Dr. Nuri Çelik'e Saygı, March 2008, p. 48.

collusion in subcontracting relationships. However, there is no regulation on the legal nature of subcontractor relationships that do not meet the conditions required in the sixth paragraph.[36] According to the Court of Cassation, just like the collusive subcontracting relationship, in a subcontracting relationship that does not have the elements listed in the Law, the subcontractor's employees must be considered as the employees of the principal employer from the beginning.[37] Applying the sanctions related to collusion to every relationship that does not meet the conditions in the law, and therefore considering the workers as employees of the principal employer, may not always be in accordance with the nature of that relationship. For this reason, each concrete case should be evaluated separately, and in cases that are not suitable for the application of the collusion provision, it should be ruled that there is no subcontracting relationship.[38]

In a subcontracting relationship, the employer (the principal employer) is jointly liable to the employees of the subcontractor for the rights arising from the Labour Law, the employment contract and the collective bargaining agreement to which the subcontractor is a party (Art. 2/6). The legislator has not only regulated joint liability, but also stipulated in Article 36 of the İK that the public contracting authorities and the principal employers are obliged to check whether the wages of the workers are paid and to pay the wages of the unpaid workers to the workers by deducting them from the progress payments of the employers.[39]

2. Joint Liability in the Principal Employer-Subcontractor Relationship

In the principal employer-subcontractor relationship, there is no employment contract between the principal employer and the subcontractor's employee. For this reason, it is necessary to make an assessment on the basis of the legal regulation regarding the liability

36 Süzek, p. 168.
37 Yarg. 9. HD, 14.05.2007, E. 2007/3132, K. 2007/14914, (www.kazanci.com.tr, AD. 06.11.2021).
38 Süzek, p. 168.
39 İbrahim Aydınlı, "6552 sayılı Kanun'la Alt İşveren Kurumunda Yapılan Yeni Düzenlemeler ve Değişiklikler", *GÜHFD*, C. XVIII, Y. 2014, Issue. 3-4, p. 83.

of the main employer in case the sub-employer's employee is exposed to an occupational accident.

One of the opinions in the doctrine bases the source of the primary employer's duty of care over the subcontractor's employees on "debt relations independent of performance obligations". In this case, the parties in social contact have an obligation to ensure that the persons under the protection of each other are not harmed, and in the event that a damage occurs as a result of this performance-independent debt relationship, contractual liability provisions may be applied.[40] According to the other opinion in the doctrine, which we also agree with, the subcontracting relationship is an institution specific to labour law and therefore, the solution of the problems should be sought within the labour law.[41] Again, determining the source of the duty of supervision as debt relations independent of the performance and directly holding the main employer responsible will not be in accordance with the nature of the work. This is because, even though the sub-employer performs the work at the principal employer's workplace, sub-employers should know the work they are carrying out and the risks that may arise. Therefore, the person who will take direct action to ensure occupational health and safety is the sub-employer. It is not possible to accept the existence of an operational supervision obligation of the main employer.[42]

The responsibility of the principal employer towards the sub-employer's employees is clearly regulated in the Law. Accordingly, the principal employer is jointly liable with the sub-employer for the obligations arising from the Labor Law, the employment contract and the collective labour agreement to which the sub-employer is a party. What is meant by joint liability here is, of course, joint liability.[43]

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40 Aydın Başbuğ, "Alt İşveren İşçisi ile Asıl İşveren Arasındaki Borç İlişkisi ve Bu İlişkinin Doğurduğu Hukuki Sorunlar", *Kamu İş*, Vol. 4, Issue. 3, Ocak 1998, p. 65 et seq; İbrahim Aydınlı, "İşverenin Edimden Bağımsız Olan Koruma Yükümlülüğüne, Normun Koruma Amacı (Hukuka Aykırılık Bağı) Bakımından Bir Yaklaşım", (www.tuhis.org.tr/pdf/811.pdf, AD. 04.11.2021); Eren, Genel, p. 43.

41 Levent Akın, İş Sağlığı ve Güvenliği ve Alt İşverenlik (Alt İşverenlik), Yetkin Yayınevi, Ankara 2013, p. 175.

42 Özdemir, p. 223. See also, Demet Belverenli, "Alt İşveren İlişkisinden Doğan İş Sağlığı ve Güvenliği Yükümlülükleri", *İÜHFM*, Vol. 74, Prof. Dr. Fevzi Şahlanan'a Armağan Issue, p. 210.

43 Çelik/Caniklioğlu/Canbolat/Özkaraca, p. 129; Süzek, p. 165.

There are several issues that need to be addressed regarding the liability of the principal employer. First of all, the Law states that the responsibility of the principal employer is only related to the obligations arising from the Labor Law, employment contract and collective bargaining agreement. The rights that an employee who suffers an occupational accident may claim from the employer are regulated under the Turkish Code of Obligations. This situation may bring to mind the question of whether the primary employer may be held jointly liable according to this article. However, it should be noted here that the occurrence of an occupational accident will constitute a breach of the negligent employer's obligation to protect the worker and that this obligation arises from the employment contract.[44] In this way, the employee who has suffered an occupational accident will be able to apply to both his/her own employer and the main employer for all of his/her receivables due to the breach of the duty of care arising from the employment contract.

