

BOARD DECISION

Application Number : 2021/329
Meeting Date/Number : 14.9.2021/159
Decision Number : 2021/230
Applicant :
Applicant's Attorney : --
Address :
Addressee Institution/Person : ...Municipality
Addressee's Address :

I. SUBJECT OF THE APPLICATION

1.The application is related to the applicant's claim that her right to work was violated by discrimination on the grounds of sex.

II. EXAMINATION PROCESS

2.In summary, the applicant stated that she started to work as a contracted personnel in 2015 in the Municipality of ... that she was made to do many jobs outside her job description by the Municipality during her employment, when she was 7.5 months pregnant, her contract was terminated without any reason due to the concern that she would use her legal leave rights (maternity leave - breastfeeding leave), upon this situation, she applied for legal remedies about the issue, and with the court decision, she returned to her duty in the Municipality, following the court decision, her contract was reissued for 2018, and this time she was assigned to the ... Excavation and Research Project Center 29 km away from the ... Center without being provided with transportation facilities, and therefore she could not use her breastfeeding leave, that in addition to not being able to use their breastfeeding leave, their requests for travel allowances could only be met in line with court decisions, in the last months of 2018, the Municipality informed her that her contract would not be renewed on the grounds that the excavation project had been completed, but this was canceled by the court and she returned to her duty, at the end of 2019, she received a notice of termination for the third time and the Plan Budget Commission in the Municipality Assembly did not include the position of art historian for 2020 and the annulment lawsuits on the subject are pending before the judicial authorities, she claims that as a result of this whole process, she became unemployed and has been subjected to mobbing and discrimination at work since her pregnancy.

3.In its opinion in writing, the addressee stated that the applicant was first hired by the Municipality as contracted personnel to be employed as an Art Historian, that contrary to the allegations in the application, the applicant, who is an art historian, could not show the necessary performance despite being provided with all kinds of opportunities, that she could not fulfill even a simple task such as creating a digital archive when she was assigned to work on the history of the district, and that she was informed that her contract would not be renewed in 2018, afterwards, the applicant applied for legal remedies and started working at the Municipality again, afterwards, she displayed biased, negative, hostile attitudes and behaviors, constantly applied to the Municipality with petitions on almost every issue and acted with the aim of collecting evidence with the lawsuits she filed, disrupted the work order within the Municipality and undermined the authority of the Municipality over other personnel by refusing to obey the orders and rules because she did not like the new job descriptions during the periods she worked, for the 2020 fiscal year, a lawsuit was filed with the request for suspension of execution and cancellation of the "non-renewal of the service contract" within the scope of the... Administrative Court's file numbered ..., but it was decided to reject the lawsuit, in the reasoning

of ...Administrative Court's decision numbered ... it is stated that since there was no need for the position of art historian in the Municipality and employing personnel related to the art historian was not considered, the said position was not included by the municipal council, since it is understood that the plaintiff did not file a lawsuit for annulment against this act, it was assessed that there was no contradiction to the law in the act subject to the lawsuit regarding the non-renewal of the contract of the plaintiff for the 2020 fiscal year, whose position required by the service was no longer needed, whose position was canceled by the decision of the municipal council, and which was approved and announced by the district governorship and finalized, and it is at the appeal phase, and that all statements and allegations of the applicant that she had been victimized since her pregnancy and that she had been subjected to mobbing are untrue.

