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Analyzing Whistleblowing Provisions in Turkish Law in the European Context

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Abstract

Whistleblowing at the workplace is the act of reporting or disclosing information about illegal, unethical, or improper activities occurring within an organization. This disclosure can be made by an employee or any member of the organization who has access to confidential information. Whistleblowing aims to expose misconduct that might otherwise remain hidden, such as fraud, corruption, safety violations, and other forms of malpractise, to protect public interest and ensure accountability. It often involves notifying higher authorities, regulatory bodies, or the public about wrongdoing. This act of notification is crucial for workplace transparency and accountability. However, balancing the duty of loyalty owed by employees to their employer with their right to freedom of expression poses significant challenges. Determining which actions are protected by whistleblowing principles is vital for maintaining this balance. Concerning this issue, the European Court of Human Rights (ECtHR) has developed a checklist to assess which whistleblowing actions warrant protection. This research analyzes Turkish regulations concerning workplace whistleblowing considering the ECtHR's decisions. By examining the alignment of Turkish provisions with international standards, this study seeks to provide comprehensive insights into current laws' protection of whistleblowers while ensuring organizational integrity.

Keywords

Whistleblowing, Disclosing Information, Workplace, Employment, ECtHR

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Introduction

The fundamental element that distinguishes employment contracts from other contracts is the dependency of employees on their employers. This means that there is a personal relationship between the parties to an employment contract, and this relationship leads to certain obligations. The duty of loyalty is one of these obligations and requires an employee to perform his duties with loyalty and protect the employer's legitimate interests under Article 396(1) of the Turkish Code of Obligation (TCoO).

The duty of loyalty includes an obligation not to disclose an employer's trade secrets. An employee cannot use any information related to business' trade secrets, which are learned during the course of work, for their own benefit or disclose them to others for the duration of the employment relationship. Furthermore, the employee is obligated to keep secrets even after the termination of the employment relationship to protect the employer's legitimate interests as per section 396(4) of the TCoO.[1]

The limitation of the employee's obligation to keep information secret is an illegal practice. In this respect, actions and practices that are contrary to the law, statutes, and moral rules will not be considered trade secrets; thus, the employee is not under the obligation to keep the information secret. To exemplify, disclosing or reporting a practice in a workplace that is illegal or unethical to the media, institutions, or organizations by an employee is called whistleblowing. In this research, the concept of whistleblowing in Turkish employment law is examined with a particular focus on whether it constitutes a breach of the duty of loyalty.

I. Whistleblowing Concept

The term whistleblowing emerged in the 1950s as a slang word to denote individuals who disclose fraudulent actions at their workplaces; thus, whistleblowers were mostly seen as spies.[2] The term whistleblowing originates from "to blow the whistle on" which means to stop the game by blowing a whistle when a foul occurs in sports, or the act of the police trying to draw public attention to a crime by blowing a whistle.[3] In other words, it can be expressed as a way of opposing a problem.[4] By contrast, whistleblowing was also used in a similar way to the terms "snitching"

1 Fatih Uşan, *İş Hukukunda İş Sırrının Korunması (Sır Saklama ve Rekabet Yasağı)* (Seçkin Yayıncılık, Ankara 2003), Tuncay, Can, İşçinin Sadakat (Bağlılık) Yükümlülüğü, (Prof. Dr. Hayri Domaniç'e 80. Yaş Günü Armağanı, Beta Yayıncılık, İstanbul 2001) 1043-1086. Arzu Arslan Ertürk, *Türk İş Hukukunda İşçinin Sadakat Borcu*, (XII Levha Yayıncılık, İstanbul 2010) Gülsevil Alpagut, 'İşçinin Sadakat Borcu ve Türk Borçlar Kanunu ile Getirilen Düzenlemeler' (2012) 7(25) Sicil İş Hukuku Dergisi, 23-32., Fevzi Demir and Demir Güvenç, 'İşçinin Sadakat Borcu Ve Uygulaması' (2019) 11(1) Kamu İş Dergisi, 1-37. Zeki Okur, 'İş Hukukunda İşçinin Düşünceyi Açıklama Özgürlüğü' (2016) 8(4) Kamu İş Dergisi, 1-47.

2 Robert A., Larmer, 'Whistleblowing and Employee Loyalty' 1992 11 (2) Journal of Business Ethics 125, 125.

3 Ufuk Aydın, 'İş Hukuku Açısından İşçinin Bilgi Whistleblowing' Anadolu Üniversitesi Sosyal Bilimler Dergisi, (2002- 2003) 2(2), 81. Kemal Eroğluer and Gizem Sarıbay Öztürk, 'İş Hukuku ve Örgütsel Boyutuyla Haber Uçurma (Whistleblowing)' in Sevinç Köse and Mustafa Alp (eds), *Örgütsel Davranış ve İş Hukukuna Yansımaları* (Seçkin, 2020) 345; Fatih Gültekin, *İş İlişkisinde İfade Özgürlüğü* (1th, Onikilevha, 2024) 199.

4 Daniele Santoro and Manuala Kumar, *Speaking Truth to Power–A Theory of Whistleblowing* (1st, Springer, 2018). 47.

and "tattling", but the emphasis in whistleblowing is announcing illegal or unethical situations.[5] Hence, the term whistleblowing cannot be used in the same context as snitching or tattling.

The aspect of this issue that concerns labor law is striking a balance between an employee's duty of loyalty, which arises from an employment contract, and whistleblowing. This involves determining which statements made by the employee fall under whistleblowing and which violate the duty of loyalty. This distinction is crucial in determining whether an employee is protected under whistleblowing regulations or faces consequences for breaching the duty of loyalty.[6]

Whistleblowing is a notification to the public that allows access to an organization's, private or public, confidential information.[7] For this purpose, the public interest is essentially prioritized over the interests of the businesses; thus, harmful activities within the workplace are against the law or ethics are reported.[8] Because hiding information within a business can sometimes be relatively easy, whistleblowing serves as a valuable tool to shed light on wrongdoings in workplaces.[9] In particular, where businesses lack transparency and information is hidden, whistleblowing activity might be likened to a "public's watchdog".[10] However, when employees' loyalty to employers is considered, disclosing information might be considered a tragic but ethical choice.[11] It should be stated that a business culture should support the act of whistleblowing not only because it will ensure transparency and accountability but also because it would contribute to the development of a sense of justice within the business.[12]

The term whistleblowing is not a new phenomenon. Silas Deane, an American citizen sent to France by the Congress as the Representative of the American Colonies in Europe, was carrying secret instructions to sell American goods in Europe and

5 Eroğluer and Sarıbay Öztürk (n.3) 345.

6 Aydın (n.3) 96.

7 Nuri Çelik, Nurşen Caniklioğlu, Talat Canbolat and Ercüment Özkaraca, *İş Hukuku Dersleri* (36th. Edn., Beta, 2023) 319; Hugh Collins, K. D. Ewing and Aileen Mccolgan, *Labour Law* (Cambridge University, 2012) 438; Tae Kyu Wang, Kai-Jo Fu, and Kaifeng Routledge Yang, 'Do Good Workplace Relationships Encourage Employee Whistle-Blowing?' (2018) 41 (4) Public Performance & Management Review, 768, 768; Santoro and Kumar (n.4) 38; Larmer (n.2) 125; Gültekin (n.3) 200.