Unlike the liability of the subcontractor, the Law introduces a "strict liability" for the principal employer. This is because the principal employer is held liable for the damages suffered by the employee of the defective sub-employer due to an occupational accident, even if the employer is not at fault. Here, the source of the liability is directly Article 2/6 of the Labour Law.[45] Pursuant to the same provision, the joint liability of the principal employer cannot exceed the liability of the sub-employer in terms of scope.[46]

Due to its nature, the provision on joint liability can only be applied to principal employers, and persons referred to as "contracting authority" or "turnkey employer" cannot be included within the scope of this provision. This is because it is not possible to talk about a principal employer in the technical sense. The Court of Cassation has also stated in one of its decisions on this issue that the person contracting the work cannot be held liable for occupational accidents and can only be held liable for unpaid wages if the conditions in article 36 of the İK are met.[47]

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44 Bkz. Çelik/Caniklioğlu/Canbolat/Özkaraca, p. 130.

45 Yarg. 21. HD, 26.12.2019, E. 2019/2527, K. 2019/8120, (www.lexpera.com, AD. 04.11.2021).

46 Çelik/Caniklioğlu/Canbolat/Özkaraca, p. 137.

47 Yarg. 9. HD, 14.05.2013, E. 2003/4721, K. 2003/4643, *Çimento İşveren Dergisi*, August 2003, p. 33.

In the subcontracting relationship, joint liability is regulated only in the form that the principal employer is jointly liable with the subcontractor for the occupational accident suffered by the subcontractor's employee. There is no regulation on the joint liability of the subcontractor and the principal employer as a result of the occupational accident suffered by the employee of the principal employer.

The subcontractor performs the work in the workplace of the main employer. Considering that they share the same workplace, it is very likely that an occupational accident will occur as a result of the subcontractor's failure to comply with the occupational health and safety obligations and that the employee of the principal employer will be harmed.[48] In this case, the subcontractor who is at fault will be held liable to the employee of the principal employer according to the provisions of tort, since there is no employment contract between them. The main employer, on the other hand, will be obliged to compensate the damages of its employee according to the provisions of contractual liability due to breach of the duty of care. In this case, both employers, who are responsible for the same damage for various reasons, will be held jointly liable for the damage of the employee of the principal employer who is exposed to an occupational accident in accordance with Article 61 of the TBK.[49]

B. Temporary Labour Relationship

1. In General

Temporary employment relationship is divided into two as professional and non-professional temporary employment relationship. This relationship is regulated in Article 7 of the İK, which was amended by Law No. 6715 in light of the European Union Directive no. 2008/104/

[48] Eren Yıldız, Asıl İşveren- Alt İşveren İlişkisinde İş Sağlığı ve Güvenliği Yükümlülükleri, Master Thesis, İstanbul 2019, p. 152.

[49] Akın, p. 225; Yıldız, p. 153.

EC.[50] In addition, the Law on Turkish Employment Agency[51] and the Regulation on Private Employment Agencies[52] also contain detailed explanations on the temporary employment relationship. According to Article 7/1 of the İK, a temporary employment relationship is established "through a private employment agency or by assignment within the holding or another workplace affiliated to the same group of companies".[53] The legislator has determined in detail the cases and periods in which the professional temporary employment relationship can be established, and in the non-occupational temporary employment relationship, the legislator has avoided restrictive statements and has given more leeway to the parties.

In the temporary employment relationship, which is a type of tripartite employment relationship, unlike other institutions that create a tripartite employment relationship such as transfer of workplace and transfer of employment contract, the employment relationship between the employee and his/her main employer does not disappear when the employee is sent to work at the workplace of the temporary employer.[54] At this point, the private employment agency continues to be the employer of the worker in the professional temporary employment relationship and the transferor employer continues to be the employer of the worker in the non-professional temporary employment relationship. In this relationship, without changing the parties to the employment contract, only the creditor of the employee's performance of work becomes the temporary employer for a temporary period of time. Due to this nature of the relationship, the obligations of the employee to the principal employer, other than

50 For the requirements of the Directive, see, Şelale Uşen, "2008/104/EC Sayılı Ödünç İş İlişkisine İlişkin Avrupa Birliği Yönergesinin Getirdiği Yeni Düzenlemelerin Türkiye Açısından Değerlendirilmesi", *Çalışma ve Toplum*, 2010/3, p. 169 et seq; On the development process of the temporary employment relationship through private employment agencies in Turkish law, see also, Ercüment Özkaraca, Özel İstihdam Bürosu Aracılığıyla Geçici İş İlişkisi (Özel İstihdam Bürosu), İş Hukukuna İlişkin Sorunlar ve Çözüm Önerileri 21. Toplantısı 2016 Toplantıları, İstanbul Barosu- Galatasaray Üniversitesi, 03-04 June 2016, İstanbul 2018, p. 56.

51 RG, 05.07.2003, 25159.

52 RG, 11.10.2016, 29854

53 Article 7 of the HR was requested to be annulled due to its unconstitutionality, but the request was rejected by the court, AYM, 28.02.2018, E. 2016/141, K. 28.02.2018, RG, 29.03.2018, 30375; Süzek, p. 281.