4.In the opinion in writing of the applicant against the opinion in writing of the addressee; she states that the Municipality's allegations that “she failed in her work” are untrue; she was assigned to write projects, prepare projects and materials for national and international competitions, participate in TV programs, and do all kinds of advertising and organization work regardless of the subject, that she won all of her re-employment lawsuits for that reason; her hostile attitude was mentioned, but there was no concrete basis for these allegations, on the contrary, the administration continued its deliberate attitudes and actions to force her to resign, when she was 7.5 months pregnant, her employment contract was terminated without any reason, she returned to work after a court decision, but she was assigned to villages many kilometers away from the center and was not even provided with transportation, and even when she managed to get there with her means, she was not paid her travel allowances and she had to apply to the court, though known to have a baby, she was assigned to remote villages without any convenience regarding her breastfeeding leave and was forced to work in filthy places where she became infected even though she was at risk, there were rumors about her before she started working in the villages where she was assigned; she was not allowed to enter the Municipality headquarters building and when she tried to enter the building, she was forced out by the police officers, the reason for all these behaviors of the Municipality is to force her to resign; in 2020, the municipal council did not make any decision regarding the position and although she objected to this, she was not notified of the decision on her objection, the case numbered ... filed against the decision of the Municipality Council is still pending before the Council of State, the case numbered ... at the ... Administrative Court against the cancellation of her employment is pending, the Municipality stated at the beginning of its opinion in writing that she was hired due to the need for an art historian, but towards the end of the opinion in writing, it contradicted its own statements by stating that there was no need for staff for that position, that the claim that there is no need for an art historian inArchaeological and Cultural Protected Area is contrary to the ordinary course of life, that the Höyük Excavation Site, which was stated to have been closed down, continued its activities; furthermore, that there was no personnel employed for the excavation site activities, that she was sent to the excavations only for mobbing purposes at the workplace, and that she had been unemployed since 2020 due to the attitude of the Municipality.

III. RELEVANT LEGISLATION

5.The relevant article of the Constitution reads as follows:

Article 49- *“Everyone has the right and duty to work. The State shall take the necessary measures to raise the standard of living of workers, and to protect workers and the unemployed in order to improve the general conditions of labour, to promote labour, to create suitable economic conditions for prevention of unemployment and to secure labour peace.”*

6.The relevant articles of the Law on the Human Rights and Equality Institution of Türkiye dated 20/04/2016 and numbered 6701 are as follows:

Article 2 - (1) *For the purposes of this Law, the following terms shall have the meaning*

indicated;

g) *Mobbing: Deliberate actions intended for alienating, excluding and putting-off a person from his/her job on grounds of discrimination cited in this Law.*

Article 3- (1) *All are equal in the exercise of legally recognized rights and freedoms.*

(2) *It is prohibited under this Law to discriminate against persons based on the grounds of sex, race, colour, language, religion, belief, sect, philosophical or political opinion, ethnical origin, wealth, birth, marital status, health status, disability and age.*

Article 4- (1) *Types of discrimination falling into the scope of this Law are as follows:*

e) *Mobbing.*

Article 6- (1) *An employer or a person authorized by an employer; shall not discriminate against an employee or a person applying to be employed, a person acquiring practical work experience at an undertaking or a person applying for this purpose or against a person wishing to receive information on the undertaking or the work for the purpose of working or acquiring practical work experience there in any stage of the work including getting information, application, section criteria, hiring criteria and working and termination of the employment.*

(...)

(3) *An employer or a person authorized by an employer shall not reject an employment application for reason of pregnancy, maternity or child care.*

(...)

(6) *Employment in public institutions and agencies is subject to the provisions of this Article.*

IV. THE BOARD'S ASSESSMENT AND JUSTIFICATION

7. The right to work implies that everyone has the right to have a job. However, it is not enough that the right to work is recognized. Along with the right to work, other rights related to this right must also be guaranteed. We can list these rights in line with court decisions; however, for the purposes of this application, we can briefly mention the right to occupational health and safety, the right to leave and the protection of maternity. The right to work and other related rights are guaranteed by the Constitution and international conventions to which Türkiye is party.

8. Mobbing is defined in the literature as "whole set of malicious, intentional and negative attitudes and behaviors that are carried out by one or more persons against another person or persons in workplaces which systematically continues for a certain period of time and which aims to frustrate, passivate or alienate the person/persons from workplace, and that cause damage to the personal values, occupational statuses, social relationships or health of the victim or the victims.", the elements of mobbing are as follows; occurring in the workplace, being systematically, being repeated with continuous repetition, being intentional, aiming to intimidate, passivate and alienate from work, and causing damage to the victim's personality, and professional status or health. In the "*Commission Report on Psychological Harassment in the Workplace (Mobbing) and Solution Proposals*", the Committee on Equality of Opportunity for Women and Men of the Grand National Assembly of Türkiye states that individuals who are subjected to psychological harassment may suffer from attitudes and behaviors causing psychological harassment such as frustration, intimidation, alienation, deprivation of the services of the institution, humiliation, not benefiting from leave and assignments, and being transferred by force, in order to consider a situation as psychological harassment at the workplace, the behaviors must be repeated several times a month, they must have passed in a number of phases one after another, they must continue for a long time, and the behaviors must be in the form of ill-treatment of the person, at least, they must have the qualities of intentionality, continuity, and systematicity, and administrative actions that may cause mobbing are listed as temporary assignment (change of duty station), not assigning the duties required by the profession (title), assignment (non-assignment), non-fulfillment of personal rights, and

