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The Third-Party Pressure for Dismissal at the Time of the Pandemic

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Abstract: The paper explores employment contract termination under third-party pressure, a topic that gained prominence during the pandemic. It categorises pressure termination into partial and complete pressure termination and highlights their differences. The authors also examine the conditions for pressure termination and its legal consequences. This issue is particularly examined within the context of terminating a contract of an employee whose spouse/partner is a healthcare worker as a result of colleagues' pressure at the time of the pandemic. The paper shows that terminating the contract of such an employee can exemplify complete pressure termination if conditions are met and it is prohibited to terminate the contract without notice. It also explains that such employees can claim compensation under general provisions. Though focused on the pandemic, the findings can apply to analogous situations, such as a professor pressuring a university to dismiss an assistant without valid cause.

***Keywords*:** employment contract; pressure; termination; dismissal; third party; pandemic; Covid-19

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Contents

I. Introduction

Employees, clients, customers or other institutions may demand the dismissal of a specific employee from the employer and may threaten them with serious economic consequences for the business if this demand is not met. This issue is labelled as "the third-party pressure for dismissal" or "pressure termination" (Settekorn, 2015, p. 66). The issue of termination under the pressure of third parties has not been extensively researched and this phenomenon needs to be discussed within the scope of the Covid-19 pandemic because the pandemic that quickly spread around the world affected the legal order and influenced working life in every aspect. Several measures such as curfews, quarantine practices, and the closure of some workplaces were introduced and implemented. This situation also devastated working life economically. Therefore, businesses had to make decisions concerning workplaces and Covid-related issues.

The relationship between Covid-19 and a third-party pressure-inducing dismissal might emerge in several ways. For example, some employees might not believe the coronavirus existence and might refuse to take necessary precautions. Additionally, the healthcare workers, who are on the front lines in the fight against the Covid-19 pandemic, might be seen as potential danger for their friends and even the friend's parents. Therefore, some people might adopt a negative attitude towards healthcare workers and their families due to the risk of transmission of the virus. Similarly, the same attitude may be displayed in workplaces towards an employee whose spouse/partner is a healthcare worker. Within this scope, the employer may have to consider the dismissal of a specific employee whose spouse/partner is a healthcare worker because of the pressure of colleagues.

In this regard, the World Health Organization is considering the advantages of global preparedness for future pandemics. This includes international collaboration on research and development, as well as launching national initiatives to create "response plans" for new disease outbreaks.[1] In the realm of legal dispute resolution, our responsibility is to be ready for individual employment disputes arising from the pandemic. On this basis, this study will examine the issue of third-party pressure for dismissal in the context of the Covid-19 pandemic. The arguments considering the concept of third-party pressure for dismissal heavily rely on German-based sources but it shows how the arguments would be comparatively applicable in Turkey.

II. Methodology

This research primarily utilizes the doctrinal research method, often referred to as *black-letter research* (McConville and Chui, 2017, p. 4). This approach involves identifying and critically examining primary sources, such as rules, principles, and judicial practices in German Law and Turkish Law to determine the key aspects, nature and scope of the relevant employment law. In addition to the primary sources, the

[1] What is Disease X and How will Pandemic Preparations Help the World? Available at: https://www.aljazeera.com/news/2024/1/18/what-is-disease-x-and-how-will-pandemic-preparations-help-the-world [Accessed 20.08.2024].

research aims to critically consider secondary sources such as academic materials regarding support, interpretation and criticism of primary sources to clarify and organize the legal issues at hand (McConville and Chui, 2017, p. 4). Ultimately, our goal is to provide an accurate and comprehensive statement of the law about the elements of third-party pressure for dismissal in employment contracts in the countries in question.

The second approach used in the research is comparative law methodology. This method helps improve the understanding of the law and enhances critical standards that may lead to advancements in domestic and/or international law (Zweigert and Kötz, 1998, p. 21). It provides insights into foreign legal systems by considering "law as rules", allowing stakeholders to view their legal system from a fresh perspective (Bogdan, 1994, p. 29). As a result, comparative law would serve not only to overcome national biases by appreciating different perspectives within various societies but also to comparatively analyse the legal consequences of pressure termination in German law and their potential application in Turkish Law without simply listing differences and similarities (Reitz, 1998, p. 630).

III. The Third-Party Pressure for Dismissal

Third-party pressure for dismissal refers to a threat of significant economic repercussions by colleagues, clients, customers, or other governmental/non-governmental institutions and applying pressure on an employer to fire a specific employee. This pressure to terminate is named *Druckkündigung* in German Law (Mues et al., 2010, p. 760; Plum, 2020, § 626 en. 43; Sandmann, 2020, § 626–629 en. 295; Kerwer, 2016, KSchG § 1 en. 583; Reinartz, 2017, § 44 Außerordentliche Kündigung, en. 141; Meyer, 2016, BGB § 626 en. 83; Rinck and Kunz, 2021, p. 1549; Vossen, 2017, BGB § 626 en. 336; Hergenröder, 2020, KSchG § 1 en. 293; Krause, 2019, KSchG § 1 en. 313; Oetker, 2020, KSchG § 1 en. 182).[2] A pressure for termination of an employment contract fundamentally involves the fact that an employer is pressured

[2] BAG., 19.06.1986 — 2 AZR 563/85; BAG., 04.10.1990 — 2 AZR 201/90; BAG., 31.01.1996 — 2 AZR 158/95; LAG Hamm, 04.05.1999 — 4 Sa 1298/98. It is important

from outside or by his employees to dismiss a specific employee in several ways such as collective resignations of employees, strikes, and withdrawal of orders (Günther, 2019, BGB § 626 en. 194; Hergenröder, 2020, KSchG § 1 en. 293). This explicitly demonstrates that the pressure for termination may contain significant risks that can create substantial challenges for even large companies, which will be discussed in detail below (Settekorn, 2015, p. 66).

