REPUBLIC OF TURKEY

CONSTITUTIONAL COURT

SECOND SECTION

DECISION

TAYFUN CENGİZ APPLICATION

(Application Number: 2013/8463)

Date of Decision: 18/9/2014

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SECOND SECTION

DECISION

President	:	Alparslan ALTAN
Members	:	Recep KÖMÜRCÜ
		Engin YILDIRIM
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		Muammer TOPAL
Rapporteur	:	Yunus HEPER
Applicant	:	Tayfun CENGİZ
Counsel	:	Att. Mustafa ERDOĞDU
		Att. Havva AKDOĞAN

I. SUBJECT OF APPLICATON

1. The applicant, did not come to work for the participation of a nation wide union call in Turkey which he was a member of, however, he asserted that he was given a warning penalty on the ground that he did not come to work without an excuse, that he was being punished because of his participation in trade union activities and this violated articles 10, 36, 40 and 90 of the Constitution and his constitutional rights with regard to the freedom of assembly and association, filed a request for material and moral compensation.

II. APPLICATION PROCESS

2. The application was lodged by the applicant via the 1st Administrative Court of Mersin on the date of 19/11/2013. As a result of the preliminary examination of the petition and annexes thereof as conducted in terms of administrative aspects, it was found that there was no deficiency that would prevent referral thereof to the Commission.

3. It was decided by the Second Commission of the Second Section on the date of 19/2/2014 that the examination of admissibility be conducted by the Section and the file be sent to the Section.

4. In the session held by the Section on 13/3/2014, it was decided that the examination of admissibility and merits be carried out together.

5. The facts and cases which are the subject matter of the application were notified to the Ministry of Justice on the date of 13/3/2014. The Ministry of Justice presented its opinion to the Constitutional Court on 14/4/2014.

6. The opinion presented by the Ministry of Justice to the Constitutional Court was notified to the applicant on the date of 14/4/2014. The applicant did not make a statement against the opinion of the Ministry.

III. FACTS AND CASES

A. Facts

7. As expressed in the application form and the annexes thereof, the facts are summarized as follows:

8. The applicant is a public official who is the member of the Trade Union of Education and Science Workers (EĞİTİM SEN).

9. Through the decision of the Administrative Board of EĞİTİM SEN dated 6/3/2012, it was decided that an action for not coming to work be organized throughout the entire country under the name "*warning strike*" on the dates of 28 and 29 March 2012.

10. The applicant did not come to work on the aforementioned dates.

11. The District Directorate of National Education of Tarsus which the applicant was working at, punished the applicant with a warning penalty on the ground that "*he did not come to work without an excuse on the dates of 28-29 March 2012*" through its decision dated 14/5/2012 as a result of the administrative investigation that it conducted on all trade union members who participated in the action.

12. The objection that the applicant filed against the decision in question was dismissed through the decision of the Governor's Office of Mersin dated 13/6/2012.

13. The applicant filed an action for annulment before the administrative court on the date of 20/7/2012 with the request for the cancellation of the disciplinary penalty imposed on him, the action was dismissed through the decision of the 1st Administrative Court of Mersin dated 25/12/2012. The justification of the Court of First Instance is as follows:

> *"In Turkish law, the rights of public officials to establish trade unions and to be a member of trade unions are guaranteed through the Constitution and Codes, as a matter of fact, the Code on the Trade Unions of Public Officials numbered 4688, which qualified as a special code, was enacted in order to regulate the trade union rights of public officials and, in this context, public officials have the right to association in trade unions; however, it is not possible to speak of the right to "strike" of public officials in the face of the fact that there is no provision that grants the right to "strike" to public officials and that no legal regulations have been formulated in this direction in our domestic law.*
>
> *...*
>
> *Nevertheless, in relation to the right to strike, although this right is not clearly stated in article 11 of the ECHR; while the granting of this right and the exercise thereof in line with its purpose undoubtedly constitute one of the most important trade union rights, it is necessary that an equitable balance be protected between the action performed, the results of this action and the purpose sought in order to protect the rights of the members of trade unions, that the method used be proportionate to the purpose sought while it is also necessary that the action in question does not have the quality to damage or prevent the fundamental rights and freedoms of other person or persons.*
>
> *In this case; when the fact that the plaintiff did not go to work uninterruptedly for two days on the dates of 28/29 March, that this situation not only constitutes contrariety with the principles of the continuity and sustainability of public services, but that within this period students were deprived of their right to education and training which is among their fundamental rights and freedoms, when considered together, there is no contrariety with law in the acts of the plaintiff which is the subject matter of the case as established by also taking into consideration his previous services in line with his action that was determined.*"