opening a disciplinary investigation. Psychological harassment in public institutions and organizations and private sector workplaces have a negative impact on working life by damaging the reputation and honor of employees, decreasing their productivity, and affecting their health. It is very important to prevent the psychological harassment that occurs in the form of deliberate and systematic humiliation, belittlement, exclusion, damage to the personality and dignity of the employee, ill-treatment, intimidation and similar forms for a certain period of time, both in terms of occupational health and safety and improving work peace. (Circular on Prevention of Psychological Harassment in Workplaces (Mobbing), 2011).

9. According to subparagraph (g) of Article 2 titled "Definitions" of the Law No. 6701 on the Human Rights and Equality Institution of Türkiye, *"Mobbing: Deliberate actions intended for alienating, excluding and putting-off a person from his/her job on grounds of discrimination cited in this Law."*

Paragraph 2 of Article 3 of HREIT Law lists the grounds of discrimination prohibited within the scope of this law as, *"sex, race, colour, language, religion, belief, sect, philosophical or political opinion, ethnical origin, wealth, birth, marital status, health status, disability and age"*. Accordingly, for an act or acts to be considered mobbing, the acts in question must be carried out with the aim of frustrating, alienating, or intimidating the person from his/her job based on the grounds listed in the HREIT Law and there must be an intention behind this.

10. In the application under examination, when her pregnancy became known in 2017, the applicant received the notification from the Municipality that her initial contract would not be renewed, and returned to her job in line with the decision of the administrative court; however, this time she was assigned to an excavation project far from the center and could not benefit from her maternity leave. Furthermore, since she could not receive travelling allowances for temporary assignments, she had to apply to the courts. The events that took place during this period occurred after the applicant's pregnancy and continued after the birth. As a consequence, it is considered that the underlying reason for the treatment of the Municipality was the applicant's gender.

11. According to the international conventions ratified by Türkiye, everybody has the right to benefit from legally recognized rights and freedoms equally, and is entitled to protection against all forms of discrimination, violence, harassment and harmful traditional practices. In this context, women have the right to work as well as the right to be a mother as a feature of their sex. No woman should be forced to terminate her pregnancy without compelling health reasons and women should not be discriminated against if they wish to exercise their right to work and their right to be a mother, which has a social significance. The State and society must respect the rights of the family and its members and assume their responsibilities in this regard, recognizing in particular that the important role of women in the reproduction of generations must not lead to discrimination. The State and every person, entity and organization that constitutes the society has the responsibility to protect, support and facilitate motherhood and mothers to the extent they are capable, taking into account the social importance of motherhood (HREIT, 2020/8, 14.01.2020, §50).

12. Regarding gender equality, the Preamble of the 1948 UN Declaration of Human Rights states that the UN members "believe in the equality of rights of men and women". Article 2 of the Declaration states that *"Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."* Article 11 of the UN Convention on the Elimination of All Forms of Discrimination against Women states that *"In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures"*. The same article further obliges States Parties to prohibit discrimination in dismissal on the grounds of pregnancy and maternity leave or on the grounds of marriage and

to penalize those who do so.