It is clear that if a part of the workforce or third parties, e.g., the employer's customers, demand the dismissal of an employee, and if rejecting this demand poses a risk of resignation, refusal to cooperate, or termination of the business relationship along with serious disadvantages, then it is referred to as a pressure for the termination. For a dismissal to be considered a pressure dismissal (termination), the following elements must be present: (i) the employer must be requested to dismiss a specific employee; (ii) this pressure must be severe and must include the threat of irreparable damage to the employer; (iii) the employer must make all reasonable efforts to eliminate the pressure. (iv) dismissal must be the means of last resort.

When the pressure comes from other employees, the pressure of dismissal should be compared to the impact of a mobbing situation. Employees might refuse to work with the concerned employee within the same environment, ultimately leading to the employee's exclusion.[3] However, unlike a typical mobbing scenario, in pressure dismissal, when the employer does not succumb to the pressure, the pressuring employees themselves may leave the company (Kerwer, 2016, KSchG § 1 en. 583). Additionally, in mobbing, the intention of pressuring co-workers is to force the employee, who is under pressure, to resign, not to be fired by the employer. From this aspect, it may differ from a classic mobbing scenario.

However, when there is a demand for dismissal, the employer is not allowed to simply comply with this demand (Henssler, 2020, BGB § 626 en. 284). If the employer is under pressure, the reasons for the pressure should primarily be examined (Settekorn, 2015, p. 66). There might

to highlight that "en." will, hereafter, be referring to paragraph numbers in German sources and BGB is an acronym of Bürgerliches Gesetzbuch [German Civil Code].

[3] LAG. Schleswig-Holstein, 20.03.2012 — 2 Sa 331/11.

be different types of pressure according to the reasons for pressure. Following this, dismissal can be divided into two types: partial pressure to dismissal and complete pressure to dismissal. The next section will examine these different types of pressure for dismissal.[4]

III.1. Partial Pressure for Dismissal

The employer always has the right to terminate an employment contract if there is a reason to do so (Sandmann, 2020, § 626–629 en. 296; Henssler, 2020, BGB § 626 en. 283; Kerwer, 2016, KSchG § 1 en. 585; Meyer, 2016, BGB § 626 en. 83; Krause, 2019, KSchG § 1 en. 314).[5] In this regard, partial pressure termination occurs in cases where the pressure for dismissal is objectively justified by the provisions of the law (Mues et al., 2010, pp. 76–77). The characteristic of partial pressure termination is that it is not primarily because there is pressure created by a third party but because there is already an existing reason for termination of the contracts that are related to employees' behaviours in the regulatory provisions. When the third party's demand is justified based on a valid reason related to the employee's behaviour, it cannot principally be considered a complete pressure termination (Niemann, 2020, BGB § 626 en. 185). Here, the pressure itself only triggers the employer's decision to terminate but does not constitute a fundamental underlying reason for termination of the employment contract (Kerwer, 2016, KSchG § 1 en. 585).

For example, where employees' behaviour is against occupational health and safety regulations, the reason for dismissal objectively justifies dismissal. A case where an employee denies the presence of coronavirus and continues violating relevant regulations by insistently refusing to put on a mask despite the warning of termination that might constitute partial pressure for termination (Kleinebrink, 2021, p. 116).[6] Similarly, a coronavirus denier who is in close contact with other employees cannot only disrupt workplace harmony but also jeopardise

[4] BAG., 15.12.2016 — 2 AZR 431/15; BAG. 19.07.2016 — 2 AZR 637/15.

[5] BAG., 19.06.1986 — 2 AZR 563/85; BAG., 10.12.1992 — 2 AZR 271/92; BAG., 04.10.1990 — 2 AZR 201/90.

[6] BAG., 18.07.2013 — 6 AZR 420/12; BAG., 31.01.1996 — 2 AZR 158/95.

the health of other employees. If they stubbornly refuse to comply with necessary protection measures and encourage other employees to do the same and if other employees express that they will not perform their duties until an infringing employee is dismissed, a legitimate reason for dismissal arises and the dismissal is legally justified (Kleinebrink, 2021, p. 119). The termination of a contract due to the behaviour of the employee is at the discretion of the employer. In other words, whether to succumb to pressure and use the right to terminate the contract is at the employer's discretion (Mues et al., 2010, p. 760; Kerwer, 2016, KSchG § 1 en. 585; Reinartz, 2017, § 44 Außerordentliche Kündigung, en. 141; Rinck and Kunz, 2021, p. 1550; Hergenröder, 2020, KSchG § 1 en. 293; Krause, 2019, KSchG § 1 en. 314; Mues et al., 2010, p. 77).[7] However, in exceptional cases such as collective resignation, the employer may not truly have discretion if a violation is so serious that it would result in the termination of the contract (Kleinebrink, 2021, p. 116).

III.2. Complete Pressure for Dismissal

In a complete pressure dismissal, there are no other reasons or legal reasons for termination of the employee's contract than external pressure (Mues et al., 2010, p. 77; Weinmann and Götz, 2017, III. Arbeitgeberkündigung en. 219). The request to terminate the employee's contract is linked to an economic threat and it is the only reason for the termination. Thus, in cases where there are no reasons related to employees' conduct or behaviours, the pressure put on the employer is a decisive factor for the dismissal (Settekorn, 2015, p. 67). That is, the characteristic of a complete pressure termination is essentially a situation of pressure beyond the employer's control. Accordingly, the employer's termination process is expressed solely based on the pressure applied by third parties and is not based on an objectively accepted reason in legislative frameworks for termination, unlike the partial pressure for termination (Mues et al., 2010, p. 760; Kleinebrink, 2021, p. 116).