54 Çelik/Caniklioğlu/Canbolat/Özkaraca, p. 253.

the obligation to perform work, continue without interruption. Again, the wage payment obligation, which constitutes the remuneration for the performance of work, remains as an obligation of the principal employer.[55]

Although the temporary employer is not the employer of the worker in this relationship, since the worker works within its own work organization, certain rights and obligations arise for the temporary employer.[56] These include the right of the temporary employer to give orders and instructions (Art. 7/9-a), the obligation to act equally (Art. 7/10), the obligation to provide occupational health and safety training and to take necessary occupational health and safety measures.[57]

2. Joint Liability in Temporary Labour Relations

The Labour Law sets forth a clear joint liability provision for the transferor and transferee employers in "non-occupational" temporary employment relationships established for the fulfilment of the performance of work within the holding or in another workplace of the same group of companies. Accordingly, the employer with whom a temporary employment relationship is established is jointly liable with the transferring employer for the wages, the obligation to take care of the employee and social insurance premiums during the period of employment (Art. 7/15). The liability stipulated herein is a joint liability as accepted in the doctrine.[58]

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55 Süzek, p. 292.

56 Orhan Ersun Civan, "Yeni Düzenlemeler Çerçevesinde Meslek Edinilmiş Ödünç (Geçici) İş İlişkisi", *AÜHFD*, 66 (2) 2017, p. 388.

57 For more information on the temporary employment relationship, see, Özkaraca, Özel İstihdam Bürosu, p. 53 et seq.; Süzek, p. 280 et seq.; Çelik/Caniklioğlu/Canbolat/Özkaraca, p. 249 et seq.; Ali Güzel/Hande Heper, "Sürekli İstihdamdan Geçici Atipik İstihdama!...: Mesleki Amaçlı Geçici İş İlişkisi", Çalışma ve Toplum, 2017/01, p. 11 et seq. ; Civan, p. 311 et seq.; Ayşegül Ekin, İş ve Sosyal Güvenlik Hukukunda Mesleki Anlamda Geçici İş İlişkisi, Unpublished Doctoral Thesis, Konya 2019, p. 6.; Esra Yiğit, Özel İstihdam Büroları Aracılığıyla Geçici İş İlişkisi, On İki Levha Yayınları, İstanbul, 2019, p. 70 et seq; Duygu Çelebi, Meslek Edinilmiş Geçici İş İlişkisi, Ankara, 2019, p. 30 et seq.

58 Süzek, p. 299; Yiğit, p. 170 vd; Çelebi, p. 345; Civan, Geçici, p. 384 et seq. ; Serkan Odaman, "Yeni Düzenlemeler Çerçevesinde Türk İş Hukukunda Ödünç İş İlişkisi Uygulaması", *Sicil İHD*, Issue 36, December, 2016, p. 55.

The employer who temporarily transfers the employee does not have the opportunity to inspect whether the temporary employer complies with occupational health and safety measures at the workplace. Nevertheless, due to the explicit legal regulation regarding the temporary employment relationship, the transferring employer will be jointly liable together with the temporary employer for an occupational accident that occurs.[59] In the doctrine, this regulation is criticized on the grounds that the main employer cannot actually take occupational health and safety measures.[60] On the other hand, it is also stated that this regulation is appropriate as it encourages employers to avoid temporarily transferring their employees or to act more diligently in the matter of transfer.[61] However, in any case, the employer who fulfils its responsibility arising from the occupational accident will be able to apply for recourse to the temporary employer in proportion to its fault.[62]

The Law does not include any joint liability provision for "professional" temporary employment relationships established through private employment agencies. It is inappropriate not to include any joint liability provision for this type of temporary employment relationship where the worker needs more protection. In this respect, it is necessary to regulate joint liability in the temporary employment relationship established through private employment agencies, just as in the temporary employment relationship without a profession.[63]

The temporary worker does not work for his/her own employer in the workplace where he/she is sent to work, but for the employer called the temporary employer and works in accordance with his/her orders and instructions. Therefore, taking occupational health

59 Odaman , p. 55.

60 Ömer Ekmekçi, "4857 sayılı İş Kanunu'nda Geçici (Ödünç) İş İlişkisinin Kurulması, Hükümleri ve Sona Ermesi", *Legal İş ve Sosyal Güvenlik Hukuku Dergisi*, Issue 2, Y. 2004, p. 376; Can Tuncay, "İş Kanunu Tasarısındaki Ödünç İş İlişkisi ve Eleştirisi" (Ödünç), Mercek, Y. 8, Issue 30, Y. 2003, p. 71.

61 Özdemir, p. 241, see the authors there.

62 Civan, p. 381; Özdemir, p. 24; "In receivables arising from occupational accidents, joint debtors can only sue the other joint debtor for compensation if they have made payments in excess of their fault ratios. The recourse lawsuit filed before the payment must be dismissed for lack of a cause of action", Yarg. 21. HD, 07.05.2015, E. 2014/24340, K. 2015/10282, (www.lexpera.com, AD. 26.11.2021).

63 Özkaraca, p. 95.

and safety measures is, as a rule, the responsibility of the temporary employer.[64] In this respect, although the Law does not provide for an explicit joint liability, in the event that the temporary employer violates its obligation to fulfil certain occupational health and safety measures, it will be possible to speak of joint liability together with the private employment agency against the temporary worker due to its own fault.