8 Mustafa Alp, 'Avrupa Birliği'nin 2019/1937 Sayılı Birlik Hukukuna Aykırılıkları Bildirenlerin Korunması (Whıstleblowing) Yönergesi Işığında İşçinin Hukuka Aykırılıkları İfşa Etmesi' (2021) 23 (1) Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi, 1, 14.

9 Sulette Lombard, 'Regulatory Policies and Practices to Optimize Corporate Whistleblowing: A Comparative Analysis', in Sulette Lombard, Vivienne Brand and Janet Austin (eds), **Corporate Whistleblowing Regulation, Theory, Practice, and Design** (Springer, 2020) 4.

10 Gülsevil Alpagut, 'İfşa-İhbar Hakkına İlişkin Avrupa Birliği Yönergesi ve Avrupa İnsan Hakları Mahkemesi İçtihatları' in Alpay Hekimler (ed), Festschritt Für Otto Kaufmann Armağanı (Legal, 2021) 4; Vickjilenca Abazi, 'Truth Distancing? Whistleblowing as Remedy to Censorship during COVID-19' (2020) 11(2) European Journal of Risk Regulation 375–381.

11 Larmer (n.2) 126.

12 Mustafa Alp, *Çalışanın İşvereni ve İş Arkadaşlarını İhbar Etmesi, Çalışanın Hukuka, Etik Kurallara Aykırılıkları İfşa Hakkı ve İhbar ve Borcu, Whistleblowing* (Beta, 2013) 145; Eroğluer and Sarıbay Öztürk (n.3) 356

to procure weapons for the war. Additionally, it was necessary to seek assistance from France for the War. He successfully secured the shipment of arms from the French King. However, Silas Deane demanded money from the Congress to keep this news secret but subsequently reported the incident to the newspaper, leading to its disclosure to the public after the Congress refused to offer compensation.[13]

Another example occurred just a few months after the signing of the Declaration of Independence in 1777.[14] Captain John Grannis, representing the sailors, presented a petition to Congress concerning the inhumane and barbaric treatment of captured British soldiers. This led to the suspension of Commander Hopkins, who retaliated by filing a slander lawsuit against those who reported him.[15] Imprisoned sailors Samuel Shaw and Richard Marven stated in a petition to Congress on July 23, 1778, that they did the right things under the law and their beliefs. This case constituted a ground for America's Whistleblower Protection Act.[16] The Act stipulates that all individuals in the service of the United States must report any misconduct, fraud, or crime they encounter during their duties to Congress or any other appropriate authority as soon as possible.[17]

Then, whistleblowing began to become popular when Time Magazine announced three women as "Persons of the Year" because they reported irregularities within their organizations to their managers and legal authorities.[18] Similar situations have also been seen in China, where Shuping Wang's actions in the 1990s led to the addressing of HIV and hepatitis epidemics; similarly, in 2020, Dr Ali Fen and Winlang might be another popular example of whistleblowing since they announced the first example of COVID-19 cases.[19] Based on the explanation provided above, whistleblowing refers to the act of informing the authorities, the press, or third parties about wrongful practices occurring within an institution or workplace.[20] When the definition of whistleblowing is scrutinized, three elements can be derived from the definition: the individual, the subject and the action.

1. Individual Element

For whistleblowing to be discussed in the context of employment law, the person in question must be associated with the relevant workplace (insider).[21] Hence, a

13 Santoro and Kumar (n.4) 11.

14 Christopher Klein, 'US Whistleblowers First Got Government Protection in 1777' (26 September 2019) <https://www.history.com/news/whistleblowers-law-founding-fathers> accessed: 10.12.2021.

15 Santoro and Kumar (n.4) 12.

16 Whistleblower Protection Act (1778).

17 Shawn Marie Boyne, 'Financial Incentives and Truth-Telling: The Growth of Whistle-Blowing Legislation in the United States' in Gregor Thüsing and Gerrit Forst (eds), *Whistleblowing - A Comparative Study* (Springer, 2016) 279.

18 Eroğluer and Sarıbay Öztürk (n.3) 344-345.

19 Abazi (n.10) 377.

20 Alp (n.8) 4.

21 Mustafa Alp, 'Avrupa İnsan Hakları Mahkemesi'nin Heinisch/Almanya Kararı Işığında Whistleblowing (İşçinin İfşa ve

whistleblower can be a dependent person of a business, such as an employee, official, or contractual staff, or someone who operates in close relation to the organization like a customer or supplier. It must be stated that the whistleblower, being part of the business and consequently, in a position to learn about the action, must take the risk of breaching the duty of loyalty by disclosing information learned during the work.[22] The identity of the person committing the unlawful or unethical act does not matter on this issue. A person could be any employee at the workplace and not necessarily someone bound by an employment contract, including a board member or even the chairman of the board.

2. Subject Element

The subject of whistleblowing, as stated above, involves behaviors that are contrary to the law and ethical standards of businesses. Not only legal violations but also deviations from professional ethical principles set by the institutions and organizations to which the workplace is subject are considered in this context.[23] Unethical situations, even if they do not constitute a legal violation, can also be considered within the scope of whistleblowing.[24] This includes exposing practices such as the use of low-quality materials or charging for unnecessary repairs, which can be regarded in favor of the public interest. Any deviations that can be anticipated to benefit the public interest are considered within the scope of whistleblowing.[25]

3. Action Element

The final element required for whistleblowing is the disclosure of unlawful or unethical actions to internal channels, external institutions, or organizations.[26] Although reporting misconduct is typically seen as positive action, external whistleblowing can sometimes have adverse effects on an organization. In contrast, internal whistleblowing tends to positively influence organizational governance and encourages ethical behavior.[27] The internal channels of a business can be exemplified by the ethics committee, company lawyer, auditor, and board of directors, while external channels can be exemplified by authoritative governmental institutions and the mass media.[28] In both cases, a person or institution does not necessarily

İhbarı) ve İş İlişkisinde İfade Özgürlüğü', Prof. Dr. Polat Soyer'e Armağan (2013) 15, Özel Sayı, DEÜHFD, 385, 388.

22 Ibid, 388.

23 Ibid, 389.

24 Alp (n.8) 12.

25 Collins, Ewing, and Mccolgan (n.7) 438; Alp (n.21) 389.

26 Collins, Ewing, and Mccolgan (n.7) 441.

27 Dawid Mrowiec, 'Factors Influencing Internal Whistleblowing: A Systematic Review of the Literature' (2022) 44 Journal of Economics and Management, 143.

28 Büşra Gizem Üner, 'Ifsa ve İhbar Hakki' (2024) 10(2) Anadolu Üniversitesi Hukuk Fakültesi Dergisi, 779.

have a special authority to apply legal sanctions.[29] For example, as an external whistleblowing channel, the media does not have authority over a subject or can enforce any sanctions. [30] However, it should also be noted that it is necessary for the media to meet strict conditions if they are informed about unlawful or unethical actions.[31] These restrictions will be discussed below in light of ECtHR decisions.