[7] BAG., 31.01.1996 — 2 AZR 158/95; LAG. Hamm, 04.05.1999 — 4 Sa 1298/98.

In cases where an employee with an HIV infection (it does not transfer to other employees due to just sharing the same working environment) continues to work without interruption, there might be pressure against the infected worker (Kerwer, 2016, KSchG § 1 en. 541; Watt, 1992, p. 280). Other employees express a suspicion about a potential violation of occupational health and safety regulations (Kleinebrink, 2021, p. 116). In the context of the coronavirus pandemic, there might be the following assumptions: a particular employee having transmitted a highly contagious virus, a particular employee having contacted with infected close relatives, or an employee intending to spend a vacation in a risky area (Kleinebrink, 2021, p. 116). In these cases, it is necessary to discuss whether the employer can be forced to dismiss the employee based on suspicion though the concerned employee has not violated the health and safety regulations in the workplace. On the other hand, if the employer continues to employ these employees, it is also necessary to examine if employers violate their duty of care for their employees (Kleinebrink, 2021, p. 116).

As a result, in a complete third-party pressure for termination, there is no other reason for the termination of the employee's contract than the threat of complete pressure for dismissal (Settekorn, 2015, p. 67; Krause, 2019, KSchG § 1 en. 315). Third parties must demand the dismissal of a specific employee from the employer, but this demand must be serious to constitute complete pressure to settle. Additionally, there should be significant disadvantages if the demand is complied with. Merely succumbing to this threat is not considered sufficient. The employer must also take action to counteract the pressure. If alternative actions are not possible and serious economic losses are imminent, then complete pressure termination would arise. Therefore, third party pressure for termination includes several elements that need to be fulfilled and the following section will analyse these elements.

III.2.1. A Demand by the Third Party to Dismiss an Employee

One of the most important characteristics of pressure termination is the influence of third parties on the decision to terminate an employment contract. This influence arises as a result of the pressure exerted by

third parties. Pressure can be applied by third parties who are outside the workplace, such as customers or suppliers, worker representation, unions, creditors, or even public agencies and citizens (Vossen, 2017, BGB § 626 en. 337; Kerwer, 2016, KSchG § 1 en. 583; Rinck and Kunz, 2021, p. 1549; Weinmann and Götz, 2017, III. Arbeitgeberkündigung en. 218; Griebeling and Herget, 2017, BGB § 626 en. 99). Potential tools of pressure include work stoppages, strikes, avoidance of continuing to work with the concerned employee, threats of resignation by employees, withdrawal of orders, and other operational pressures (commercial pressures); embargoes (stopping deliveries); severance of business relations; and the stopping of orders or deliveries (Sandmann, 2020, § 626–629 en. 297–298; Vossen, 2017, BGB § 626 en. 337; Henssler, 2020, BGB § 626 en. 285; Kerwer, 2016, KSchG § 1 en. 583; Meyer, 2016, BGB § 626 en. 83; Rinck and Kunz, 2021, p. 1549).[8]

III.2.2. A Demand must be Severe and must Include Significant Economic Loss

A simple request by a third party for an employer to terminate a specific employee's contract will not meet the strict requirements of a pressure termination (Mues et al., 2010, p. 760; Henssler, 2020, BGB § 626 en. 343). That is, the mere presence of pressure does not constitute a fundamental reason for termination and does not lead to complete pressure termination (Sandmann, 2020, § 626 en. 296). In addition to the pressure being directed towards termination, the pressure must also be serious. For example, a collective complaint — without insisting on dismissal — or requesting the employee be relocated or warned (telling someone what to do; reprimanding someone for a wrongdoing) would not be sufficient to create pressure for dismissal (Kerwer, 2016, KSchG § 1 en. 593).[9] Moreover, only the refusal of employees to work may not be sufficient since it would depend on the number of employees and their proportion in the workforce (Günther, 2019, BGB § 626 en. 555). If the employer has waited a considerable amount of time after the

[8] BAG., 08.05.1996 — 5 AZR 315/95.

[9] BAG., 10.10.1957 — 2 AZR 32/56; BAG., 18.09.1975 — 2 AZR 311/74.

pressure situation has arisen before resorting to termination, this could be taken as an indication that the pressure was not very serious (Kerwer, 2016, KSchG § 1 en. 593).[10]

This condition must be linked to the threat of serious disadvantages for the employer if they do not comply with the termination request (Settekorn, 2015, p. 67; Rinck and Kunz, 2021, p. 1549). The threatened disadvantages must relate to the most severe economic damage and the pressure on the employer must be strong enough (Günther, 2019, BGB § 626 en. 553). In other words, if the employer does not succumb to the pressure, the threatened outcomes must seriously affect the employer (Settekorn, 2015, p. 68). To illustrate, a strike or collective resignation, termination of business relations by a large number of customers, or a bank refusing to provide critical documents for the business or rejecting credit application (Settekorn, 2015, p. 67). In addition, the threat must also be communicated to the employer in a very serious way (Settekorn, 2015, p. 67). Given the severity of the threatened disadvantages and the likelihood of their occurrence, it would not be reasonable for the employer to resist the demand for the employee's dismissal (Settekorn, 2015, p. 67).