The temporary employer is obliged to report the occupational accident suffered by the temporary worker to the law enforcement authorities and the SGK (Social Security Institution), as well as to the private employment agency, just like a principal employer (Art. 7/9-c). The temporary employer is also obliged to provide the trainings stipulated for temporary employers in Law No. 6331, to take the necessary measures in terms of occupational health and safety and to provide basic working conditions for the temporary worker during the period of employment (Art. 7/9-f; Art. 7/10). In the event that the temporary employer fails to fulfil the occupational health and safety obligations stipulated in the Law and causes the worker to suffer an occupational accident or to increase the damage caused by the occupational accident, it is possible to be held liable due to its own fault.

When an occupational accident occurs as a result of the temporary employer's failure to comply with the occupational health and safety measures stipulated by the Law, a typical example of joint liability arises within the meaning of Art. 61 of the TBK. The temporary employer is liable for the same damage caused by his/her negligent behaviour, while the actual employer of the worker is liable as required by the Law. In this case, the main and temporary employers, who are "responsible for the same damage for various reasons", will be jointly liable as per the Law.[65] In this case, it will be possible for the injured worker to apply to both the temporary employer and his/her own employer for the full compensation of the damage.

64 Özdemir, p. 242; Ekmekçi, Geçici, p. 376; Odaman, p. 54.
65 Özkaraca, p. 97.

C. Transfer of Workplace

1. In General

According to the Labour Law, the transfer of a workplace or a part of a workplace to another employer based on a legal transaction is called a transfer of workplace (Art. 6/1). The legislator has expressed the transfer of the workplace with a general expression and has not included a detailed regulation on its conditions. However, in the EU Directive on the transfer of the workplace, the conditions that must be present in order for the transfer of all or part of the workplace to be qualified as a transfer of the workplace in the technical sense are clearly listed.

According to Directive no. 2001/23, the transfer of a workplace is defined as "the transfer of an economic entity which retains its identity in the sense of an organized pooling of resources for the purpose of carrying on a main or subsidiary economic activity" (Art. 1/1.b). Accordingly, the conditions for the transfer of a workplace or part thereof are the existence of an economic entity, i.e. a workplace or part thereof, the transfer of the workplace or part thereof to another employer, the transfer being based on a legal transaction and the preservation of the identity of the economic association despite the change of employer.[66]

Although the conditions required by the EU Directive are not explicitly stipulated in our domestic law, it is observed that the Court of Cassation's decisions require these conditions in order to qualify as a transfer of workplace.[67] In the decisions of the Court of Cassation, it is seen that the transfer of a workplace or a part of a workplace with economic integrity "while preserving its identity" is strictly sought for the characterization of the transfer of a workplace.[68] However, in

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66 Gülsevil Alpagut, İşyerinin Devri ve İş Sözleşmesini Fesih Hakkı, Beta Yayınevi, İstanbul, 2010, p. 28; Ercüment Özkaraca, İşyeri Devrinin İş Sözleşmesine Etkisi ve İşverenlerin Hukuki Sorumluluğu, Beta Yayınevi 1. Basım, İstanbul 2008, p. 33.

67 "Transfer refers to the transfer of a business or a workplace or a part of a workplace that has an economic integrity while preserving its own identity...), Yarg. 9. HD, 27.05.2019, E. 2017/10797, K. 2019/12098, (www.lexpera.com, AD. 07.11.2021).

68 Yarg. 9. HD, 22.2.2016, E. 2014/30825, K. 2016/3327, (www.lexpera.com, AD. 7.11.2021).

the transfer of a part of a workplace, it is not necessary that all of the conditions stipulated for the acceptance of the transfer by preserving the identity are present in the concrete case. For the transfer of a part of the workplace, the existence of the element that characterizes the economic integrity, i.e. the workplace, will be sufficient for the acceptance of the preservation of identity. For example, the transfer of machinery in workplaces where goods are produced or the transfer of only workers in workplaces where labour is important may constitute a transfer of the workplace.[69] What is important here is that it is possible for the transferee to continue the same technical and economic activity and that the same activity will be continued by the transferee.[70] This is because the activities carried out in the workplace must be continued by the transferee in order to talk about the transfer of a workplace in the technical sense.[71]

2. Joint Liability in Transfer of Workplace

According to the Labor Law, in the event of a transfer of a workplace, the transferor and transferee employers are jointly liable for the debts arising before the transfer and due for payment on the date of transfer. However, the liability of the transferor employer ends two years after the date of transfer (Art. 6/3). As stated in the doctrine, the liability stipulated in the Law is a joint liability.[72]

The liability stipulated in the Law for the transferee is valid for the employment contracts existing in the workplace at the time of the transfer, i.e. those that have not expired. This limitation in terms of

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69 Bkz. Orhan Ersun Civan, "Makineyle Birlikte İşçi Devri", Prof. Dr. Savaş Taşkent'e Armağan, İstanbul, 2019, p. 993 et seq; Süzek, p. 197; For examples of workplace transfers, see also Ömer Ekmekçi/Esra Yiğit, Bireysel İş Hukuku Dersleri, On İki Levha Yayınları, İstanbul, 2020, p. 218.

70 Süzek, p. 196; On factors to be considered in assessing the conditions for the protection of identity, see Alpagut, p. 49 et seq.

71 Ali Güzel, İşverenin Değişmesi- İşyerinin Devri ve Hizmet Akitlerine Etkisi, Doçentlik Tezi, İstanbul, 1987, p. 82; Özkaraca, p. 22; Kübra Doğan Yeniset, İş Hukukunda İşyeri ve İşletme, Legal Yayıncılık, İstanbul, 2007, p. 213; Alpagut, p. 48.