13. In order for individuals to enjoy legally recognized rights and freedoms on an equal basis with those in comparable situations, the State has an obligation to take certain positive actions. Protection of disadvantaged groups in society and ensuring decent life for humans will both serve the implementation of the principle of equality and ensure the establishment of a social state (*HREIT, 2021/152, 22.06.2021*). As a matter of fact, our legislation also emphasizes equality between women and men and the protection of women in working life. As one of the protection arrangements, the breast-feeding leave practice provides assurance to female employees and contributes to the establishment of equality between women and men in the labour market. However, the Constitution states that everyone has the right to life and the right to protect and improve his/her corporeal and spiritual existence. In this context, from a medical point of view, the importance of breast milk for the protection of the corporeal and spiritual existence of a newborn baby should also be taken into consideration. Therefore, the right to breastfeeding leave serves both to secure the fundamental rights of individuals and to eliminate gender inequalities in working life. In this context, it is against the law for the addressee Municipality, which has the obligation to protect and realize the rights of female employees, to take actions not facilitating and solution-oriented, but on the contrary, to make it difficult for the applicant to use her rights arising from motherhood.

14. On the other hand, the addressee's response to the applicant's allegations that she was asked to do all kinds of work unrelated to her title was not found to be relevant. Moreover, the reasons for the court judgments in the cases brought by the applicant also played an important role in the formation of the opinion. On the grounds of the decision of the... Administrative Court numbered ..., it was assessed as; *"From the examination of the information and documents in the file; it has been understood that the procedure regarding the non-renewal of the plaintiff's contract was not based on any justification, that the plaintiff did not undergo a disciplinary investigation for any reason due to the allegation that she failed to fulfill the duties assigned during her term of office, and that she did not receive any disciplinary punishment. At the end of the contract period, although the administration has discretionary power to renew or terminate the contract, the power of non-renewal or termination of the contract is not unlimited, and the termination or non-renewal must be based on justified reasons. Thus, considering that there is no evidence of a failure of the plaintiff in her duty, as well as no concrete information and documents that her service is not needed, it is concluded that the non-renewal of the plaintiff's contract is not based on a justifiable reason, and the action that the plaintiff's contract will not be renewed is not legally acceptable."*

15. In the ... decision of the ... Administrative Court, it gives justifications as follows; *"Regarding the non-renewal of the contract for 2019, it is seen that the defendant administration's claim that the service of the plaintiff is no longer needed is based on the letter dated ... and numbered ... of the Head of the ... Excavation and Research Centre ... stating that this year's active excavation work has ended as of 17.08.2018, so it is not necessary for the assigned staff to stay in the excavation house after this stage, the aforementioned letter is not related to the fact that the service of the plaintiff is no longer needed in the Municipality, but only to the fact that there is no longer a need for personnel in this field due to the completion of the excavation works for 2018, moreover, from the information and documents sent upon the interim decision of the Administrative Court, the Head of the Department ... wrote to the Head of the Archaeology Department on, it was seen that there was no excavation license request for the active excavation research planned to be carried out in the summer season of 2019, that it would be carried out within the official period given at the end of December 2018, that this work was carried out without the help and contribution of or any other municipal employee in the excavation works in previous years, and that the plaintiff was assigned here for the first time in order to implement the cancellation decision given by the Administrative Court."*

16. In the second cancellation case at the ... Administrative Court, the defense that "there has been no need for an art historian in this excavation area for the past years and therefore her contract will not be renewed" was made by the addressee Municipality, and even if it is assumed that this defense is true, the fact that the applicant was deliberately assigned there even though it was known in advance that there was no need for an art historian at the ... Excavation and Research Centre can be considered as a planned action with the aim of not renewing her contract in the next business year. In addition, it should also be taken into consideration that, as established by the contents of the file and the court decisions, in previous years aforementioned excavation works were carried out without the assistance and contribution of the applicant or any other Municipality employee; however, for the first time, the addressee Municipality preferred the applicant, who returned to work as a result of a court decision and who had recently given birth, for such an assignment.

17. Moreover, although the addressee Municipality claimed that the applicant disrupted the work order within the Municipality by refusing to obey the orders and rules as she did not like the new job descriptions during the periods she worked, it is evaluated from the documents in the application file that this situation does not coincide with the reality. Based on the information and documents submitted, it is seen that the applicant fulfilled the duties assigned by the Municipality and only requested the correction of certain conditions in the new duties assigned to her after she returned to her job following the cancellation lawsuits. These requests are understood to be in the form of allocation of a shuttle service to be able to use breast-feeding leave when assigned to excavation works, and provision of space and materials to fulfill her duties. The applicant notified the addressee Municipality of the requests in question, and when the requests were not met, the applicant continued to work to the extent possible. The above-mentioned matters have also been recognized by court decisions. In the justifications of the court decisions in paragraphs 28 and 29, it was found that the applicant had not been subjected to any disciplinary proceedings and that the notifications of the addressee Municipality that the contract would not be renewed were not based on justified grounds. Considering the content of the application file and the court decisions; it is seen that the applicant tried to fulfill her job diligently even during this contentious process, but the addressee Municipality continued to take actions that would constitute mobbing despite all these.