III.2.3. The Pressure must not be Eliminated by other Means

In eliminating the pressure, there is a significant role for employers. The employer must primarily adopt a protective approach and try all reasonable means to continue working with both the threatening employees and the complained employees to avoid termination (Mues et al., 2010, pp. 76–77; Settekorn, 2015, p. 67; Kerwer, 2016, KSchG § 1 en. 588; Rinck and Kunz, 2021, p. 1550; Griebeling and Herget, 2017, BGB § 626 en. 102; Henssler, 2020, BGB § 626 en. 284; Vossen, 2017, BGB § 626 en. 339; Weinmann and Götz, 2017, III. Arbeitgeberkündigung en. 219).[11] In other words, avoiding dismissal should be prioritised by the employers. For this purpose, the employer is obliged to try alternative

[10] LAG Schleswig-Holstein, 20.03.2012 — 2 Sa 331/11.

[11] BAG., 31.01.1996 — 2 AZR 158/95; LAG Düsseldorf, 21.08.2008 — 5 Sa 240/08; BAG., 27.01.2011 — 2 AZR 825/09; ArbG. Hamburg, 23.02.2005 — 18 Ca 131/04; BAG., 15.12.2016 — 2 AZR 431/17; LAG. Hamm, 16.10.2015 — 17 Sa 696/15.

reasonable ways by protecting the interest of employees as required by the duty of care in the employment contract (Mues et al., 2010, p. 760; Reinartz, 2017, § 44 Außerordentliche Kündigung en. 142; Rinck and Kunz, 2021, p. 1550; Hergenröder, 2020, KSchG § 1 en. 293). It is claimed that even if the relevant employee has committed a crime outside of work, the employer's protective approach should continue (Vossen, 2017, BGB § 626 en. 339).

The termination of an employment contract must be the only possible way as a last resort to prevent damage to the business (Mues et al., 2010, p. 760; Kerwer, 2016, KSchG § 1 en. 588).[12] If serious and significant disadvantages cannot be remedied in any other alternative and reasonable way and if the request is serious, the employer may have to accept the pressure of a third party (Günther, 2019, BGB § 626 en. 553; Sandmann, 2020, § 626–629 en. 299).[13] Alternative means can depend on several factors such as who is applying the pressure, the position of the threatening employee, and what disadvantages are being threatened (Plum, 2020, § 626 en. 43). In these cases, the employer is obliged to clarify the essence of the incident (Sandmann, 2020, § 626–629 en. 300).

If termination requests arise from irrelevant (unrelated) reasons — especially in cases involving a protected characteristic (gender, race, etc.) regulated under the anti-discrimination law — more effort must be exerted by the employer to correctly recognise the type of termination since it is likely that it does not constitute a complete pressure for termination, but is likely to constitute a partial pressure termination (Kerwer, 2016, KSchG § 1 en. 541).

The employer is obliged to actively behave in a way that aims to eliminate the threat (Rachor, 2018, § 626 Abs. 1 BGB, en. 90; Hergenröder, 2020, KSchG § 1 en. 293).[14] The employer must take necessary measures in individual cases to prevent future violations and prevent the health risks to other employees and must act in accordance with the principle of proportionality when choosing a sanction.

[12] BAG., 19.06.1986 — 2 AZR 563/85; BAG., 11.02.1960 — 5 AZR 210/58; BAG., 26.01.1962 — 2 AZR 244/61; BAG., 10.02.1977 — 2 ABR 80/76.

[13] BAG., 10.12.1992 — 2 AZR 271/92.

[14] BAG., 15.12.2016 — 2 AZR 431/15; BAG., 19.07.2016 — 2 AZR 637/15.

Nevertheless, the employer is not required to take any measures that are unreasonable for him.[15]

The severity of the allegations would have an impact on the employer's efforts to avoid termination. That is, the more clearly the employer sees the request as unjust, the greater the effort expected of him to eliminate the threat (Kerwer, 2016, KSchG § 1 en. 593).[16] For example, in the case of coronavirus, the employer should inform other employees that there is no risk of infection in the workplace since necessary precautions have already been taken and check whether the pressure can be eliminated by transferring him/her to another part of the workplace position to decrease the tension and establishing regular testing mechanism might be considered at the workplace to ensure peace of mind.[17] Moreover, for instance, the employee whose spouse/partner is a healthcare worker might be, if possible, allowed to work from home.

Additionally, the court, as a rule, requires the employer to demonstrate a reasonable cause for the termination, protecting the employee against arbitrary dismissal (dismissal without a just cause).[18] Therefore, it is also expected that the allegations against the employee must be clearly notified to the employees.[19] This means that the employer cannot dismiss an employee due to baseless or insufficient information about the situation as grounds for termination (Kerwer, 2016, KSchG § 1 en. 587).

While taking measures to deter the threatening employee, the employer must make a serious effort (Settekorn, 2015, p. 68). For this purpose, the employer should demonstrate arguments when there is an unjust request for dismissal, the employer must point out the illegality of the employee stopping work (Henssler, 2020, BGB § 626 en. 285; Plum, 2020, BGB § 626 en. 43). Therefore, the employer should try to be calm against the situation and conduct discussions with the employees requesting the dismissal (Settekorn, 2015, p. 67; Günther, 2019, BGB

[15] BAG., 09.06.2011 — 2 AZR 323/10.
[16] ArbG. Köln, 13.02.2015 — 1 Ca 5854/14.
[17] ArbG Berlin, 16.06.1987 — 24 Ca 319/86.
[18] BAG., 28.08.2003 — 2 AZR 333/02.
[19] BAG., 10.02.1977 — 2 ABR 80/76.