72 Ercüment Özkaraca, İşyeri Devri Halinde İşverenlerin Hukuki Sorumluluğu (Hukuki Sorumluluk), İş Hukukunda Üçlü İş İlişkileri, Kadir Has Üniversitesi Sempozyumu, İstanbul, 2009, p. 178; Süzek, p. 198; Yarg. 9. HD, 15.10.2010, E. 2008/377249, K. 2010/29226, (www.lexpera.com, AD. 7.11.2021); Özkaraca, Hukuki Sorumluluk, p. 178.

liability is a consequence of the provision of Article 6/3 of the HR, which stipulates that the employment contracts existing at the time of the transfer are transferred to the transferee with all their rights and obligations in accordance with the Law and that a two-year limitation is imposed on the liability of the transferor.[73] As a rule, it is not possible for the transferee employer to be held liable for the debts arising from an employment contract that does not exist at the time of the transfer, in the face of the provisions of the Labor Law regarding the transfer of the workplace (Art. 6/1).

Although Article 6 of the Labor Law does not protect the employment contracts terminated before the transfer in terms of joint liability, it is stated in the doctrine that if the conditions are met, protection can be provided for these employees by applying the provisions of the Turkish Code of Obligations regarding the transfer of the enterprise.[74] Again, the Court of Cassation considers it possible to establish a joint liability relationship based on these provisions for the employees whose employment contracts are terminated if the conditions are met.[75]

Pursuant to Article 202 of the Turkish Code of Obligations titled "acquisition of an asset or an enterprise", "the transferee of an asset or an enterprise, together with its assets and liabilities, shall be liable to the creditors for the debts in the asset or enterprise starting from the date of notification or announcement" (Art. 202/1). In this case, the transferor will also be liable together with the transferee for a period of two years (Art. 202/2). If the transferee employer fails to make the announcement mentioned in the article, the two-year period will not start to run.[76] Unlike Article 6 of the İK, the provision does not make a distinction as to whether the employment contracts exist at the time of

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73 Özkaraca, p. 334.

74 Özkaraca, p. 345.

75 Yarg. 9. HD, 12.10.2004, E. 2004/13687, K. 2004/22962, Cevdet İlhan Günay, İş Kanunu Şerhi, Vol. I, 2. Baskı, Ankara 2006, p. 281; Yarg. 9. HD, 05.10.2006, E. 2006/4720, K. 2006/25950, (www.kazanci.com, AD. 7.11.2021); Yarg. 21. HD, 19.10.2010, E. 2010/3450, K. 2010/10172, Çalışma ve Toplum, Issue 31, 2011/4; Yarg. 21. HD, 02.07.2011, E. 2010/3098, K. 2011/5070; Yarg. 9. HD, 11.03.2020, E. 2016/15573, K. 2020/4215, (www.lexpera.com, AD. 28.1.2022).

76 Hamdi Mollamahmutoğlu/Muhittin Astarlı/Ulaş Baysal, İş Hukuku, Ankara 2014, p. 270.

the transfer or not.[77] Therefore, if the conditions sought in the provision are present in the concrete case, it will be possible for the employee whose employment contract ended on a date prior to the transfer to apply to the transferee employer for his/her receivables.

The termination of the employment contract before the transfer or the termination of the employment contract after the transfer to the new employer is of great importance in terms of the compensation claims of the survivors of the employee who died as a result of an occupational accident. This is because there is a situation that differs from most other labour claims. If the employee dies as a result of an occupational accident, the employment contract will be terminated solely for this reason (Art. 440 TBK). In this case, unlike the occupational accident that results in injury or moral damage to the worker, the possibility for the worker to participate in the transfer of the workplace that takes place after the date of the occupational accident is completely eliminated and becomes impossible. For this reason, if the employee dies due to an occupational accident on a date prior to the transfer, it is not possible to claim compensation from the employer who takes over the workplace on a later date based on Art. 6 of the İK, since the employment contract will not be transferred to the new employer. If the workplace is transferred according to the provisions of the Labor Law at a later date after the date of the accident, the injured worker may apply to both the transferor and the transferee employer for compensation. However, the joint liability of the transferor employer is limited to a period of two years.

As a result, it is not possible, as a rule, for an employee who dies as a result of an occupational accident or whose employment contract was terminated at a date prior to the transfer of the workplace to apply to the transferee employer in the face of the explicit provision of the Labor Law regarding liability in the transfer of the workplace. However, in cases where there is a transfer within the meaning of art. 202 of the TBK, or the transfer in question is of a nature that will result in the conclusion of a merger, such as a merger transaction, in the event of death of the employee who has suffered an occupational accident,

77 For detailed information on the transfer of the operation, see Hüseyin Ülgen/Mehmet Helvacı/Abuzer Kendigelen/Arslan Kaya/Füsun Nomer Ertan, Ticari İşletme Hukuku, Güncellenmiş Dördüncü Basıdan Beşinci Tıpkı Bası, İstanbul 2015, p. 196 et seq.

his/her heirs, and in other cases, he/she himself/herself may apply for the joint liability of both employers.[78]

D. Transfer of Employment Contract

1. In General

Unlike the provisions on the temporary transfer of the employee and the transfer of the workplace, there is no provision on the transfer of the employment contract in the Labor Law. The transfer of the employment contract is addressed in Article 429 of the Turkish Code of Obligations titled "transfer of the contract". Accordingly, the employment contract may be transferred to another employer with the written consent of the employee (Art. 429/1). Upon the assignment of the contract, the assignee becomes the employer party to the contract with all rights and obligations. In terms of the rights based on the length of service of the employee, it is necessary to act according to the date of employment with the transferor employer (Art. 429/2).