14. The applicant objected against the decision of the Court of First Instance; the decision of the Court of First Instance was approved through the decision of the Regional Administrative Court of Adana dated 8/5/2013. The relevant part of the decision of the Regional Administrative Court is as follows:

> "… *[a]lthough it is understood that it cannot be mentioned that it is necessary in a democratic society that public officials are punished with disciplinary penalties due to the fact that they participate in work stoppage actions, so as to protect, improve, develop their economic, social and professional rights and interests and, within this scope, their personal and monetary rights, their working conditions, to ensure that attention is drawn to these issues and that public opinion is forged and, in the event that they do not have any other option, in accordance with the decisions that the trade unions of which they are members of make; in the face of the fact that it is uncontentious that the reason why the plaintiff did not come to work was to ensure that the bill of the Code on Primary Education and Education be withdrawn and to prevent it from being negotiated and enacted at the General Assembly of the GNAT, it is concluded that there is no contrariety with law in the action which is the subject matter of the case. That the objection be dismissed due to the reasons explained ...*

15. The applicant's request for correction was dismissed through the decision of the Regional Administrative Court of Adana dated 19/9/2013.

16. The writ of the Regional Administrative Court was notified to the applicant on the date of 25/10/2013 and the applicant lodged an individual application to the Constitutional Court on the date of 19/11/2013.

B. Relevant Law

17. Article 26 of the Code of Public Servants dated 14/7/1965 and numbered 657 with the side heading of *"Prohibition of conducting collective actions and activities"* is as follows:

> "*It shall be prohibited for public servants to collectively withdraw from public service intentionally in a way which hinders public services or not to come to work or when they do come to work to conduct actions and activities which will bear the consequence of the slowdown or hindering of State services and affairs* ".

18. The relevant part of article 125 of the Code numbered 657 with the side heading of *"Types of disciplinary penalties and actions and cases to which penalty will be applied"* is as follows:

> *"The disciplinary penalties which will be imposed on public servants and the actions and cases which require each of the disciplinary penalties are as follows:*
>
> *...*
>
> *C - Deduction from salary: Deduction from the gross salary of a public servant between the rates of 1/30 - 1/8.*
>
> *The actions and cases which require the penalty of deduction from salary are as follows:*
>
> *...*
>
> *b) Failure to come to work for one or two days without any excuse,*
>
> …"

19. Article 135 of the Code numbered 657 is as follows:

"*An objection can be filed to the disciplinary board against the penalties of warning, condemnation and deduction from salary given by the disciplinary chiefs, to the higher disciplinary board against the penalty of interrupting grade advancement.*

The period of objection shall be seven days following the date of notification of the decision to the relevant person. The disciplinary penalties against which an objection is not filed within due time shall become final.

The authorities of objection shall be obliged to make their decisions within thirty days following the transfer of the objection petition and the decision and the annexes thereof to them.

In the event that the objection is accepted, disciplinary chiefs can commute or completely lift the penalty imposed by reviewing the decision.

Administrative justice remedy can be seized against disciplinary penalties."

20. The relevant part of the writ of the Plenary Session of the Administrative Law Chambers of the Council of State dated 22/5/2013, numbered Merits 2009/63 and Decision 2013/1998 is as follows:

"…

In the dispute, determining whether or not the action of the plaintiff not to come to work for 1 day on the date of 11/12/2003 by complying with the decision made by the authorized boards of the trade union of which s/he was a member will be evaluated within the scope of article 125/C-b of the Code of Public Servants numbered 657 is of importance.

In the last paragraph of article 90 of the Constitution of the Republic of Turkey numbered 2709, the provision "International agreements which are duly put into effect have the power of law. It is not possible to apply to the Constitutional Court with the claim that such agreements are contrary to the Constitution. (Additional sentence: 07/05/2004 - the Code numbered 5170/ art. 7) In the case of conflicts which may arise due to the fact that international agreements on fundamental rights and freedoms which are duly put into effect and the laws include different provisions on the same matter, the provisions of the international agreement will prevail." is included.