II. Effective Protection of Whistleblowing

Whistleblowing may lead individuals to a series of significant risks because they might be seen as "spies" in the workplace[32], and the whistleblowers may confront retaliation, blacklisting, significant emotional stress, and loss of employment status, income, reputation, and relationships.[33] This is because these types of behaviors might be considered disloyalty to business by employers, and this consideration might lead to the termination of the employment contracts.[34] Accordingly, legal whistleblowing regulations are becoming increasingly important worldwide.[35] In the context of our topic, it is important to consider which provisions should be addressed in the protection of an employee who performs whistleblowing.[36]

Article 5 of the ILO Convention No. 158 states that the termination of a contract will not be deemed for a valid reason if it involves filing a complaint against the employer participating in proceedings against the employer for alleged violations of laws or regulations or making a complaint to the competent administrative authorities[37]. The convention protects employees who report breaches of law in the workplace against termination of their employment contract. Additionally, the Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, adopted by the EU, imposes an obligation on all EU Member States to enact specific legal regulations by the end of 2021. This directive also introduces some new principles regarding what whistleblowing could entail and protects whistleblowers.[38]

29 Alp (n.21) 390.

30 Carmen R. Apaza, Yongjin Chang, Srisombat Chokprajakchat, and Thomas Devine, "Summary and Conclusions" in Carmen R. Apaza and Yongjin Chang (eds), *Whistleblowing in The World* (Palgrave Macmillan, 2017), 81; Alp (n.21) 390.

31 Collins, Ewing, and Mccolgan (n.7) 441.

32 Larmer (n.2) 135.

33 Vivienne Brand, "The Ethics of Corporate Whistleblowing Rewards" Edt: Sulette Lombard, Vivienne Brand, Janet Austun; **Corporate Whistleblowing Regulation, Theory, Practice,** and Design (Springer, 2020) 38; Eroğluer and Sarıbay Öztürk (n.3) 356-357.

34 Larmer (n.2) 135.

35 Alp (n.8) 1.

36 Alp (n.8) 4.

37 Gültekin (n.3) 206.

38 Alp (n.8) 4; Gültekin (n.3) 209.

1. Evaluation of Whistleblowing in the Context of European Law

In the realm of the protection of whistleblowing activities, some tools have been adopted to establish a legal framework for the protection of employees reporting breaches related to European law both inside and outside of the workplace.[39] In this context, when European legal instruments is scrutinized, firstly, in 2010, the Parliamentary Assembly's Committee of Legal Affairs and Human Rights defined whistleblowing as a "generous, positive act" carried out by brave individuals who choose to address the wrongs they encounter rather than take the easier path of staying silent.[40] At that time, most member states lacked laws to protect whistleblowers. Consequently, the Assembly recommended that the Committee of Ministers create guidelines based on the principles set out in Resolution 1729.[41] The Parliamentary Assembly of the Council of Europe, under the title "Protect of Whistleblower" states that[42]

- *6.1.1. The definition of protected disclosures shall include all bona fide warnings against various types of unlawful acts, including all serious human rights violations which affect or threaten the life, health, liberty and any other legitimate interests of individuals as subjects of public administration or taxpayers, or as shareholders, employees or customers of private companies.*
- *6.1.2. the legislation should therefore cover both public and private sector whistle-blowers, including members of the armed forces and special services,*
- *6.2.2- This legislation should protect anyone who, in good faith, makes use of existing internal whistle-blowing channels from any form of retaliation (unfair dismissal, harassment or any other punitive or discriminatory treatment).*
- *6.2.3- Where internal channels either do not exist, have not functioned properly or could reasonably be expected not to function properly given the nature of the problem raised by the whistle-blower, external whistle-blowing, including through the media, should likewise be protected.*
- *6.2.4- Any whistle-blower shall be considered as having acted in good faith provided, he or she had reasonable grounds to believe that the information disclosed was true, even if it later turns out that this was not the case, and provided he or she did not pursue any unlawful or unethical objectives.*[43]

39 Abazi (n.10) 645.

40 Anna Myers, *Protection of Whisteblowers* (Council of Europe, 2022) para 85. <https://rm.coe.int/cdcj-2022-01-evaluation-report-on-recommendation-cmrec-2014-7p/1680a6fee1> accessed 09.09.2024.

41 Parliamentary Assembly Resolution 1729 on the Protection of "Whistle-blowers" (2010).

42 Parliamentary Assembly, 'Resolution 1729 Final Version Protection of "Whistle-blowers"' <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17851#:~:text=the%20public%20interest.-, 6.2.,other%20punitive%20or%20discriminatory%20treatment> accessed 09.09.2024.

43 Ibid, Para 6.

Second, in 2014, the Committee of Ministers adopted Recommendation CM/Rec (2`014)7 on whistleblower protection, which was developed by the European Committee on Legal Co-operation (CDCJ) of the Council of Europe and acknowledged its explanatory memorandum. The CDCJ encourages and assists in the implementation of this recommendation, which outlines a set of principles to guide member states in reviewing their national laws or when introducing or amending legislation and regulations as needed within the context of their legal systems.[44] The aim is to assist member states in creating and developing a legal framework that effectively protect whistleblowers. Although the recommendations seek to establish a common set of principles for all member states, the manner in which each country applies these principles has varied.[45] However, according to the Council of Europe's report in 2022, notable progress has been made since the adoption of the Recommendation CM/Rec(2014); however, significant efforts are still needed.[46] The protective measures in Recommendation CM/Rec(2014)7 are mainly administrative, and the states must recognize the importance of strong organizational policies and protections.[47]

Third, until the adoption of the EU Directive 2019, the EU and the European Commission heavily relied on the Council of Europe's efforts.[48] In October 2019, the European Parliament enacted the "Directive on the Protection of Persons who Report Breaches of Union Law."[49] According to the Directive, whistleblowers play a significant role in uncovering and preventing violations of European Union laws and in protecting the welfare of society.[50] As explicitly stated in Article 1 of the Directive, the primary objective is to enhance the enforcement of Union law and policies in specific areas. In this sense, the Directive goes beyond the protection of freedom of expression and whistleblowing; it primarily aims at improving and developing EU law.[51]

EU Directive 2019 emphasizes that whistleblower protection is part of the right to freedom of expression and has created a common framework for Member States that intend to ensure, in a broadly consistent way, the effective protection

44 European Committee on Legal Co-operation, 'Protection of Whistleblowers' <https://www.coe.int/en/web/cdcj/activities/protecting-whistleblowers> accessed 09.09.2024.

45 Council of Europe, 'Protection of Whistleblowers' (2014) 18. <https://rm.coe.int/16807096c7> accessed 09.09.2024.

46 Myers (n.40) 8.

47 Ibid.

48 European Parliament, 'Protecting whistle-blowers in the EU' (September 2024) 2. <https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/747103/EPRS_BRI(2023)747103_EN.pdf> accessed 09/09/2024.

49 Directive (Eu) 2019/1937 of the European Parliament and of The Council of 23 October 2019 (On the Protection of Persons who Report Breaches of Union Law.