The transfer of the employment contract may be made by a unique legal transaction in which the transferor, the party remaining in the contract and the transferee participate, or it may occur with the consent of the employee to a contract previously concluded between the transferor and the transferee employer.[79]

The law states that the written consent of the employee shall be sought for the transfer, but there is no explanation as to the time interval in which the consent must be obtained. However, it should be accepted that the written consent must be sought at the time of the transfer, since it is a transaction that may lead to unfavourable situations such as the transfer of the employee to an employer who is financially very weak or the employee starting to work in a workplace that is not covered by job security.[80] Considering the fact that the consent is sought at the time

78 Mollamahmutoğlu/Astarlı/Baysal, p. 280; Özkaraca, p. 345.

79 Ercüment Özkaraca, İş Sözleşmesinin Devri (Sözleşmenin Devri), İş Hukukunda Yeni Yaklaşımlar, On İki Levha Yayınevi, İstanbul 2014, p. 120.

80 For the dissenting opinion see Efe Yamakoğlu/Eda Karaçöp, "6098 sayılı Türk Borçlar Kanunu'nun Hizmet Sözleşmesine İlişkin Hükümleri ve İş Kanunu ile İlişkisi", *Legal İHSGHD*, Y. 2013, Issue. 38, p. 12; For evaluations regarding the nature of the written form requirement, see. Özkaraca, Sözleşmenin Devri, p. 121 et seq.

of the transfer even in temporary employment relationship, reaching a different conclusion would not be compatible with the logic of law.[81]

With the transfer of the employment contract, the employer party to the contract changes, but there is no change in the terms of the contract.[82] With the transfer, all rights and obligations arising from the employment contract with the title of being a party are assumed by the new employer. As a result, the contractual relationship between the transferor employer and the employee ends.[83]

2. Joint Liability in Transfer of Employment Contract

The legislator has not explicitly regulated joint liability in the transfer of the employment contract. In this respect, Article 429 of the TBK leaves unanswered the question of whether the transferor employer continues to be jointly liable with the transferee employer for debts arising on a date prior to the transfer of the employment contract.

By its nature, the transfer of the employment contract transfers all rights and obligations arising from the employment contract to the transferee employer and releases the transferor employer from liability.[84] As a result of this transaction, the transferee employer remains as the sole addressee in terms of all receivables and debts and succeeds to the rights of the transferor employer. Here, the assignee assumes the legal status of the transferor employer as a whole.[85] Due to the nature of the transfer of the contract, the transferee employer becomes liable for all debts arising in the period before the transfer of the contract.[86]

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81 Süzek, p. 330.

82 Mustafa Alp, "İş Sözleşmesinin Devrinde Bazı Sorunlar", *DEÜHFD*, Vol. 9, Special Issue, Y. 2007, p. 193.

83 Çelik/Caniklioğlu/Canbolat/Özkaraca, p. 310; Nurşen Caniklioğlu, Türk Borçlar Kanunu- İş Kanunu İlişkisi ve Türk Borçlar Kanunu'nun Bazı Hükümlerinin İş Kanunu Açısından Değerlendirilmesi, 10. Yılında İş Kanunu Semineri, 15 November 2013, İstanbul 2014, p. 78; Özkaraca, p. 114;

84 Özkaraca, Sözleşmenin Devri, p. 133.

85 Eren, Genel, p. 1392.

86 Şeref Güler, "İş Sözleşmesinin Devrinde Müteselsil Sorumluluk", *İMHFD*, Vol. VI, Issue 11, 2021, p. 215.

Article 428 of the Turkish Code of Obligations, which regulates the transfer of the workplace, regulates the joint liability of the transferor and transferee employers in line with Article 6 of the Labour Law (Art. 428/3 of the TBK). In the next article, the transfer of the employment contract, there is no provision on joint liability. One of the opinions in the doctrine states that the legislator aims not to accept joint liability through deliberate silence in order not to make a negative regulation, and therefore, a gap in the law cannot be mentioned here. According to this opinion, unlike the transfer of the workplace, the consent of the employer is sought in the transfer of the employment contract, and therefore the transfer of the employment contract occurs with the will of the employee who is in a position to calculate the consequences of the transfer of the receivables from the transferor employer to the transferee.[87] Again, unless explicitly stipulated in the law, it is not possible to create a joint liability through interpretation or to extend a joint liability provision by analogy.[88] Pursuant to Article 141 of the TBK, the source of joint liability is only the agreement of the parties or an express provision of law.[89]

According to another opinion in the doctrine, the absence of a provision on the liability of the transferor employer in Article 429 of the TBK regarding the transfer of the employment contract is due to the negligence of the legislator. Therefore, this gap in the law should be filled by applying the joint liability provisions stipulated in the provisions of the TBK and the İK regarding the transfer of the workplace by analogy to the transfer of the employment contract, which is similar in terms of the interests protected.[90]