In article 11 of the European Convention on Human Rights in which the "freedom of assembly and association" is regulated, the rule as to the effect that everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of their interests, that no restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary ina democratic society in the interests of national security or publicsafety, for the prevention of disorder or crime, for the protectionof health or morals or for the protection of the rights and freedomsof others, that this Article shall not prevent the imposition of lawfulrestrictions on the exercise of these rights by members of thearmed forces, of the police or of the administration of the State" is included.

In its Kaya and Seyhan v. Turkey decision dated 15/09/2009 (application no. 30946/04); the European Court of Human Rights concluded that the imposition of a warning penalty on the teachers who were members of Eğitim-Sen as they did not come to work on the date of 11/12/2003 due to the fact that they participated in a national action organized for one day in order to protest the bill of the code of public administration which was being discussed at the parliament by complying with the call of KESK (the Confederation of the Trade Unions of Public Workers) on the date of 11/12/2003 had a quality of dissuading members of the trade union from participating in a legitimate strike or action days in order to protect their interests even if the penalty was minor, that the disciplinary penalty imposed on the teachers

did not correspond to a "pressing social need" and that for this reason, it was not "necessary in a democratic society", as a result of this, it decided that article 11 of the European Court of Human Rights was violated on the ground that the applicants' right to exercise the freedom of demonstration within the meaning of article 11 of the ECHR in an effective manner was infringed in a disproportionate way.

In this case, no compliance with law has been observed in the action which is the subject matter of the case in relation to the imposition of the penalty of deduction from the salary of the plaintiff due to the action which does not constitute any disciplinary offense in accordance with article 125/C-b of the Code numbered 657 as the plaintiff 's action of not to come to work in line with a trade union activity on the date of 11/12/2003 will not be considered within the scope of the act of not coming to work for one or two days without any excuse and it is necessary to accept as an excuse the act of not coming to work for one day within the scope of a trade union activity.

…"

IV. EXAMINATION AND JUSTIFICATION

21. The individual application of the applicant dated 19/11/2013 and numbered 2013/8463 was examined during the session held by the court on 18/9/2014 and the following were ordered and adjudged:

A. Claims of the applicant

22. The applicant asserted that he did not come to work by participating in the call of the trade union, of which he was a member, made for not coming to work in Turkey as a whole, that however, he was given a warning penalty on the ground that he did not come to work without an excuse, that article 90 of the Constitution and his constitutional rights in relation to the freedom of assembly and association were violated due to the fact that the penalty was imposed on the ground that he participated in trade union activities and that he was punished in contrary to the freedom of claiming rights stipulated in article 36 of the Constitution, the right to equality stipulated in article 10 of the Constitution, the right to effective remedy stipulated in article 40 of the Constitution, article 11 of the European Convention on Human Rights (Convention) and article 28 of the Charter of Fundamental Rights of the European Union, filed a request for material and moral compensation.

B. Evaluation

1. In Terms of Admissibility

23. The applicant claimed that articles 10, 36, 40 and 90 of the Constitution and his constitutional rights with regard to the freedom of assembly and association were violated.

24. In the opinion of the Ministry, it was stated that the complaints that the applicant expressed were related to the freedom of assembly and association defined in articles 51, 53 and 54 of the Constitution and article 11 of the Convention.

25. By considering the conditions which the applicant complained about and the form of expressing his complaints, it is necessary to examine these complaints within the context of article 51 of the Constitution.

26. The applicant's complaints as to the effect that his Constitutional rights were violated due to the fact that he was punished on the ground that he participated in a trade

union activity are not clearly devoid of basis. Moreover, it should be decided that the application is admissible as there is no other reason for inadmissibility.

2. In Terms of Merits

27. The applicant asserted that the Board of EĞİTİM SEN of which he was a member decided on the date of 6/3/2012 that an action not to come to work for 2 days in Turkey as a whole be organized on the dates of 28/29 March 2012 in order to ensure that the negotiations of the Bill of the Code on Primary Education and Education which were being held at the Grand National Assembly of Turkey on the date of incident be terminated and that the Bill be withdrawn, that a disciplinary penalty being imposed on him due to the fact that he participated in the action in question was contrary to the Constitution. The applicant reminded that the ECtHR issued a decision of violation in similar applications previously, that moreover, the act of not coming to work within the scope of a trade union activity was accepted as an excuse in the steady case-law of the Council of State . Apart from these, the applicant also relied upon the circular of the Prime Ministry dated 1999 and the letter of the Ministry of National Education dated 2012 indicating that no disciplinary penalty must be imposed on the members of trade unions who did not come to work within the framework of a trade union activity.