§ 626 en. 556). If work is refused by threatening employees due to non-compliance with the termination request by other employees, it should be stated that this behaviour is a serious violation of the employment contract and that they have no right to demand wages for the periods they did not work, and even this situation could give employers the right to terminate their contract by following notification periods requirements (Günther, 2019, BGB § 626 en. 556; Kleinebrink, 2021, p. 116).

By contrast, the employee should also be willing to cooperate, for instance, by accepting a workplace transfer to help reduce the pressure (Plum, 2020, BGB § 626 en. 43; Sandmann, 2020, § 626–629 en. 301; Meyer, 2016, BGB § 626 en. 86; Rinck and Kunz, 2021, p. 1550; Vossen, 2017, BGB § 626 en. 340).[20] Because the endangerment of the employer's interests is caused by the employee, the employee might be obligated to facilitate a compromise to resolve the pressure situation.[21] If dismissal is the last resort to eliminate potential significant losses for the employer, then the dismissal due to pressure could be considered and justified according to the principle of proportionality that will illustrate how it works in third-party pressure dismissal[22] (Günther, 2019, BGB § 626 en. 556; Krause, 2019, KSchG § 1 en. 315). On this basis, mediation as an alternative dispute resolution mechanism can also be used as a way to prevent third-party pressure (Settekorn, 2015, p. 67; Kerwer, 2016, KSchG § 1 en. 593; Hergenröder, 2020, KSchG § 1 en. 294). In the Federal Court decision, it is stated that mediation is reasonable for the employer only if the dispute is justified and no obstacle could prevent such a procedure (Hergenröder, 2020, KSchG § 1 en. 294). Nonetheless, it should be highlighted that if the reasons for the termination request stem from personal and vulnerable issues and if the conflicting issue is not at the discretion of conflicting parties, the parties should be forced to participate in mediation (Günther, 2019, BGB § 626 en. 556; Henssler, 2020, BGB § 626 en. 284).

[20] BAG., 11.02.1960 — 5 AZR 210/5.

[21] BAG., 11.02.1960 — 5 AZR 210/58; BAG., 26.01.1962 — 2 AZR 244/61.

[22] LAG. Rheinland-Pfalz, 20.10.2009 — 3 Sa 430/09.

III.2.4. The Employer should not Cause the Pressure

When assessing the third-party pressure for termination, it is also necessary to consider whether the employer caused the pressure and to what extent the employer contributed (Vossen, 2017, BGB § 626 en. 339; Rück/Kuntz, p. 1551).[23] If the employer is at fault for causing the pressure, then they cannot justify termination by referencing to the pressure applied to him (Kerwer, 2016, KSchG § 1 en. 593).[24] In other words, if the employer is responsible for the pressure resulting in the request for termination by third parties, and if the employer contributes to the creation of the threat situation by generating or provocatively inciting, the termination of the contract cannot be justified (Henssler, 2020, BGB § 626 en. 285; Sandmann, 2020, § 626–629 en. 300; Krause, 2019, KSchG § 1 en. 316; Günther, 2019, BGB § 626 en. 555). For example, if the employer contributed to the situation by spreading baseless fears regarding Covid-19 among employees, he cannot rely on third-party pressure to justify the termination (Kerwer, 2016, KSchG § 1 en. 541).[25] This condition is based on the Roman law principles, namely; ex *suo delicto meliorem suam conditionem facere potest,* meaning that no one can benefit from their faults (Kreindler, 2010, p. 7).

IV. An Example from the Covid-19 Pandemic

The pandemic was troubling many employees in companies because individuals fear the transmission of the coronavirus in their work environments. As stated above, there might be employees who deny the risk of transmission and refuse to wear or properly wear a mask. Furthermore, an employee whose spouse/partner is a healthcare worker may not be wanted in the workplace because of the potential high risk of transmission. The possibility of such pressure being applied by other employees because his/her spouse/partner is a health worker, and whether it could lead to pressure termination should be considered based on the principles from comparative law.

[23] BAG., 26.01.1962 — 2 AZR 244/61.

[24] BAG., 18.07.2013 — 6 AZR 420/12; BAG., 04.10.1990 — 2 AZR 201/90; BAG., 26.01.1962 — 2 AZR 244/61.

[25] ArbG. Berlin, 16.06.1987 — 24 Ca 319/86.

How an employer should act against such pressure should be answered by considering the *sui generis* structure of employment law. In this case, what an employer should do must be considered according to the conditions of pressure termination mentioned above. According to the second condition, a demand must be severe and must include significant economic loss. While examining this condition, the principle of proportionality would be helpful. It is necessary to keep a balance between the disruption of internal peace and the interest of the concerned employee. While applying the proportionality principle, establishing peace within the enterprise should be taken into account. For this purpose, it is necessary to examine the meaning of the disruption of internal peace. The disruption of internal peace can be defined by satisfying several conditions: (i) interruption and deterioration of peaceful cooperation between employees and the employer (ii) persistence of such a disruption over a certain period (iii) negative impacts on a large number of employees (Kleinebrink, 2021, p. 118).

In scrutinising these conditions, jeopardizing internal peace by the behaviours of employees is not sufficient to constitute a disruption of internal peace. In this regard, the disruption of enterprise peace must be so severe and there should be considerable concern among the workforce.[26] Additionally, the disruption of business peace must have occurred repeatedly.[27] In the case of the dismissal of a specific employee solely because his/her spouse is a healthcare worker, these conditions might be satisfied and there might be a risk of disruption of internal peace.

Accordingly, if the pressure is serious and failing to terminate would result in significant harm to the employer, and if the employer, despite all efforts, cannot dissuade the employees from their demands, the termination should be deemed complete pressure termination. However, as previously stated, this situation must be subject to strict requirements. Legal consequences of pressure termination will be discussed in the next section.