In our opinion, holding the transferor employer liable for the pre-assignment debts by analogy in the face of the explicit provision of the Law on joint liability does not comply with the logic of law (Art. 141 TBK). However, even though the employee is given the authority

87 Ekmekçi/Yiğit, p. 241.
88 Ekmekçi/Yiğit, p. 242; Yamakoğlu/Karaçöp, p. 125.
89 İpek Kocagil, "Yeni Borçlar Kanunu Işığında İş Sözleşmesinin Devri", Sicil *İHD*, Issue. 22, Haziran 2011, p. 56.
90 Özkaraca, Sözleşmenin Devri, p. 137 et seq; Süzek, p. 331; Çelik/Caniklioğlu/Canbolat/Özkaraca, p. 312; Mustafa Alp, İş Sözleşmesinin Devri, Kadir Has Üniversitesi Hukuk Fakültesi, İş hukukunda Üçlü İş İlişkileri Sempozyumu, 4. April 2009, İstanbul 2009 (Devir), p. 327.

to consent to the transfer, the employee cannot be expected to make a free decision and to have the correct belief that his/her rights are secured in every situation. For this reason, we believe that it would be more appropriate for the establishment of justice to hold the transferor employer jointly liable for the debts arising before the transfer.

In its decisions, the Court of Cassation applies Article 6/3 of the İK regarding the joint liability arising from the transfer of the workplace by analogy.[91] However, in terms of the law, it is necessary to include a clear provision of law regarding the joint liability of the transferor and transferee employers in the transfer of the employment contract, just as in the transfer of the workplace.[92] This practice is incompatible with the nature of the transfer of the contract regulated under Article 205 of the TBK.

Both employers will be jointly liable for damages arising from occupational accidents, as well as other labour receivables arising prior to the transfer of the employment contract, for a period of two years. Only the transferee employer will be liable for occupational accidents occurring after the transfer of the employment contract. Unlike subcontracting and temporary employment relationship, since the employee is not in the workplace of more than one employer or does not work under the orders and instructions of another employer, even temporarily, it will not be possible, as a rule, for joint liability to arise within the scope of Art. 61 of the TBK as a result of the existence of joint fault. This is because the transfer of the employment contract does not create a permanent relationship between the transferor and the transferee employers, and the employer, who is the transferor of the tripartite relationship at the time of the completion of the transfer, completely leaves the relationship.

III. SCOPE OF JOINT LIABILITY

Neither the Labour Law nor the Occupational Health and Safety Law regulates the receivables that fall within the scope of the employer's liability arising from occupational accidents. Therefore, the

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91 Yarg. 9. HD, 26.03.2018, E. 2018/2403, K. 2018/6275, (www.lexpera.com, AD. 09.11.2021).

92 Özkaraca, Sözleşmenin Devri, p. 141.

provisions of the Turkish Code of Obligations shall apply to the claims of the employee and other beneficiaries arising from the occupational accident.[93]

In the event of an occupational accident at the workplace as a result of the employer's breach of the duty of care in the broad sense and breach of the duty to take occupational health and safety measures in the narrow sense, the employee may claim compensation for his/her physical damages from the employers who are jointly liable (Art. 54 and 55). In addition to pecuniary compensation, it is also possible to claim non-pecuniary compensation for an occupational accident (Art. 56). In the event that the worker dies as a result of an occupational accident, those who are deprived of the worker's support may claim pecuniary compensation, which is referred to as compensation for deprivation of support (Art. 53). In addition, the relatives of the worker who have suffered pain and anguish due to the death of the worker may file a lawsuit for non-pecuniary damages against all of the jointly liable employers (Art. 56/2).[94]

A. Material Compensation

The employee may claim monetary compensation from the employer for bodily injury suffered as a result of an occupational accident. The scope of the concept of bodily injury is defined in Article 54 of the Turkish Code of Obligations. The first item of bodily damages is treatment expenses. The worker may claim the expenses incurred for going to and coming from the hospital, the expenses incurred for the treatment and surgeries performed as pecuniary compensation.[95] In addition, loss of earnings, losses arising from the reduction or loss of working capacity and losses arising from the loss of economic future can also be claimed from the employer within the scope of pecuniary compensation.

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93 Süzek, p. 409; Çelik/Caniklioğlu/Canbolat/Özkaraca, p. 436; Özdemir, p. 301.

94 For detailed information on the rights that the worker and his/her relatives may claim as a result of an occupational accident, see Cengiz, p. 134 et seq; Süzek, p. 427 et seq; Çelik/Caniklioğlu/Canbolat/Özkaraca, p. 443; Özdemir, p. 301 et seq.

95 Sarper Süzek, İş Kazasından Doğan Maddi Tazminat, Prof. Dr. Ali Güzel'e Armağan, İstanbul 2010, p. 705.

In our law, pecuniary compensation does not aim for enrichment, but serves to restore the financial situation of the injured party. Therefore, the amount of pecuniary compensation to which the worker is entitled is limited to the damage suffered.[96] The Court of Cassation takes into consideration the age, wage, incapacity rate and fault rates of the worker in the calculation of financial compensation arising from occupational accidents. Using these data, calculations are made separately for three different time periods, namely the period of active loss, the period of active loss to be incurred and the period of passive loss to be incurred, and the amount of compensation to be paid is found.[97]

B. Compensation for Loss of Support

According to Article 53 of the Turkish Code of Obligations, the damages incurred by the persons deprived of the support of the deceased due to death resulting from an occupational accident must be compensated. The employment contract is a contract between the employee and the employer and depends on the personality of the employee. Those who are deprived of the support of the employee are not a party to the employment contract. However, with a special provision, the legislator has paved the way for those who are deprived of the support of the employee to claim compensation for their damages in accordance with the provisions of contractual liability, not the provisions of tort. Accordingly, "compensation for damages arising from the death of the employee due to the employer's... behaviour contrary to the law and the contract shall be subject to the provisions of liability arising from breach of contract" (TBK art. 417/3).