28. The applicant stated that he participated in the event in question in order to show his democratic reaction by relying upon the rights granted in domestic law and international law, that the right of public officials to collective action was absolutely recognized in the conventions of human rights, the Constitution and court decisions. Moreover, the applicant pointed to the fact that it was emphasized that the state was a social state of law in article 2 of the Constitution, that employees and employers had the right to establish trade unions and framework organizations in order to protect and improve the economic and social rights and interests of their members in their working relations, to become a member of these trade unions and to carry out activities in this direction without getting prior permission in article 51, that required measures would be taken to ensure that employees get a fair wage which was proportionate with the work they did was stated in article 55 and that the state would perform its duties in social and economic domains was emphasized in article 65.

29. In the opinion of the Ministry, the case-law of the ECtHR was reminded of and it was stated that an evaluation needed to be done as to whether or not the intervention which was the subject matter of the application was necessary in a democratic society.

30. The freedom of association means the freedom of individuals to come together by creating a collective entity which represents them in order to protect their own interests. The concept of “*association*” has an autonomous meaning within the framework of the Constitution and the failure to recognize the activities that individuals perform continuously and in coordination as an association in our law does not mean that the freedom of association will not necessarily come to the fore within the scope of the provisions of the Constitution.

31. In democracies, the existence of organizations under which citizens will come together and pursue common goals is an important element of a sound society. In democracies, such an "*organization*" has fundamental rights which needs to be respected and protected by the state. Trade unions which aim to protect the interests of their members in the field of employment are an important part of the freedom of associations which is the freedom

of individuals to come together by creating collective entities in order to protect their own interests.

32. The freedom of association provides individuals with the opportunity of realizing their political, cultural, social and economic goals in a collective manner. The right to trade union brings about the freedom of association of employees by coming together so as to protect their individual and common interests and, with this quality, is not seen as an independent right, but a form or a special aspect of the freedom of association (*Belgian National Police Union v. Belgium*, App. No: 4464/70, 27/10/1975 § 38).

33. The right to trade union and trade union activities are regulated between articles 51 and 54 of the Constitution under the chapter "Social and Economic Rights and Duties". The right to freedom of establishing trade unions or becoming members of trade unions is included in article 51 of the Constitution.

34. Article 51 of the Constitution with the heading of *"Right to establish trade unions"* is as follows:

> "*Employees and employers have the right to establish trade unions and framework organizations in order to protect and improve economic and social rights and interests of their members in their working relations, to freely become a member of and to freely resign from such unions without getting prior permission. No one can be forced to become a member of or resign from a membership of a union.*
>
> *The right to establish trade unions may only be restricted by law and for the purposes of national security, public order, prevention of offending, public health and public morality and protecting the rights and freedoms of others.*
>
> *Forms, conditions and procedures to be applied in exercising the right to establish unions are specified in law.*
>
> ...
>
> *In this field, the scope, exceptions and limits of the rights of civil servants who do not hold a worker status are regulated by law in accordance with the characteristics of the service they provide.*
>
> *The by-laws, administration and functioning of trade unions and their framework organizations cannot be contrary to the fundamental characteristics of the Republic and the principles of democracy.*"

35. Trade union rights and freedoms which are regulated in articles 51-54 of the Constitution are completed with the relevant Conventions of the International Labor Organization (ILO) including, in particular, the Freedom of Association Convention and the Right to Organize and Collective Bargaining Convention and the European Social Charter which have introduced similar guarantees. While interpreting the scope of the trade union rights and freedoms regulated in articles 51-54 of the Constitution, the guarantees which are included in these documents and interpreted by the relevant bodies should also be taken into consideration.