[26] LAG Hamm, 23.10.2009 — 10 TaBV 39/09; LAG Köln, 15.10.1993 — 13 TaBV 36/93.

[27] BAG., 16.11.2004 — 1 ABR 48/03.

V. The Consequences of the Termination of the Contract due to Third-Party Pressure in German Law

When termination of an employment contract is demanded by a union, administrative authorities, regulatory authorities, a sponsor, or one of the employer's clients by threatening employees with serious harm to business, the threat can emerge as an underlying reason for termination (Niemann, 2020, BGB § 626 en. 185).[28] Continuing employment relationships in a peaceful environment in a cooperative manner is essential for successful business activities. If there is a failure in this, the achievement of operational objectives might be prevented. Therefore, it can be said that dismissal can only be justified if there is a risk of serious economic damage to the employer.

Pressure termination can manifest as either ordinary or extraordinary termination (Mues et al., 2010, p. 77; Settekorn, 2015, p. 67).[29] Whether the pressure can be categorised as ordinary or extraordinary can be determined according to the features of each case (Henssler, 2020, BGB § 626 en. 283; Sandmann, 2020, § 626–629 en. 298). On this issue, the severity of the actual pressure involved in the termination, the weight of the threatened disadvantage, and the length of the notice period are decisive in determining whether the termination is ordinary or extraordinary (Weinmann and Götz, 2017, III. Arbeitgeberkündigung en. 218; Henssler, 2020, BGB § 626 en. 283; Kerwer, 2016, KSchG § 1 en. 594). This issue will be discussed further in the next sections of the paper.

Firstly, the third-party pressure for dismissal might be linked to operational reasons and it only allows for ordinary termination, meaning that the employee must be given a termination notice (Meyer, 2016, BGB § 626 en. 85; Rinck and Kunz, 2021, p. 1550). As stated above, the employer must attempt to resist the pressure before issuing the termination notice. Therefore, where there are no less severe alternatives available, it would be possible to resort to an ordinary termination

[28] BAG., 11.02.1960 — 5 AZR 210/58; BAG., 26.01.1962 — 2 AZR 244/61; BAG., 18.09.1975 — 2 AZR 311/74; BAG., 19.06.1986 — 2 AZR 563/85; BAG., 04.10.1990 — 2 AZR 201/90; BAG., 31.01.1996 — 2 AZR 158/95; BAG., 18.07.2013 — 6 AZR 420/12.

[29] BAG., 18.09.1975 — 2 AZR 311/74.

(Henssler, 2020, BGB § 626 en. 283; Hergenröder, 2020, KSchG § 1 en. 295). The timing of the third party's demand does not have any significance for the commencement of the notification (Günther, 2019, BGB § 626 en. 561). That is, the termination notice period only begins when the employer realises that they cannot resist this pressure in any other way than by issuing a termination notice (Günther, 2019, BGB § 626 en. 194).

The Bremen Employment Court ruled that pressure related to a strike could constitute a basis for a pressure termination.[30] In this case, which is not about the pandemic but applicable to it, other employees avoided working with an employee who was convicted of sexual offences, leading them to quit their jobs and halt operations at the workplace (Settekorn, 2015, p. 66). Therefore, the court ruled that the termination of the employment contract, which allowed activities to continue at the workplace, was based on operational reasons. Consequently, it can be said that if — as in this case — there is no personal or behaviour-related reason for termination against the concerned employees, this is seen as a third-party pressure termination based on operational reasons (Vossen, 2017, BGB § 626 en. 336; Rachor, 2018, § 626 Abs. 1 BGB, en. 90).

Operational reasons may include all facts attributable to the operation that led to the termination of the employment contract (Günther, 2019, BGB § 626 en. 552). Accordingly, even if there is no legitimate objective for the threat, the dismissal of a specific employee because of the threat of disadvantages to the employer can still constitute a reason for the termination based on operational reasons (Rachor, 2018, § 626 Abs. 1 BGB, en. 90). In a pressure termination tied to operational needs, the employer should be threatened with the severest economic damage, and termination should be the only means to mitigate the loss.[31] If an employer is going to lose an order, or if the employer must adjust the workforce according to the remaining order situation, this creates a pressure situation for the employer in terms of ensuring the

[30] BAG., 21.10.2014 — 11 Ca 11185/13.

[31] BAG., 26.01.1962 — 2 AZR 244/61; BAG., 18.09.1975 — 2 AZR 311/74; BAG., 04.10.1990 — 2 AZR 201/90; BAG., 10.12.1992 — 2 AZR 271/92; BAG., 31.01.1996 — 2 AZR 158/95; BAG., 19.06.1986 — 2 AZR 563/85; BAG., 31.01.1996 — 2 AZR 158/95.

continuation of the business as an entrepreneur (Kerwer, 2016, KSchG § 1 en. 590). If the employer faces severe economic disadvantages because of the pressure, it is stated that he would be compelled to act for economic reasons (Kerwer, 2016, KSchG § 1 en. 590).

The pressure caused by the loss of orders may not be directly cited as a justification for an operational-based termination. However, if the employer makes an entrepreneurial (operational) decision in reaction to the loss of an order to decrease the number of employees in the workplace (employment redundancy), this situation can justify the termination of the contract under an operational-based termination (Oetker, 2020, KSchG § 1 en. 182). This is applicable when the employer, if the complained employee continues to work, accepts significant or even serious economic loss due to the absence of customers or restricted or terminated business relations with partners, leading to a decline in business volume. These damages should be presented in the notification forms and should be expected with a high level of possibility (Meyer, 2016, BGB § 626 en. 86).