18. The statements of the addressee Municipality that "the applicant exhibited biased, negative, hostile attitudes and behaviors towards the administration, which is her employer, after her contract was re-contracted pursuant to the court decisions, that she constantly applied to the Municipality with petitions on almost every issue and that she acted in an attempt to collect evidence with the lawsuits she filed" are inadmissible. Article 8 of the Universal Declaration of Human Rights (UDHR) states that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. Similarly, Article 36 of the Constitution states that everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through legitimate means and procedures. Given these explanations, it should also be indicated that there is no illegal violation in the applicant's collection of evidence and documents in order to benefit from the aforementioned regulations on the freedom of the applicant's right to seek justice. Because in disputes related to mobbing, the victim has the obligation both to reveal the existence of long-lasting repetitive actions of the employer and to reveal the intent of the employer. For the reasons stated above, the applicant's exercise of the right to seek remedy cannot be considered as a rightful justification for the actions and proceedings of the addressee Municipality against the applicant.

19. Article 21 of the Law No. 6701 on the Human Rights and Equality Institution of Türkiye regulating the burden of proof states that "*In applications filed at the Institution exclusively on the basis of an alleged violation of non-discrimination, if the applicant exhibits*

the presence of strong signs and presumptive facts relating to the veracity of his/her allegation, then the other party shall be required to prove the non-violation of the non-discrimination and principle of equal treatment.” In this framework, in order for the burden of proof to shift in applications to the Institution, the applicant must exhibit the presence of strong signs and presumptive facts relating to the veracity of her allegation. When the application file and its annexes are examined, there are strong indications that the acts of mobbing occurred on the basis of sex. It is also observed that the addressee Municipality, which is a public institution, rejected the allegations of the applicant by making only abstract statements in response to the allegations regarding the treatment she was subjected to due to her pregnancy and did not present counterclaims and documents to prove them.

20. Mobbing is the systematic exposure of an individual to acts of intimidation at work. The most prominent features of the actions performed in mobbing cases are that they are done intentionally, repeated systematically, have been going on for a long time, and aim to remove the employee from the workplace. Considering the information and documents in the application, it is understood that the actions and procedures in this specific case were triggered by the applicant's pregnancy and the concern that she would use her maternity leave after giving birth. Therefore, it should be noted that acts and procedures of mobbing due to the applicant's *"gender"* were systematically put into practice. However, the fact that the addressee Municipality notified the applicant repeatedly that her contract will not be renewed, which had been cancelled by the courts, without providing any justification, also reveals the element of *"intent"*. The aforementioned acts, which have occurred repeatedly since the applicant's pregnancy, are considered as the equivalent of mobbing (intimidation at the workplace).

21. Consequently, it has been understood that the applicant has been doing a wide variety of jobs outside her job description since she became pregnant, that she was faced with termination notices that were found to be unlawful by the courts during pregnancy and after the birth, that she was assigned to remote villages after each cancellation decision given by the judicial authorities, that she was able to obtain even her legal allowances for these assignments by resorting to legal remedies, that she could not use her breastfeeding leave due to these assignments and that her right to work was violated in this respect. Based on the above explanations, it has been concluded that the addressee Municipality has violated the prohibition of discrimination on the basis of "sex" on the grounds that the actions and practices carried out against the applicant were of the nature of intimidation at the workplace mobbing (intimidation at the workplace) as defined in Law No. 6701 and that they were repeated continuously after the applicant's pregnancy.