36. Article 51 of the Constitution brings about both negative and positive liabilities for the state. The negative obligation of the state not to intervene in the freedom of association of individuals and trade unions within the framework of article 51 has been subjected to the conditions which allow for an intervention through the justifications stipulated in paragraphs

two to six of article 51. On the other hand, although the main aim of the right to trade union "*is to protect the individual against arbitrary interference by public authorities with the exercise of the rights protected, there may in addition be positive obligations to secure the effective enjoyment of these rights*" (see *Wilson, the National Union of Journalist and Others v. the United Kingdom,* App. No: 30668/96, *30671/96 and 30678/96, 2/10/2002, § 41).*

37. Indeed, it is not always possible to make certain distinctions between the positive and negative obligations of the state. However, there is no change with regard to the criteria to be applied in relation to both of these obligations of the state. Irrespective of the positive or negative obligations of the state, it is necessary to strike a fair balance between the conflicting interests of the individual and the society as a whole. (see *Sorensen and Rasmussen v. Denmark, App. No: 52562/99 and* 52620/99, 11/1/2006 § 58). While deciding on whether or not this fair balance has been struck, the Constitutional Court will take into consideration the fact that the bodies which use public force has a certain discretionary margin in this field.

38. The right to trade union which is a right that can be restricted is subject to the restriction regime of the fundamental rights and freedoms contained within the Constitution. In paragraph two and subsequent paragraphs of article 51 of the Constitution, the reasons for restriction over the right to trade union are included. However, it is also clear that there must be a limit to the restrictions aimed at these freedoms. The criteria under article 13 of the Constitution must be taken into consideration as regards the restriction of fundamental rights and freedoms. For this reason, the review concerning the restrictions imposed on the right to trade union should be conducted within the framework of the criteria stipulated in article 13 of the Constitution and within the scope of article 51 of the Constitution.

39. In the light of the principles explained above, it needs to be evaluated at first whether an intervention exists or not and then whether the intervention relies on valid reasons when assessing whether or not the right to trade union was violated in the incident which is the subject of the application.

i. Concerning the Existence of the Intervention

40. The applicant claims that the fact that a warning penalty was imposed on him as he participated in a trade union action which was organized throughout the country constituted an intervention in his right to trade union. In the opinion of the Ministry, it was stated that these kinds of penalties constituted an intervention in the right to trade union. Through the punishment of the applicant due to his participation in an action which took place nationwide within the scope of a trade union activity, an intervention was made in the applicant's right to trade union.

ii. Concerning the Intervention Resting on Valid Ground

41. The intervention mentioned above will constitute a violation of articles 13 and 51 of the Constitution unless they rest on one or more of the valid reasons stipulated under paragraphs two and six of article 51 of the Constitution and they fulfill the conditions stipulated in article 13 of the Constitution. As a result, whether or not the restriction is in line with the conditions of bearing no prejudice to the essence, being indicated under the relevant article of the Constitution, being envisaged by codes, not being contrary to the letter and spirit of the Constitution, the requirements of the democratic social order and of the secular Republic and the principle of proportionality prescribed in article 13 of the Constitution needs to be determined.

1. Lawfulness of the Intervention

42. No claim was made as to the fact that there was contrariety with the condition of making the intervention with *"the code"* contained within paragraphs two, three and five of article 51 of the Constitution in the intervention which was made. As a result of the evaluations made, it was concluded that article 26 of the Code numbered 657 with the side heading of "*Prohibition of conducting collective actions and activities*" and article 125 thereof with the side heading of "*Types of disciplinary penalties and actions and cases to which penalty will be applied*" fulfilled the criterion of "*lawfulness*".

2. Legitimate Purpose

43. The Court of First Instance stated that the intervention served the purpose of public order and the protection of the rights and freedoms of others on the ground that "*the plaintiff did not go to work uninterruptedly for two days on the dates of 28/29 March, that this situation constitutes contrariety with the principles of the continuity and sustainability of public services and that within this period students were deprived of their right to education and training which is among their fundamental rights and freedoms*". The applicant did not express any opinions on this subject.

44. In order for an intervention made in the right to trade union to be legitimate, this intervention must be made for the purposes of national security, public order, the prevention of the committal of crime, general health, general ethics and the protection of the rights and freedoms of others as stipulated in article 51 of the Constitution and be made by code.

45. Even if it is accepted that the disciplinary penalty imposed due to the fact that the applicant did not come to work without an excuse targeted the legitimate purposes listed in paragraph two of article 51 of the Constitution, when the evaluations that need to be made with regard to the necessity of intervention are taken into consideration, it is concluded that there is no need to solve the problem of the legitimacy of intervention.