Secondly, extraordinary third-party pressure termination depends on the characteristics of a specific case. When termination is demanded under the threat of disadvantages by employees, workplace representation, one of the regulatory authorities, or clients, the pressure situation the employer faces can constitute a legitimate reason for extraordinary (without notice) termination (Henssler, 2020, BGB § 626 en. 283; Kerwer, 2016, KSchG § 1 en. 594; Vossen, 2017, BGB § 626 en. 338). Compared to ordinary situations, extraordinary can be categorised as more severe threats against the employer. For example, if a business is largely dependent on producing arms and it is no longer permissible to tolerate an employee in a managerial position because the responsible ministry suspects him/her of attempting bribery and putting pressure on the employer to terminate the contract of the suspected employee with the threat of the withdrawal of orders. It should be emphasised that the employee, in this case, is suspected of attempting bribery and there is no crime proved. For extraordinary termination without notice, the conditions of third-party pressure must be satisfied. On this basis, there should be a significant reason due to potential prospective danger for the business (Vossen, 2017, BGB § 626

en. 340). The extraordinary termination must be inevitable; hence, there should be no softer way possible to prevent the threatened damage (Meyer, 2016, BGB § 626 en. 86). That is, if the employer can already mitigate the pressure with ordinary (with notice) termination or can reduce it, then there would be no right to extraordinary (without notice) termination (Sandmann, 2020, § 626–629 en. 298).[32]

When we come back to the case about pressure against the employee whose spouse/partner is a healthcare worker, if the operational activities of the business would end due to substantial economic damage, the termination should be accepted based on the termination with a valid operational reason (Süzek, 2021, p. 623). Consequently, due to the termination being based on a valid reason under ordinary termination, notice periods should be recognised and the employee should be entitled to severance pay if its conditions are satisfied. It is also possible that there would be a right to compensation for pecuniary and non-pecuniary damages, which will be examined in the next section.

VI. The Right to Compensation for Employees Dismissed Due to the Third Party Pressure

If the pressure overrides the right not to be unfairly dismissed, it might be problematic in terms of ensuring social justice in societies (Kerwer, 2016, KSchG § 1 en. 588). Hence, it is necessary to assess whether an employee whose employment contract has been terminated due to pressure can claim compensation. According to the prevailing view, the employee affected by the pressure termination has the right to claim compensation not only against the employer but also against the third party (Henssler, 2020, BGB § 626 en. 286; Weinmann and Götz, 2017, III. Arbeitgeberkündigung en. 221; Oetker, 2020, KSchG § 1 en. 183).

If an employee loses his job due to the pressure of the third party, an employee whose contract was terminated, would have the right to claim compensation from the third party. This argument relies on the *Bürgerliches Gesetzbuch* (BGB) — the General Civil Code of Germany,

[32] BAG., 10.03.1977 — 4 AZR 675/75.

Section 823 (1).[33] According to this provision, a person who intentionally or negligently violates another person's life, body, health, freedom, property, or any other right is liable to compensate the other person for this damage. Therefore, if the termination request also constitutes a violation of personal rights, it is possible to seek damages. The "right in the workplace" or "right in the employment relationship" can be considered as absolute legal interests related to the most violated personal right in the sense of BGB § 823 (1) (Rinck and Kunz, 2021, p. 1551).

Each specific case must be discussed in more details (Sandmann, 2020, § 626–629 en. 302). In cases of pressure from employees, disputes arise because of unlawful actions of colleagues. These unlawful actions might be related to the employment relationship (Günther, 2019, BGB § 626 en. 565). In this case, the compensation is based not on the unfair dismissal, but on the behaviour of the colleagues that are not objectively justified (Sandmann, 2020, § 626–629 en. 302).[34] The damage is particularly seen in the loss of salary caused by the termination of the employment relationship (Günther, 2019, BGB § 626 en. 562). In the assessment of the compensation, the means used and how seriously the employee's work life and private life have been affected should be taken into consideration.

By contrast, whether an employee, whose contract has been terminated due to third-party pressure, has the right to claim compensation against the employer and its legal basis is a controversial issue (Günther, 2019, BGB § 626 en. 563). In this case, it is asserted that a compensation claim will be successful if the employer violates the duty of care in finding an alternative instead of pressure termination (Vossen, 2017, BGB § 626 en. 344a; Günther, 2019, BGB § 626 en. 563; Oetker, 2020, KSchG § 1 en. 187). Moreover, some scholars claim that there should be a fixed compensation for the right to sacrifice (Vossen, 2017, BGB § 626 en. 344a; Günther, 2019, BGB § 626 en. 563; Oetker, 2020, KSchG § 1 en. 187). This can be seen as a sacrifice for the

[33] Bürgerliches Gesetzbuch [BGB] [Civil Code] Aug. 18. 1896, § 823. Available at: https://www.gesetze-im-internet.de/englisch_bgb/ [Accessed 20.08.2024].

[34] BAG. 04.06.1998 — 8 AZR 786/96.

employer's loss to protect the business against serious economic harm, since the contract is terminated without a just reason (Kerwer, 2016, KSchG § 1 en. 596). The idea is based on the fact that the employer mitigates economic disadvantages by terminating the contract, partially compensates the employee's losses by transferring a portion of the advantage gained because of the dismissal of the employee (Kerwer, 2016, KSchG § 1 en. 596). Furthermore, if the employer is held liable for paying compensation, the employer should have the right of recourse against a threatening third party in the internal relationship (Sandmann, 2020, § 626–629 en. 303) because the third-party employees have a fundamental impact on the cause of the damage (Kerwer, 2016, KSchG § 1 en. 596).