50 Jan Tadeusz Stappers, 'EU Whistleblower Protection Directive: Europe on Whistleblowing' (2021) 22 ERA Forum, 87, 89.

51 Ibid, 87. Arnaud Van Waeyenberge and Zachariah Davies, 'The Whistleblower Protection Directive (2019/1937): A Satisfactory but Incomplete System' (2021) 12 European Journal of Risk Regulation, 236, 238; Abazi (n.10) 645.

of whistleblowers.[52] It is important to highlight that in the course of drafting the Directive, as Article 10 of the European Convention on Human Rights (ECHR) is related to freedom of expression, the relevant decisions of the European Court of Human Rights (ECtHR) and the Council of Europe's recommendations in 2014 should be taken into consideration.[53]

The underlying reasons for the enactment of the Directive include a retaliation concern among employees reporting a wrong practice in a workplace.[54] However, measures have been taken at EU level in a few sectors. Regulations to protect whistleblowers are mostly implemented in financial services. Accordingly, for instance, protection is provided by 2019 Directives in the areas of public procurement; financial services, products, and markets; prevention of money laundering and financing of terrorism; product safety; transport safety; environmental protection; radiation and nuclear safety; food and feed safety; animal health and welfare; public health; consumer protection; privacy and protection of personal data; and security of networks and information systems (Article 2).[55]

The European Commission has stated that the protection of the right to disclose and report will provide better protection for the EU's financial interests and contribute to a fair and well-functioning single market.[56] According to the Commission, 49 percent of EU citizens does not even know where to report corruption.[57] In the initial impact assessment of the Directive, the importance of whistleblowers in detecting fraud and corruption is emphasized.[58] Accordingly, by providing effective protection for whistleblowers, the Directive will benefit the EU's competitiveness by contributing to the integrity of the internal market, increasing cross-border investment in the EU, reducing corruption and fostering economic growth.[59] As indicated, this goal is based not on the protection of employee freedom of expression but mainly on strengthening the enforcement of EU law.[60] Therefore, the Directive's aim is not to directly protect employees expressing their opinions in the workplace: instead, the right to disclose is adopted as a tool to ensure the application of EU law.[61] In other words, the protection of employees will play an effective role as a necessary means to achieve these goals.

52 Directive (Eu) 2019/1937 of the European Parliament and of The Council of 23 October 2019 (On the Protection of Persons who Report Breaches of Union Law, Recital 1.

53 Alpagut (n.10) 8.

54 Stappers (n.50) 89.

55 Directive (Eu) 2019/1937 of the European Parliament and of the Council of 23 October 2019 (On the Protection of Persons who Report Breaches of Union law, Article 2.

56 Ibid, Recital 2.

57 Factsheet on Whistleblower Protection, European Commission, April 2018; Stappers (n.50) 99.

58 Stappers (n.50) 88. The Commission estimates that the revenue lost from fraud and corruption affecting the EU is between €179 and €256 billion annually (p. 138).

59 Stappers (n.50) 88.

60 Ibid, 88.

61 Alpagut (n.10) 8.

However, the Directive has not defined the concept of whistleblowing nor referred to this concept, but it is applicable to protecting whistleblowers in workplaces.[62]

The concept of breach is also broadly defined to include actions and ignorance that constitute violations.[63] In this context, according to the Directive, breaches that have already occurred; breaches that have not yet been committed but are very likely to occur; actions or ignorance for which the whistleblower has reasonable grounds to believe constitutes a legal violation; attempts to conceal breaches; and incidents related to legitimate concerns and suspicions where no evidence can be presented are considered within the scope.[64]

There are three types of reporting procedures: internal reporting, where a person reports to their workplace; external reporting to relevant authorities outside the workplace; and public reporting, which refers to reporting to the media.[65] When the EU Directive was adopted, there was considerable debate over whether individuals were required to report misconduct to their employer through internal channels before being allowed to communicate with an authoritative body.[66] Public disclosure of information is subject to stricter criteria and is treated as a last resort (ultima ratio). On this issue, Article 15 of the Directive prerequisites to exhaust other internal and external channels. Furthermore, preamble 33 of the Directive states that although balancing interests is not required for internal or external whistleblowing, it should be considered in cases of public disclosure. Hence, when these legal materials are taken into consideration, it can be concluded that there might be a hierarchy among these procedures. According to Article 7(2) of the Directive (EU) 2019/1937 of the European Parliament, Member States should ensure that internal reporting is preferred over external reporting.[67] This shows that the Directive significantly expands the rights of whistleblowers and creates numerous obligations for organizations within the EU.

These provisions show that the definition of whistleblower is quite broad and there is no distinction between public institutions and the private sector. In addition, the importance of internal channels within the workplace is highlighted. Furthermore, if internal channels are ineffective or not available, external channels such as media disclosure can be used. Lastly, it is assumed that as long as the whistleblower does not have a clearly malicious intent, they are acting in good faith.

62 Abazi (n.10) 645.

63 Alpagut (n.10) 15.

64 Directive, Article 5.

65 Abazi (n.10) 645.

66 Boris Dzida, 'Wann dürfen Arbeitnehmer gegen ihren Vorgesetzten Anzeige erstatten?' (2021) 6 ArbRB 192.

67 Alp (n.8) 16-17.

2. Evaluation of the Principles of the European Court of Human Rights

According to Article 10 of the ECHR, the scope of freedom of expression includes individuals in private law.[68] The employee's, as individuals, freedom of expression may override the duty of loyalty to the employer.[69] The same principle applies to employees in public workplaces. According to ECtHR judgements, which will be explored below, a notification to external authorities should be the last resort. In assessing to notify external authorities, the potential harm to the employer, the motive behind the employee's report, the public's right to information and the authenticity of the information should be taken into consideration, and it should be ensured that any potential sanctions applied to the employee should be proportionate. Accordingly, the ECtHR created a checklist to determine whether whistleblowing acts can be assessed within the framework of freedom of expression. The checklist requires the following questions to be answered:

1. Whether there is a public interest in disclosing the information.
2. Whether the applicant has an alternative means of making the disclosure.
3. Whether the authenticity of the disclosed information has been checked.
4. Whether the person making the disclosure has acted in good faith.
5. Whether the disclosed information is harmful to the employer's business
6. Whether the sanction applied to the person who made the disclosure is proportionate.[70]

Based on these principles, it must be noted that public interest must be considered while considering whistleblowing actions. Conflicts of interest are also of significance, especially when comparing the employer's interest and the benefits of disclosing information to the public. If the information is to be disclosed to the media (publicly), it should first be examined whether notification of external channels has been used as a last resort. In other words, it must be determined whether the requirement to first attempt internal channels has been fulfilled. In addition, the accuracy of the information must be verified. The whistleblower's motives are also important, and any decision should consider whether the sanction applied is proportional to the act of whistleblowing.

68 *Heinisch v. Germany* (Application no. 28274/08) Judgment Strasbourg (21 July 2011) para 43-46.

69 Alp (n.8) 7.

70 *Heinisch v. Germany* (Application no. 28274/08) Judgment Strasbourg (21 July 2011) para 70-92. For the applicability of the ECHR to employment relations see: *Georgiadis v Greece* App No. 21522/93 (ECtHR, 29 May 1997) para 34. *Buchholz v Germany,* App No. 7759/77 (ECtHR, 6 May 1981), para 45.

It should be noted that the ECtHR points out that refusing to conduct a criminal investigation due to a lack of evidence differs from an act of whistleblowing that does not reflect reality.[71] Furthermore, it should be accepted that the employee acted in good faith when making the report.[72] On this basis, the research discusses the *Heinisch* case[73], which was the first case to address whistleblowing in the private sector, and the *Gawlik* case[74] decided by ECtHR in 2021.