3. Necessity and Proportionality in a Democratic Society

46. The applicant reminded the case-law of the ECtHR, the Council of State and the courts of instance in similar cases and the circular of the Prime Ministry dated 1999 on not imposing a disciplinary penalty with regard to the actions organized within the framework of trade union activities and the opinion of the Legal Advisory Department of the Ministry of National Education as to the effect that the work stoppage action organized through the decision of a trade union be accepted as a trade union activity. The applicant stated that the imposition of a disciplinary penalty on a work stoppage action which was within the framework of a trade union activity was contrary to the freedom of association in the face of the rules in question and the case-law of the courts.

47. It was stated in the opinion of the Ministry that in the event that an intervention aimed at the right to trade union existed, whether or not justifications which would justify the measures taken existed and whether or not *"there existed a reasonable balance between the objective and means of restriction"* needed to be evaluated with a view to the requirements of a democratic society.

48. As the right to trade union is not absolute, it can be subjected to some restrictions. An evaluation needs to be conducted concerning the matter of whether or not the restrictions listed in paragraph two of article 51 of the Constitution (see § 41) regarding the right to trade union are in harmony with the requirements of a democratic societal order and the principle of proportionality guaranteed under article 13 of the Constitution.

49. In the justification of the first version of article 13 of the Constitution, it was reminded that the restrictions to be imposed on rights and freedoms must not be contrary to the understanding of a democratic regime; in the justification for the amendment made in the Constitution with article 2 of the Code Concerning the Amendment of Some Articles of the Constitution of the Republic of Turkey dated 3/10/2001 and numbered 4709, it was stated that article 13 of the Constitution was regulated in line with the principles in the Convention (App. No: 2013/409, 25/6/2014, § 92).

50. The concept of "democratic society" stipulated in the Constitution of 1982 needs to be interpreted with a modern and libertarian understanding. The criterion of *"democratic society"* clearly reflects the parallelism between article 13 of the Constitution and articles 9, 10 and 11 of the ECHR which contain this criterion. Therefore, the criterion of democratic society should be interpreted on the basis of pluralism, tolerance and open mindedness (for the decisions of the ECtHR in the same vein, see *Handyside v. United Kingdom*, App. No: 5493/72, 7/12/1976, § 49; *Başkaya and Okçuoğlu v. Turkey*, App. No: 23536/94, 24408/94, 8/7/1999, § 61).

51. Indeed, as per the established case law of the Constitutional Court, *"Democracies are regimes in which the fundamental rights and freedoms are ensured and guaranteed in the broadest manner. The limitations which bear prejudice against the essence of fundamental rights and freedoms and render them completely non-exercisable cannot be considered to be in harmony with the requirements of a democratic societal order. For this reason, fundamental rights and freedoms may be limited exceptionally and only without prejudice to their essence to the extent that it is compulsory for the continuation of democratic societal order and only by code.*" (CC, M.2006/142, D.2008/148, D.D. 24/9/2008) In other words, if the limitation which is introduced halts or renders extremely difficult the exercise of the right and freedom by bearing prejudice against its essence, renders it ineffective or if the balance between the means and objective of the limitation is disrupted in violation of the principle of proportionality, it will be against the democratic societal order (App. No: 2013/409, 25/6/2014, § 94).

52. The freedom of association, in general, and the right to trade union, in particular, are among the freedoms which concretize political democracy which is one of the fundamental values adopted in the Constitution and constitute one of the fundamental values of a democratic society. The ability to discuss and settle issues in public forms the essence of democracy. The Constitutional Court emphasized in its previous decisions that the foundations of democracy were pluralism, tolerance and open mindedness (App. No: 2013/409, 25/6/2014, § 95). According to this, individuals who exercise the right to trade union make use of the protection of the fundamental principles of a democratic society such as pluralism, tolerance and open-mindedness. In other words, unless there is a case of provoking violence or the denial of democratic principles, even if some opinions expressed within the framework of the right to trade union and the form of expressing them are unacceptable in the eyes of competent authorities, the measures aimed at eliminating the freedoms of expression, association and trade union cannot serve democracy and yet, they imperil it. In a democratic society which relies upon the rule of law, the expression of

different thoughts through the freedoms of trade unions or other means should be permitted. (for similar evaluations, see *Oya Ataman v. Turkey*, App. No: 74552/01, 5/3/2007, § 36).