Compensation for deprivation of support may be claimed by the spouse, children, mother, father and other persons who actually benefited from the support of the worker during his/her lifetime.[98] In determining the amount of this compensation, the variables to be taken into account in the determination of pecuniary compensation will need to be taken into account. In addition, specific to this type

96 Cengiz, p. 134; Süzek, p. 427-428.
97 Süzek, p. 433 et seq; Akın, p. 119 et seq.
98 Çelik/Caniklioğlu/Canbolat/Özkaraca, p. 453; Süzek, p. 438.

of compensation, the data regarding the portion of the income of tge deceased that he/she would have allocated to his/her own expenses, savings, and how much share he/she would have allocated to which support, if he/she had survived, will also be taken into consideration in the determination of the compensation.[99]

C. Moral Compensation

The worker who suffered an occupational accident may claim moral damages, as well as his/her relatives in the event of severe bodily harm or death of the worker (Art. 56/2 of the TBK). The provisions regarding the determination of pecuniary damage are applied to non-pecuniary damage by analogy. However, unlike pecuniary damage, since non-pecuniary damage results in a diminution in personal assets, the discretion of the judge will be much more effective than pecuniary damage.[100] As a matter of fact, it is not possible to calculate and reveal the non-pecuniary damage with calculation methods based on certain mathematical formulas as in the case of pecuniary damage.[101]

CONCLUSION

An occupational accident is an occupational injury where the employee suffers mental or physical damage as a result of an event arising out of the work he/she is performing while under the control of the employer or as a result of an event that occurs suddenly for an external reason. In the event that there is a fault that can be attributed to the employer in the occupational accident that occurs, and therefore, if there is an attitude of the employer contrary to the employer's duty of care, the legal liability of the employer arising from the occupational accident becomes an issue. In some cases, albeit exceptional, even a fault is not required for the employer to be held legally responsible for the occupational accident.

An employee who suffers bodily injury as a result of an occupational accident may claim financial compensation and moral compensation from the employer. If the worker loses his/her life, those who are

99 Süzek, p. 442.
100 Cengiz, p. 138.
101 Süzek, p. 444.

deprived of his/her support may claim compensation for deprivation of support. In addition, in the event of severe physical damages or the death of the worker, the relatives of the worker who suffered and heard the pain and suffering of the worker may also claim non-pecuniary compensation.

In labour law, subcontracting relationship, temporary employment relationship, transfer of workplace and transfer of employment contract are referred to as tripartite relationships. The legislator has included joint liability provisions in order to protect the workers in labour relations where tripartite relationships are in question. As a matter of fact, the principal employer is jointly liable together with the sub-employer for the labour receivables of the sub-employer's employee (art. 2/6 of the İK). Again, it is regulated that the transferor and transferee employers will be jointly liable for the wages, supervision obligation and social insurance premiums of the worker in the temporary employment relationship (Art. 7/15 of the İK). Again, in the transfer of the workplace, the transferor and transferee employers are held jointly liable for the debts arising before the transfer for a period of two years.

Unlike other tripartite employment relationships, the Law does not provide for an explicit joint liability provision in the transfer of an employment contract. However, in line with the dominant opinion in the doctrine and the jurisprudence of the Court of Cassation, the two-year joint liability provision in the transfer of the workplace is applied by analogy to the transfer of the employment contract, and both employers are held liable for the debts arising from occupational accidents that occurred on a date prior to the transfer.

Unlike the temporary employment relationship established for the purpose of employing workers in another workplace within the holding or in another workplace affiliated to the same group of companies, the Law does not include a provision stipulating that the temporary employer shall be jointly liable with the private employment agency for the breach of the duty of care. Therefore, as a rule, it is not possible for the employee to claim from the temporary employer the damages incurred as a result of an occupational accident while working for the temporary employer. However, if the occupational health and safety

obligations stipulated for temporary employers in both the Labour Law and the occupational health and safety legislation are not fulfilled, the temporary employer's liability arising from its own fault may become an issue. In this case, the private employment agency and the temporary employer may be held jointly liable pursuant to Article 61 of the TBK, which stipulates that persons who cause the same damage for different reasons shall be jointly liable for the damage.

Similar to the temporary employment relationship, it is also possible to apply it to the liability arising in the event that the employee of the main employer suffers damage as a result of the subcontractor's failure to fulfil the occupational health and safety obligations of the subcontractor. In this case, the subcontractor will be liable to the employee of the principal employer under the tort provisions, while the principal employer will be held liable for the occupational accident under the contractual liability provisions. In this case, pursuant to Article 61 of the TBK, the employee of the principal employer may apply to both the sub-employer and the principal employer for compensation for the material and moral damages suffered due to the occupational accident.

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