In *Heinisch*, Brigitte Heinisch, a nurse working in a care home, complained about the shortage of nurses and reported this situation to the institution in an internal way. After not receiving any resolution and becoming ill due to excessive workload, she became unable to work. In this context, several inspections have been carried out at the workplace and several deficiencies have been identified by the relevant authorities. The employer was then warned that her employment contract would be terminated.[75] At the same time, a complaint was filed with the prosecutor's office alleging that even the basic hygiene care for the elderly was inadequate in the care home. Following the distribution of a leaflet[76] about the deficiency of the care home by Heinisch and her colleagues, in conjunction with their union, the care home management terminated her contract without notice due to preparing and distributing the brochure.[77]

When applying the six criteria mentioned above, the ECtHR first determined that the information disclosed by the applicant was in the public interest. Additionally, as explained in the case, Heinisch initially used internal channels and approached the employer to resolve the situation. When it comes to whether the alleged deficiency actually exists before resorting to relevant external channels, the reality of the situation was confirmed through inspections conducted in the workplace.[78] Following the Heinisch case, the ECtHR also expressed that it cannot be expected from a whistleblower employee to predict whether the facts reported will ultimately result in a criminal prosecution.[79] Lastly, considering that the elderly require special protection, Heinisch's good faith was recognized, and he was protected against unfair dismissal.[80]

By contrast, in another case reflected in the decisions of the ECtHR, Gawlik, who was the deputy chief physician at a hospital, found 11 unnatural deaths according to

71 *Gawlik v. Liechtenstein* (Application no. 23922/19) Judgment Strasbourg (16 February 2021).

72 Collins, Ewing, and Mccolgan (n.7) 441.

73 *Heinisch v. Germany* (Application no. 28274/08) Judgment Strasbourg (21 July 2011).

74 *Gawlik v. Liechtenstein* (Application no. 23922/19) Judgment Strasbourg (16 February 2021).

75 *Heinisch v. Germany* (Application no. 28274/08) Judgment Strasbourg (21 July 2011), para 9.

76 Ibid, para 18-22.

77 Ibid, para 28.

78 Orhan Ersun Civan, *İşçinin Yan Yükümlülükleri* (Beta, 2020) 227.

79 Alp (n.8) 7-8.

80 Alpagut (n.10) 13.

a report prepared by Spiegel.[81] Gawlik, who determined that patients without severe pain were given very high doses of morphine—believing that illegal euthanasia was being practiced—reported the situation to the prosecutor, and as a result, his employment contract was terminated without notice.[82] The case was examined by the ECtHR following a lawsuit filed against the termination of Gawlik's employment contract.

The facts of the case of Gawlik represent a typical example of the dilemma many employees confront when they want to report illegal actions in the workplace. In this case, although the hospital has an internal complaint system that allows employees to anonymously report their complaints through an online form, Gawlik did not use this internal whistleblowing system, nor did he communicate with the board of trustees or the hospital director.[83] The underlying reason for this may be that the applicant's supervisor was the person he believed to be responsible for the euthanasia of the patients. Additionally, this supervisor oversaw the internal whistleblowing channel. Although other individuals were also assigned to handle whistleblowing matters, the Court noted that such information was not widely known within the hospital. However, Gawlik acted without sufficiently investigating the accuracy of the information given that he did not check the medical paper records and electronic files. Given the suspicion of illegal euthanasia, it is undeniable that immediate action was necessary to stop the alleged murder. However, Gawlik was noted to be able to easily access the paper medical records; therefore, no investigation would have led to a significant delay.[84]

Consequently, employees are advised to use internal reporting channels first if they suspect that their employers are at fault.[85] In addition, whistleblowers risk their jobs if they turn to an external institution without adequately evaluating the facts. In this context, employees should first use the company's internal reporting channels that are properly functioning if they exist.[86] In this context, a systematic review of internal whistleblowing channels recommends some implication policies to ensure proper functioning of internal channels. Implementing a clear and fair internal whistleblowing policy is essential. This includes establishing a set of guidelines that provide both non-anonymous and anonymous reporting channels for employees.[87] Once a report has been received, the organization must conduct a thorough and reliable examination of the issue. Additionally, it is recommended that an audit

81 *Gawlik v. Liechtenstein* (Application no. 23922/19) Judgment Strasbourg (16 February 2021) para 1.

82 Ibid, para 16.

83 Ibid, para. 14.

84 Ibid, para 18.

85 Alp, (n.12) 68.

86 Dzida (n.66) 193.

87 Mrowiec (n.27) 164-167.

committee should be involved in the development and implementation of the internal reporting system to oversee its operation and ensure its effectiveness.[88] By contrast, it should be noted that there might be circumstances that make it lawful to directly address external whistleblowing channels, which will be revealed below.

In practice, many employees do not know where and how to find an internal reporting system. In addition, employees must trust the internal reporting system. The more reliable a reporting channel is, the higher the likelihood that employees will opt to provide internal information to their employer rather than going directly to an external authority. Hence, good internal communication with the employer is indispensable. Employers should take measures to protect the identity of the whistleblower and should allow anonymous reporting through the reporting system. Employees who are not afraid of retaliation when openly addressing complaints may prioritize internal reporting channels over going directly to an external forum if they feel assured. In the mentioned case, it was decided that the freedom of expression should not be violated.

The ECtHR's Gawlik decision demonstrates that a whistleblower must sufficiently clarify their suspicion of illegal action to their superiors before reporting it to governmental law enforcement authorities. The decision emphasized that the whistleblower should not have limited themselves to electronic medical files but should have also examined more comprehensive paper medical records to check the validity of their suspicion. Furthermore, the termination of employment was deemed proportionate action in comparison to the institution's reputation caused by Gawlik's actions. Differing from the 2011 Heinisch decision, the ECtHR does not describe these requirements for clarifying the facts by the whistleblower. Therefore, the new decision can be understood as emphasizing the obligation of whistleblowers to carefully examine facts and documents before reporting to an external authority.[89]

In this regard, it would be valuable to discuss recent ECtHR judgments. *Halet v. Luxembourg* judgment, delivered by the Grand Chamber on February 14, 2023.[90] This case centered on Raphaël Halet, a whistleblower involved in the LuxLeaks scandal, which exposed corporate tax avoidance practices. Halet disclosed internal documents from his employer, PricewaterhouseCoopers (PwC), to a journalist.[91] He was subsequently convicted by Luxembourg courts for violating professional secrecy, but he argued that the conviction violated his right to freedom of expression. The Grand Chamber of the ECtHR overturned the earlier judgments, ruling in favor of Halet,

88 Ibid.

89 Dzida (n.66) 193.

90 *Halet v Luxembourg* (Application no. 21884/18) Strasbourg Judgement, 14 February 2023.

91 Ibid, para 10.

finding that his criminal conviction was a disproportionate interference with his right to freedom of expression under Article 10 of the ECHR.[92] The Court emphasized that the disclosed information contributed to the public debate on tax practices and was of legitimate public interest.[93] This case marks a significant development for whistleblowers, strengthening their protection when disclosing information of public concern, even if it affects their employer's reputation.