53. Another guarantee which will intervene in all kinds of limitations to be introduced to rights and freedoms is the *"principle of proportionality"* expressed under article 13 of the Constitution. This principle is a guarantee which needs to be taken into consideration with priority in applications regarding the limitation of fundamental rights and freedoms. Although the requirements of a democratic societal order and the principle of proportionality are regulated as two separate criteria under article 13 of the Constitution, there is an inseparable bond between these two criteria. As a matter of fact, the Constitutional Court examines whether or not there is a reasonable relation and balance between the objective and the means (App. No: 2013/409, 25/6/2014, § 96).

54. According to the decisions of the Constitutional Court, proportionality reflects the relationship between the objectives of limiting fundamental rights and freedoms and the means The review of proportionality is the inspection of the means selected based on the sought objective in order to reach this objective. (App. No: 2012/1051, 20/2/2014, § 84; App. No: 2013/409, 25/6/2014, § 97). For this reason, in interventions made to the right to trade union, whether or not the intervention selected in order to achieve the sought objective is suitable, necessary and proportionate needs to be evaluated.

55. In this context, the main axis for the evaluations to be carried out with regard to the incident which is the subject of the application will be whether or not the justifications which the courts of instance that caused the intervention relied on in their decisions are in line with *"necessity in a democratic society"* and *"the principle of proportionality"* with a view to restricting the right to trade union, could be convincingly put forth. (App. No: 2013/409, 25/6/2014, § 98).

56. From its initial decisions on the subject, the ECtHR explained what the term "*necessary*" stipulated in paragraphs two of articles 10 and 11 of the Convention meant. According the ECtHR, the term "*necessary*" implies "*a pressing social need*". (*Handyside v. the United Kingdom*, App. No. 5493/72, 7/12/1976, § 48). Then, it will be necessary to see whether or not a judicial or administrative intervention in the freedom of association and the right to trade union meets the pressure of a social need. In this framework, an intervention should be an intervention which is proportional to the legitimate purpose; secondly, the justifications which public authorities show for the legitimacy of the intervention should be relevant and sufficient (*Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, App. No: 29221/95 29225/95, 2/10/2001, § 87).

57. Therefore, in the event that it is accepted that the balance between the right to trade union which was intervened due to the disciplinary penalty imposed on the action in the form of not coming to work within the framework of trade union activities and the public interest sought to be achieved through the disciplinary penalty is proportionate, it can be concluded that the justifications in relation to the imposition of the disciplinary penalty and the dismissal of the filed case by the courts of instance were convincing and, in other words, relevant and sufficient (for a similar approach in another context, see App. No: 2012/1051, 20/2/2014, § 87).

58. The disciplinary penalty which is the subject matter of the application should be examined in the light of all incidents. It was decided through the decision of the Board of

EĞİTİM SEN dated 6/3/2012 that an action not to come to work in Turkey as a whole be organized on the dates of 28 and 29 March 2012 in order to ensure that the negotiations of the Bill of the Code on Primary Education and Education which were being held at the Grand National Assembly of Turkey on the date of incident be terminated and that the bill be withdrawn. In other words, the date of the action which is the subject matter of the case was notified in the entire country in advance. It was not asserted that the organization of the action in question was objected by competent authorities, either. The applicant exercised his right to trade union by participating in this action (for a similar evaluation, see *Ezelin v. France*, App. No: 11800/85, 26/4/1991, § 41).

59. The applicant participated in the action in question and was punished with a warning penalty for not coming to work as organized by EĞİTİM SEN. In the event that a person fails to come to work within the framework of a trade union activity as in the incident which is the subject matter of the application, it is considered that the person uses his/her casual leave and no disciplinary investigation is initiated both in the ordinary practice of the administration and in the established case-law of the administrative justice. However, in spite of the case-law of the administrative justice which has become established as to the effect that the members of trade unions will be considered to be on casual leave in the event that they do not come to work within the scope of a trade union activity, there is no legislative regulation which will ensure that the administration and justice act in a uniform way as a whole. For this reason, it should be noted that the persons who exercise their right to trade union in cases such as the one in the current application are under the threat of a disciplinary investigation.