22. In terms of Article 3 of Law No. 6701;

Article 3 of the Law No. 6701 on the Human Rights and Equality Institution of Türkiye states as follows: *“Where the principle of non-discrimination is violated, relevant competent and responsible public institutions and agencies and public professional organizations with public institution status shall take necessary actions with a view to putting an end to the violation, remedying its consequences, preventing its repetition and ensuring the launch of administrative and judicial proceedings into it.”* This injustice to the applicant, who has been subjected to discriminatory treatment in terms of the enjoyment of legally recognized rights and freedoms, must be remedied by the addressee following the clear provision of the Law. The basic rule for remedying the consequences of a violation is to ensure that the pre-violation situation is restored. In order to achieve this, first of all, the ongoing violation must be prevented, the decision or action causing the violation must be eliminated, material and moral damages, if any, must be compensated, and the necessary measures must be taken. Since violation of these obligations entails additional liability, it is a legal obligation for the addressee Municipality to take measures to remedy the consequences of the violation.

23. In terms of application for legal remedies;

The relevant sections of Law No. 6701 are as follows

Administrative sanctions

Article 25- (1) In case of violation of non-discrimination principle, an administrative fine ranging from one thousand Turkish lira to fifteen thousand Turkish lira depending on the gravity of the effects and consequences of such violation, financial situation of the perpetrator and aggravating effect of the multiple discrimination, shall be imposed on the relevant public institutions and agencies, professional organizations with public institution status, natural persons and legal persons established under private law responsible for the violation.

6) Cases not covered by this Law shall be governed by the provisions of the Law on Misdemeanours dated 30/3/2005 and No 5326 in relation to administrative sanctions.

24. Pursuant to Article 125 of the Constitution, the Board's decisions are subject to judicial review. Although Law No. 6701 does not explicitly specify the legal remedies that may be applied against the Board's decisions, there is no dispute that all decisions of the Board, other than the decisions on violation of the prohibition of discrimination, fall within the jurisdiction of the administrative judiciary.

25. The Human Rights and Equality Board of Türkiye, which independently fulfills and exercises its duties and powers assigned by Law No. 6701 and other legislation under its responsibility, is the decision-making body of the Institution and establishes administrative action in the field of administrative law.

The decision on violation of the prohibition of discrimination is one of them. The Board has to impose a fine in accordance with the aforementioned Law which states that "*In case of violation of the prohibition of discrimination, ... an administrative fine shall be imposed.*" Although the Board has discretionary power to determine the amount of the fine within the lower and upper limits and to convert it into alternative sanctions, it does not have the authority not to impose administrative sanctions in case of violation of the prohibition of discrimination. Therefore, the administrative sanction decision is not separate, but a consequence of the decision on the violation of the prohibition of discrimination.

26. Even if the administrative sanction imposed by the Board is considered an separate decision, it still remains within the jurisdiction of the administrative jurisdiction pursuant to the provision in paragraph 8 of Article 27 of the Law on Misdemeanors stating that "*If decisions falling within the jurisdiction of the administrative jurisdiction have also been made about the same person within the scope of the transaction in which the administrative sanction decision was issued, the claims of illegality regarding the administrative sanction decision shall be heard at the administrative jurisdiction together with the request for the annulment of this transaction.*"

V. DECISION

On 14.09.2021, it was decided with the dissident votes of Saffet BALIN and with the MAJORITY OF VOTES:

1. That there was A VIOLATION OF THE PROHIBITION OF DISCRIMINATION on the ground of "sex",
2. AN ADMINISTRATIVE FINE of 20.000 TRY shall be imposed on addressee,
3. Notification of the decision to the parties and ANNOUNCEMENT to the PUBLIC,
4. Against the decision, an application can be made to the Ankara Administrative Court within 60 days from the date of notification.

e-signed
Prof. Dr. Muharrem KILIÇ
Chairperson

e-signed
Att. Alişan TIRYAKI
II. Chairperson

e-signed
Dr. Burhan ERKUŞ
Board Member

e-signed
Dilek ERTÜRK
Board Member

e-signed
Att. Harun MERTOĞLU
Board Member

e-signed
İsmail AYAZ
Board Member

e-signed
Mehmet Emin GENÇ
Board Member

e-signed
Muhammet Ecevit CARTİ
Board Member

e-signed
Saffet BALIN
Board Member

e-signed
Ünal SADE
Board Member

e-signed
Att. Zennure BER
Board Member

Annex: Saffet BALIN Dissident Vote