Last but not least, when ECtHR case law and EU Directive 2019/1937 were examined, it can be said that similar criteria to those in the ECtHR case law were introduced regarding the exercise of the right to disclosure and whistleblowing under EU Directive 2019/1937. However, the ECtHR and the EU approach to the duty of loyalty, particularly in the context of whistleblowing, stem from how each body balances the duty of loyalty with the right to freedom of expression and the protection of whistleblowers. First, while the ECtHR emphasizes the need for a case-by-case assessment of whether whistleblowing disclosure serves the public interest, the EU Directive presumes public interest for the specific issues it covers (the issues listed in Article 2), eliminating the need for a separate public interest evaluation for these cases. Second, whereas The ECtHR case law traditionally requires that whistleblowers act in good faith, the EU Directive does not explicitly require the whistleblower to act in good faith. Third, the Court's rulings often emphasized that internal channels should be used before external reporting (such as to the media) unless compelling reasons exist to bypass internal mechanisms. By contrast, the Directive does not prioritize internal over external disclosure. Whistleblowers are allowed to go directly to external authorities without first reporting internally, thereby offering more flexibility but potentially undermining the employer's ability to address issues internally. On the other hand, both instruments adopt the "last resort" principle for media disclosures, which requires whistleblowers to exhaust internal or external reporting channels before going public. This means that the EU Directives have a rightful distinction between governmental external institutions and mass media disclosure.

In summary, the ECtHR approach is more nuanced, requiring evaluations of good faith and public interest on a case-by-case basis, with an emphasis on internal disclosure before external reporting. By contrast, the EU Directive offers broader protections for whistleblowers, presuming public interest in certain cases and not strictly requiring good faith or internal reporting first, making it a more streamlined but potentially less employer-friendly framework.

92 Ibid, para 36.

93 Ibid, para 201-205.

III. Reflections of the Whistleblowing in Turkish Law

1. Evaluation of the Concept of Whistleblowing within the Scope of the Duty of Loyalty of Employees

An employment contract establishes a personal relationship between employees and employers and creates an expectation that employees will act properly and refrain from certain actions.[94] In other words, due to an employment contract that imposes the duty of loyalty, an employee is generally obligated to contribute to the purpose of the business and to protect the legitimate interests of the employers.[95] On this basis, the scope of the duty of loyalty is that an employee acts or, if necessary, refrains from certain actions to protect the employer's interests.

The duty of loyalty in employment relations should be understood as somehow renouncing personal interests for both parties.[96] It should not be expected that an employee's interest will be more than that of the employer, or *vice versa*.[97] It is often emphasized that an employee who discloses situations constituting a crime will not be considered acting against the duty of loyalty when a superior public interest is considered.[98]

The duty of loyalty encompasses the obligation to protect and watch over an employer's interests in accordance with an employee's position within the business by considering rules of good faith.[99] The duty of loyalty is regulated by Law No. 6098, which defines the criterion of the duty of loyalty as the protection of the employer's legitimate interests. The scope of these legitimate interests varies according to the specific circumstances of the employment relationship and the values of one's working life.[100] Therefore, because the obligation imposed on an employee by an employment contract is not fundamentally a liability for results; therefore, the duty of loyalty is considered a responsibility to achieve the main purpose of the contract. This obligation requires employees to perform their duties in line with the rules of honesty and within a trust relationship. Therefore, the duty of loyalty is a fundamental obligation of an employment contract.[101]

94 Aydın Başbuğ and Mehtap Yücel Bodur, *İş Hukuku* (6th. Edn., Beta, 2021) 141.

95 Münir Ekonomi, *İş Hukuku – Ferdi İş Hukuku*, (1st. Edn. V. 1, İstanbul Teknik Üniversitesi, 1976) 111; Muammer Vassaf Tolga, *İş Hukuku* (3th. Edn., Türkiye Ticaret Postası, 1958) 141; Tuncay (n.1) 1047; Sarper Süzek, *İş Hukuku* (21th. Edn., Beta, 2023) 360; Öner Eyrenci, Savaş Taşkent, Devrim Ulucan and Esra Baskan; *Bireysel İş Hukuku* (10th. Edn.: Beta, 2020) 133; Ömer Ekmekçi and Esra Yiğit, *Bireysel İş Hukuku Dersleri* (5th. Edn., Onikilevha , 2023) 388; Ercan Akyiğit, *Bireysel İş Hukuku* (3nd. Edn., Seçkin 2023) 203; Arzu Arslan Ertürk (n1) 140; Alp (n.72) 115; Ute Teschke-Barle, *Arbeitsrecht Schnell Erfasst* (6th. Edn., Springen, 2006) 87; Frank Hahn and Lisa Käckenmeister, Arbeitszeitrecht, Edt: Frank Hahn, Gerhard Pfeiffer and Jens Schubert (Nomos, 2018) en. 21.

96 Larmer (n.2) 125.

97 David Lewis, 'Whistleblowing in A Changing Legal Climate: Is It Time to Revisit Our Approach to Trust and Loyalty at The Workplace?' (2011) 20(1) Business Ethics, 71, 71.

98 Çelik, Caniklioğlu, Canbolat and Özkaraca (n.7) 319; Larmer (n.2) 125.

99 Kenan Tunçomağ and Tankut Centel, *İş Hukukunun Esasları* (9th. Edn.: Beta, 2018), 102; Süzek (n.95) 360; Arslan Ertürk (n.1) 182.

100 Süzek (n.95) 360.

101 Hamdi Mollamahmutoğlu, Muhittin Astarlı and Ulaş Baysal, *İş Hukuku* (7th. Edn. LYKEION, 2022), 602.

The duty of loyalty forms a broad manifestation of the principles of good faith in employment relations, and it can generally be defined as actions in accordance with the principles of good faith aimed at protecting the employer's legitimate interests.[102] To illustrate, actions such as saving goods in a fire, immediately reporting malfunctions and taking necessary precautions against such malfunctions, avoiding behaviors that disrupt harmony at the workplace and protecting the employer's reputation are included within the scope of the duty of loyalty.

By contrast, reducing the number of defective goods to decrease the shrinkage in inventory counts and benefit from the inventory bonus provided by the employer constitutes a violation of the duty of loyalty.[103] In this regard, it should be noted that the Turkish Employment Law, which regulates the conditions for just termination, often includes the right to terminate due to violations of moral and good faith rules (Article 25/II), which are mostly related to breaches of the duty of loyalty.[104] It is not possible to fully specify what constitutes the duty of loyalty or to define the scope of this obligation.[105] However, it can be said that the primary limit is the interests of the employer.[106]

It is not possible to achieve a perfect balance between the duty of loyalty and freedom of expression.[107] Nonetheless, the main point is that an employee cannot use his/her freedom of expression in a way that disrupts the order of the business, causes damages, or puts it in serious danger. If an employee's freedom is restricted arbitrarily even though it is not based on such considerations, these restrictions are considered unlawful.[108] An employee's expression of thoughts that disrupt the workflow and peace in the workplace cannot be justified. In this respect, freedom of expression is somewhat limited to the right to criticize the employer. Regarding providing an understanding of this limitation, Alp said that employees must act in good faith and whistleblowing should not be motivated by intentions such as harming the employer or seeking personal gain but should be done in the public interest. More importantly, the matters disclosed must be true, and unfounded accusations should be avoided.[109] The key consideration is whether the employee acted in good faith, and if the employee believed in the truth of the matters reported in good faith, like ECtHR

102 Ibid, 602; Ekmekçi and Yiğit (n.95) 388 fp.

103 Y9HD., 10.02.2020, E. 2017/15415, K. 2020/1782.

104 Çelik/Caniklioğlu/Canbolat/Özkaraca (n.7) 317; Plaintiff's actions, which are clearly explained in the statements of the defendant witnesses, such as receiving commissions from customer companies due to the works outsourced by the defendant factory and goods purchase contracts due to his work as a factory manager, and having the supplier company buy a mobile phone are within the scope of behavior that does not comply with honesty and loyalty according to Article 25/II-e of the Labor Law. Requests for severance and payment of notice must be rejected.