60. On the other hand, although it is possible that the prohibition of a trade union activity as a whole or the subjection of its realization to severe conditions will damage the essence of the right, performing legal regulation with regard to the participation of the members of trade unions in the actions such as work stoppage and general regulatory actions depending on the legal regulations is in the discretion of legislative and executive bodies.

61. Given the fact that the applicant is a teacher at a public school, it is also necessary to note that public servants will not be able to be totally deprived of this right. Nevertheless, in cases where its necessity is indisputable in a democratic society, it is possible to introduce restrictions with regard to trade union activities in the military, police and some other sectors. It was not asserted that the applicant was at a position which would require subjecting him to these kinds of restrictions, either.

62. In spite of all these, even if the penalty imposed is petty, it has a quality to dissuade the persons who are members of a trade union, such as the applicant, from participating in the legitimate days of strike or action organized in order to defend their interests (see *Kaya and Seyhan v. Turkey*, App. No: 30946/04, 15/12/2009, § 30; Karaçay v. Turkey, App. No: 6615/03, 27/6/2007, § 37; *Ezelin v. France*, App. No: 11800/85, 26/4/1991, § 43).

63. Due to the reasons explained, even if the warning penalty about which a complaint is filed is a petty penalty, it is concluded that "*it is not necessary in a democratic society*" as it does not correspond to "*the pressure of a social need*". For this reason, it should be decided that the applicant's right to trade union guaranteed in Article 51 of the Constitution was violated.

3. In Terms of Article 50 of the Code Numbered 6216

64. Under paragraph numbered (1) of article 50 of the Code numbered 6216, it is indicated that in the event that a violation decision is delivered at the end of the examination on merits, what needs to be done to remove the violation and its consequences are adjudged; however, it is adjudged that a review for legitimacy cannot be done, that a decision with the quality of administrative act and action cannot be delivered.

65. By considering that the warning penalty imposed on the applicant violated the right to trade union, a legal benefit was deemed to be present in the holding of a retrial in the case with regard to the cancellation of the disciplinary penalty action imposed on the applicant. It should be decided that the file be sent to the relevant Court to carry out a retrial in order for the violation with regard to the right to trade union and the consequences thereof to be removed.

66. In the application, it has been concluded that article 51 of the Constitution was violated. The applicant filed a request for a material compensation of 1.076,00 TL and a moral compensation of 1.000,00 TL. The applicant also requested that the attorney's fees and the fees paid and other expenses made be paid.

67. The Ministry of Justice did not make any statements with regard to the amounts of compensation which were requested by the applicant.

68. As it was decided that a retrial be held in the case with regard to the cancellation of the disciplinary penalty action imposed on the applicant and as the applicant can request his financial loss composed of the proceeding expenses which he made before the courts of instance and the attorney's fee during the retrial, it should be decided that the request for material compensation be dismissed.

69. As it is considered that the determination of violation has provided sufficient satisfaction in terms of the applicant, in relation to the applicant's right to trade union, it should be decided that his request for compensation due to the intervention made in his right to trade union be dismissed.

70. It should be decided that the trial expenses of 1,698.35 TL in total composed of the fee of 198.35 and the counsel's fee of 1,500.00 TL which were made by the applicant and determined in accordance with the documents in the file be paid to the applicant.

V. JUDGMENT

In the light of the reasons explained; it is **UNANIMOUSLY** held on the date of 18/9/2014;

A. That the application is ADMISSIBLE,

B. That article 51 of the Constitution was VIOLATED due to the intervention made in his right to trade union,

C. That the requests of the applicant for compensation BE DISMISSED,

D. That the trial expenses of 1,698.35 TL in total composed of the fee of 198.35 and the counsel's fee of 1,500.00 TL, which were made by the applicant be PAID TO THE APPLICANT,

E. That the payments be made within four months as of the date of application by the applicants to the Ministry of Finance following the notification of the decision; that in the event that a delay occurs as regards the payment, the legal interest be charged for the period that elapses from the date, on which this period comes to an end, to the date of payment,

F. That a copy of the decision be sent to the relevant court.

President	Member	Member
Alparslan ALTAN	Recep KÖMÜRCÜ	Engin YILDIRIM

Member	Member
Celal Mümtaz AKINCI	Muammer TOPAL