Ultimately, the employees can defend themselves against termination by bringing a claim to courts for protection against dismissal and seeking re-employment (Günther, 2019, BGB § 626 en. 564). In these cases, the burden of proof for pressure and the threat of specific disadvantages from third parties lies with the employer. In addition to proving the existence of pressure, the employer must also explain and prove the extent to which they fulfilled their duty of care and whether the employer has exhausted all alternative means to eliminate the pressure applied.

VII. Third-party Pressure for Dismissal and its Legal Consequences in Turkish Law

In Turkish Law, the term "pressure termination" is understood as the situation when an employer terminates an employment contract due to pressure applied by third parties who are generally represented by employees (Süzek, 2021, p. 590).[35] However, pressure termination or third party pressure leading to termination are not included in legislative frameworks or judicial materials. Furthermore, there might be confusion about the concept of pressure termination. For example, the employer may want to immediately terminate the employee's contract. For this purpose, in order not to pay compensation in lieu of

[35] Y9HD., 28.11.2017, E. 2016/798, K. 2017/19292.

notice, the employer may not pay the employee's wages to compel the employee to terminate the contract with a just cause. The contract is indeed terminated by pressure but this does not satisfy the conditions of pressure termination due to the lack of a third party and thus, this is a wrong classification of a legal issue. Therefore, the rules in German should comparatively be applicable to Turkish Law.

If the pressure situation threatens serious economic harm to the employer and cannot be mitigated in any other way, it should be possible to terminate the employment contract based on the necessities of the workplace and business. Situations that have a direct impact on the functioning of the workplace and negatively affect its normal operation should be considered within the scope of pressure termination (Centel, 2020, p. 334; Çelik et al., 2021, p. 553; Ekmekçi and Yiğit, 2020, p. 555; Süzek, 2021, p. 605). Since pressure termination, as mentioned above, should be accepted as termination based on operational reasons like in German law, we believe that a termination request made by third parties should be accepted within the scope of termination of the employment contract with a valid reason.

Art. 18 of the Turkish Employment Law requires valid reasons for the termination of a contract that negatively affects the normal operation of the work. The valid reasons for the termination can be exemplified as circumstances that seriously and negatively affect the employee's ability to perform their duties due to reasons attributable to the employee or the workplace and that prevent them from fulfilling their duties properly.[36] Article 25 of the Turkish Employment Law regulates more severe reasons for dismissal without notification such as theft by the employee or sexual harassment in the workplace.[37] While Art. 18 is a reflection of ordinary termination in German Law, Article 25 is that of extraordinary termination. Whereas Aricle 18 requires notification to terminate the contract, Article 25 gives the employer the right to terminate the contract without notification.

Ultimately, if maintaining the employment relationship cannot be reasonably expected from the employer, in other words, if there

[36] Employment Law No. 4857, Art. 18. Official Gazette: 10.06.2003. Available at: https://www.mevzuat.gov.tr/mevzuatmetin/1.5.4857.pdf [Accessed 20.08.2024].

[37] Employment Law No. 4857, Art. 25.

is no possibility to avoid termination, it should be accepted that the termination is based on a valid reason. In the case of the dismissal of an employee whose spouse/partner is a healthcare worker, due to complete pressure termination, the employer can terminate the contract with a notice. However, the employee will be entitled to claim both pecuniary and non-pecuniary compensation under general provisions. Moreover, the employee will be entitled to severance pay if the conditions are satisfied. If the employer fails to notify about the dismissal, the employee can also claim compensation in lieu of notice.

VIII. Conclusion

The paper proposes to introduce the concept of pressure termination by considering German Law. On this basis, it determines the difference between complete pressure termination and partial pressure termination. Then, it examines the conditions of third-party pressure for dismissal. Towards the end, the researchers analysed the legal consequences of pressure termination in German Law and their potential application in Turkish Law.

If employees violate health and safety regulations, the employer is entitled to terminate the employment relationship under pressure from the workforce. However, there must be a serious disruption of business peace. At least, there should be a significant concern among the employees. In German Law, if an employee's contract is requested to be terminated due to non-compliance with occupational health and safety measures, a case of partial third-party pressure termination arises and the termination is based on a just cause.

When it comes to a case where an employee is unwanted at the workplace solely because his/her spouse/partner is a healthcare worker, the reason for termination is based on pressure from other employees, not a regulation. The criteria for pressure termination present in German law must be carefully considered. There must be significant pressure, and this pressure must direct the employer to terminate the contract. The employer must face severe economic damage unless the termination happens. However, the employer should still do everything possible to dissuade the pressure-applying side. If, despite everything,

termination is the last resort, termination should be pursued for valid reasons under Section 17 of the Employment Law (ordinary termination). Consequently, if the employee was not notified, the employee would be entitled to compensation in lieu of notice and severance pay. Besides, the employee can seek compensation under the general law provisions. When it comes to the difference between partial and complete pressure termination, since partial pressure termination relies on legislative or regulatory provisions, there is a possibility to terminate the contract without notification as extraordinary termination. Conversely, in complete pressure termination, the termination is only based on the third-party pressure; it is not possible to terminate the employment contract without a notification.

The study aims to explain the concept of third-party pressure termination in the context of the pandemic. However, the pressure termination is not confined to the time of the pandemic. For example, a professor attempting to get an assistant fired for personal reasons or a famous football player refusing to play in the same team with another player for personal reasons might be another example of third-party pressure termination. However, it should be noted that the conditions of pressure termination and potential rights that are illustrated in this paper would also apply to other types of pressure terminations.

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