105 Haluk H. Sümer, *İş Hukuku Uygulamaları* (7th. Edn., Seçkin, 2019) 119.

106 Tunçomağ and Centel (n.99) 102.

107 Ekmekçi and Yiğit (n.95) 388-389.

108 Kenan Tunçomağ, *Türk İş Hukuku* (1th, Edn., V. I, Sulhi Garan, 1971) 211.

109 Alp (n.21) 418.

case law, he/she should not face any sanctions under labor or criminal law.[110] In this regard, it should be noted that acting in good faith is a criterion sought by ECtHR case law but not by EU Directives. It is not easy to detect whether an employee acted in good faith or bad faith, but if the employee first approaches internal channels, there might be an inclination to consider that the employee acted in good faith.

The duty of loyalty also encompasses the ancillary obligation of an employee to first initiate internal company or business channels for the resolution of his/her criticisms and complaints toward the employer regarding the operation of the business.[111] This obligation is not absolute, and there are some exceptions. First, it should be stated that if these internal channels have not been made well-known within the company, the expected benefit would be obtained from internal channels.[112] In addition, if the employee does not expect any just outcome from reporting the situation to the internal channels or if the employee anticipates that evidence will be destroyed when they inform their supervisor, they can simultaneously/directly approach the relevant authority (tax office, police, ministry).[113]

The stakeholders should be, at the same time, aware that publicizing a workplace problem without utilizing internal complaint and criticism channels might constitute a violation of the employee's duty of loyalty, and the employee cannot defend his/her actions based on freedom of expression. This result is consistent with Heinisch's decision of the ECtHR. On this issue, wrongful accusations against the employer and statements that insult the honor and dignity of the employer are grounds for termination for just cause under Turkish Employment Law. While not as severe, continuously making statements against the employer and negatively affecting the harmony of the workplace can lead to termination for valid reasons. In this context, whether the continuation of the employment relationship becomes possible and whether termination is seen as a last resort are determinative factors that can be used to categorize dismissal as fair or unfair.

2. Legal Provisions Related to Whistleblowing in Turkish Employment Law

The provisions regarding whether an employee who reports an illegal violation in the workplace will face any retaliation are included in the Turkish Employment Law and the Occupational Health and Safety Law. Additionally, the articles concerning freedom of expression contained in the 1982 Constitution should also be generally considered. Finally, because failing to report a crime is regulated as a punishable offense under the Turkish Penal Code, reporting a crime observed in the workplace

110 Ibid, 418.

111 Civan (n.78) 45-69.

112 Dzida (n.66) 193.

113 Aydın (n.3) 87.

is also recognized as a legal obligation. The aforementioned legal provisions include the following:

- Freedom of Expression (Turkish Constitution Art.26)
- An employee's right to apply to administrative or judicial authorities against an employer (Employment Law Art. 18/3)
- The right of employees to appeal to labor inspectors authorized for labor inspection and investigation (Employment Law Art. 96/1)
- The notification obligation of workplace doctors and occupational safety specialists (Law No. 6331 Art. 8).
- False accusations that insult honor and dignity (Employment Law Art. 25/ II-b)
- The offense of failing to report a crime (Turkish Penal Code Art. 278-280).

First, according to Article 26 of the Turkish Constitution, everyone has the right to express their thoughts and opinions as individuals or collectively through speech, writing, images, or other means. In this context, no legal provision can be introduced that would result in sanctions against whistleblowing individuals within the framework of freedom of expression. As stated in Article 26(2) of the Constitution, the exercise of these freedoms may be restricted for purposes such as the protection of national security, public order, public safety, the fundamental qualities of the Republic, the indivisible integrity of the State with its country and nation, the prevention of crimes, the punishment of offenders, the non-disclosure of information duly classified as state secrets, the protection of others' reputations or rights, their private and family lives, or professional secrets prescribed by law, or to ensure the proper operation of judicial duties. Indeed, this provision constitutes a basis for the criteria of public interest established by both ECtHR judgements and EU materials.

Second, the continuation of the employment contract might be unpleasant for the employer if the employee files a lawsuit or complaints to the administrative authorities against the employer. Therefore, although it can be said that this situation might be a valid reason for termination under Article 18/3 of Employment Law No. 4857, it is explicitly stated that an employee's application to administrative or judicial authorities against his/her employer does not constitute a valid reason. Accordingly, it is understood that whistleblowing by an employee does not constitute a valid reason for termination. This constitutes a fundamental guarantee for employees who disclose actions and practices that violate the laws or who bring a claim to court against their employers.

Third, according to Article 96 of the Employment Law, employers are prohibited from directly or indirectly suggesting, coercing employees to conceal or alter the truth and from behaving badly toward employees who have applied to relevant authorities, brought a claim, provided information and statements during inspections, or made complaints or threats for termination. These provisions clearly prevent threats of termination against employees who have applied to administrative or judicial authorities or made statements to labor inspectors during inspections. This provision does not refer to media and internal channels but refers to governmental external authorities. Therefore, it shows greater fitness to the EU Directives, which does not prioritize internal methods over external ones, than the ECtHR judgements.

Fourth, Article 8 of Law No. 6331 mandates that a workplace doctor and safety specialist appointed to guide and consult an employer on occupational health and safety issues and generally employees of the employer be charged with identifying any deficiencies and malfunctions related to occupational health and safety, considering relevant legislation and technical developments at the workplace. They must determine preventive measures, make recommendations, and report them to the employer in writing. This may be a functional equivalent of internal channels established by ECtHR judgements and EU legal documents. If measures are not taken, the situation must be reported to the Ministry's relevant departments, the authorized union representative, if available, or the employee representative (external authorities). If a workplace doctor or safety specialist does not report the deficiency, the certification of the workplace doctor and safety specialist will be suspended (for three months for the first instance, and six months in case of recurrence).

The legislator has introduced a protection for whistleblowing laws on occupational health and safety by regulating that an employer cannot terminate the employment contract of a workplace doctor or safety specialist, and whistleblowers cannot be subjected to any loss of rights just because of reporting. Employers who breach these provisions will be sentenced to compensation of not less than the annual salary. Moreover, employees can also apply to the competent external authority in cases where the measures taken for occupational health and safety in the workplace are insufficient and, hence, their rights cannot be restricted due to these actions (Law No. 6331, Art. 18/3). This may be an exception to the rule of primarily exhausting internal channels in European materials. Nevertheless, unlike European materials, it should be emphasized that the provision is specific to health and safety issues. When these provisions are scrutinized, it is observed that the right to whistleblowing concerning occupational health and safety measures is secured.[114] However, it should be noted that this right is limited to the initial warning of the employer to exhaust internal channels and then to report the situation to the Ministry.

114 Civan (n.78) 222.

The internal channel must be designed, established, and operated in a manner that protects the integrity, accuracy, and confidentiality of the disclosed information, thereby preventing unauthorized employees from accessing it. On this issue, Alp commented on the related provision of the Directive on internal channels: This directive aims to create neutral and transparent whistleblowing channels subject to specific and clear rules, particularly preventing delays.[115] It seeks to ensure that the whistleblower receives an acknowledgment of the application within seven days (the latest deadline) and feedback within three months (the latest, thereby avoiding unnecessary delays. The employee should be informed in advance about whom or which authority to report, how to file the report, and what protection measures will be taken.[116] Additionally, it should allow for the permanent storage of this information in accordance with Article 18 of the Directive, enabling the initiation of new investigations. The underlying reason for this is that violations of occupational health and safety measures endangers employees' right to life, which should be prioritized over employers' economic interests.

Fifth, it was mentioned that the boundary of an employee's right to whistleblowing is limited to illegal practices. In this regard, practices that violate the statutes will not be considered trade secrets, and the employee is not obliged to keep the information confidential. The main purpose is to prioritize public interest over employers' interests. According to Article 25/II of the Employment Law No. 4857, actions and statements against the honor and dignity of the employers and baseless accusations and attributions to the employer are grounds for termination of an employment contract. In contrast, if the accusation or attribution made by the employee reflects the truth, the employer cannot terminate the employment contract on the grounds of violating moral and good faith principles.

If the act of whistleblowing is not based on truth and is baseless, the employment contract can be terminated on just grounds when ECtHR decisions, which require consideration of whether the disclosed information is truthful, are taken into account. Additionally, the conflict between the duty of loyalty and the right to disclosure and whistleblowing should be examined. In this regard, in developed legal systems, since the excessive limitation of an employee's rights and freedoms is not acceptable, it is also important to define the boundaries of an employee's duty of loyalty.[117] On this basis, it is clear that on the one hand, the limit on the duty of loyalty is that an employee is not obligated to waive or excessively limit his/her personal rights and fundamental freedoms because it conflicts with the employer's interests. For example, an employee cannot be forced to work under unhealthy and insecure conditions.[118]

115 Alp (n.8) 21-22.

116 Ibid.

117 Üner (n.28) 786.

118 Ibid, 786.

On the other hand, the employee is also responsible for safeguarding the employer's legitimate interests under the duty of loyalty. These legitimate interests include preventing economic harm to the business and ensuring an employer's competitive ability. However, only lawful or legitimate interests fall under this protection, and interests that are illegal, unethical, or immoral cannot be defended under the duty of loyalty.[119] Therefore, disclosing or reporting actions that constitute a crime does not violate the duty of loyalty. For instance, although a bank has a valid interest in keeping financial data and management details confidential to maintain its competitive ability, an employee who exposes fraudulent accounting practices is not considered to have breached his/her duty of loyalty by revealing these criminal activities[120]. Hence, to analyze if the termination of the contract constitutes an unfair dismissal, in addition to the truthfulness of the information disclosed, the proportionality of the duty of loyalty with the right to disclosure should also be considered.

Proportionality refers to the principle that prohibits the use of a "steam hammer to crack a nut if a nutcracker would do".[121] In other words, the limitation should not exceed the boundaries of what is necessary and suitable for attaining legitimate objectives in the public interest.[122] In other words, a balance must be struck between the employer's legitimate legal interests and the overriding public interest.[123] However, it should be noted that if a whistleblower initially approaches internal authorities under European standards, this would create a presumption that the whistleblower's good faith will be performed in a proportional way.

According to a case decided by the Regional Court of Appeal in Ankara, the contract of an employee working in an animal shelter managed by the City Council was terminated by the Council for publicizing information about the killing of animals via mass media, allegedly damaging the institution's reputation. The court decided that the termination was not based on a just cause. Furthermore, it is noted that the Council had already been previously fined for the act reported, confirming that the whistleblower's report was not baseless.[124] Although the decision did not explicitly focus on whether the act of whistleblowing constituted a violation of the duty of loyalty or could be evaluated within the context of freedom of expression, it highlighted that the termination was not based on a just cause because the Council has been fined for alleged actions, thus proving the truthfulness of the report. Additionally,

119 Alp, (n.72) 121; Mollamahmutoğlu/Astarlı/Baysal (n.101) 605.

120 Üner (n.28) 786.

121 Nicholas Emiliou, *The Principle of Proportionality in European Law: A Comparative Study* (Kluwer Law International 1996) 2.

122 Ibid. J. Ceno, 'Compulsory Mediation: Civil justice, Human rights and Proportionality' (2014) 6(3) International Journal of Law in the Built Environment, 286, 293.

123 Christian Alexander, *Gesetz gegen den unlauteren Wettbewerb: UWG,* Köhler/Bornkamm/Feddersen (Edts) (42th Edit. Beck, 2024), GeschGehG 5 Ausnahmen en 44.

124 Ankara Regional Court of Appeal, 8HD (29.11.2018), E. 2017/4517, K. 2018/2912.

the employee's actions should be prioritized over the employer's interests because the disclosure of the act of killing animals is also related to the public interest. In this case, in the realm of European standards, there is no doubt that there was overriding public interest, and the truthfulness of the disclosed information was proved, but the court did not consider whether the employee first brought the case to internal channels. On this issue, because the Council has already been alleged and fined on the same issue, the case might be regarded as an exception to primarily exhausting internal channels. Consequently, in the case of a potential reemployment case, compensation for not reemploying the employee should be determined, considering that the termination was made in bad faith.

Conclusion

The concept of whistleblowing refers to the disclosure of legal or ethical violations in a workplace to competent authorities, third parties, or the media. In employment law, protecting employees who report illegal or unethical practices in the workplace to competent authorities or the media is of great importance. This is because individuals who perform whistleblowing actions may be subjected to accusations such as being spies or snitches in the workplace and may face retaliation, the most severe being termination. The protection of individuals who report violations of EU law is provided for by the Directive titled "Protection of Persons Reporting on Breaches of Union Law" (Directive 2019/1937), dated October 23, 2019, in EU law. Additionally, ECtHR decisions regarding whether whistleblowing can be evaluated within the scope of freedom of expression in the workplace, particularly the Heinisch and Gawlik cases, should be considered.

In ECtHR decisions, the right to freedom of expression supersedes the duty of loyalty to the employer. Therefore, employee protection is necessary. However, this requires public interest. The employee is also obliged to investigate the accuracy of the information. In particular, internal channels should be preferred first. Moreover, good faith among employees is required, and the outcome should be proportionate.

In Turkish Law, making false accusations and imposing responsibility to check the truthfulness of information against an employer are accepted as valid reasons for termination of an employment contract. It is also regulated that an employee's application to administrative or judicial authorities against his/her employer does not constitute a valid reason for termination (Employment Law Art. 18/3). It is also stipulated that an employee cannot be subjected to any sanctions for making statements to inspectors authorized for inspection and investigation. (Employment Law Art. 96/1). Considering the impact of occupational health and safety measures on an employee's right to life, the obligation of workplace doctors and safety specialists

has been legislated to notify the Ministry about deficiencies in the workplace, and they are protected against termination. (Law No. 6331, Art. 8). Lastly, the offense of failing to report a crime is specifically regulated in Articles 278-280 of the Turkish Penal Code, stipulating that it is an obligation to report a crime committed in the workplace.

The duty of loyalty is an obligation arising from an employment contract and requires the protection of the employer's legitimate interest. The verification of the truthfulness of information and reporting a violation occurring in the workplace to the employer should be considered the requirements of loyalty. Therefore, the situation should be evaluated according to the specifics of each case and proportionality principles.

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