

Selecting those subject to dismissal for managerial reasons & related cases

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I. Requirements for Dismissal for Managerial Reasons

According to paragraphs (1) to (3), Article 24 of the Labor Standards Act, an employer's decision to dismiss an employee for managerial reasons shall be based on urgent managerial needs. The employer shall make every effort to avoid dismissal of employees and shall select employees to be dismissed by establishing rational and fair criteria for dismissal. With regard to the possible methods for avoiding dismissal and the criteria for dismissal, the employer shall give notice, 50 days prior to dismissal, to a labor union which is formed by the majority of all employees in the business or workplace concerned and consult with them in good faith.

1. In consideration of all the circumstances collectively and synthetically, the dismissal shall be recognized to have objective rationality and social validity. (Supreme Court 96 nu 8031)
2. Each of the above qualifications is not defined or fixed, but shall be determined flexibly in relation to meeting other requirements in actual cases. Whether the dismissal for managerial reasons in a substantial case meets each of the above requirements shall be judged synthetically in consideration of each individual situation related to each requirement. (Supreme Court 2003 du 4119)

II. Fair criteria for selecting those subject to dismissal

1. When the employer selects those subject to dismissal based on employee age, service years, number of dependents, faithfulness in attendance, rewards and punishments, certificates of qualification, etc., this selection is rational and fair criteria for dismissal because objectively measurable methods and distinguishable criteria were applied after considering subjective situations for each employee and the company synthetically. (Seoul Administrative Court 2005 Guhap 15694)
2. Concerning the criteria and method to select those subject to dismissal for managerial reasons, the employer shall not consider only a single factor, like employee job skills, but also consider employee living conditions, equity between

employees, etc. The criteria and methods are mostly at the employer's discretion, but the criteria and methods of selection decided upon by mutual agreement between the employer and the employee representative are considered rational, unless they are extremely subjective or unjustifiable. (Seoul Administrative Court 2005 Guhap 5086)

3. In cases where dismissal of employees for managerial reasons must be done, it is desirable that the employer shall not only select those employees working in a division that will be abolished, but select those subject to the dismissals from throughout the company, as employees are transferable in personnel management. (Gungi 68207-1905)
4. If an employer excludes some employees in production from those subject to dismissal for managerial reasons, it shall be accepted as rational if they are skilled craftsmen and those possessing essential certificates of qualification to operate production lines. (Supreme Court 2000 du 8486)
5. Even though the only employees dismissed for managerial reasons were labor union members, this is justifiable if the employer consulted with the labor union in advance and dismissed them according to objective and fair criteria. (Seoul Appellate Court 2000 nu 6963)

III. Unfair criteria for selecting those subject to dismissal

1. Criteria that only considers company circumstances

- (1) In the selection of those subject to dismissal, if the employer considers educational background as the sole criteria for dismissal, and proposes voluntary resignation only to those with lower educational levels, and dismisses the employees concerned without making any effort to avoid dismissal, these dismissals would be unfair because they were not done according to the required procedures. (NLRC 2004 buhae 78)
- (2) When dismissing temporary employees for managerial reasons, a local government did not make an effort to avoid dismissal, and dismissed the temporary employees according to age, from the oldest, without determining rational and fair criteria for dismissal. The local government also implemented the dismissal unilaterally,

without consultations with the employee representative, so this dismissal is an unfair dismissal, and an abuse of personnel rights. (NLRC 2001 buhae 192)

- (3) An employer selected employees subject to dismissal for managerial reasons on the basis of age as unilateral and subjective criteria. If the employer did not consider the degree of disadvantages affecting the employees concerned, the necessity of social protection, contributions made or employee attitudes during their service period, etc., this dismissal cannot be seen as rational and fair criteria for dismissal. (Seoul Administrative Court 2001 gu 26794)
- (4) It is hard to accept as fair dismissal for managerial reasons if the employer selected those subject to dismissal only on the basis of disciplinary punishment received by certain employees. Even though such criteria were accepted as rational, most disciplinary punishment of the employees concerned cannot be accepted as justifiable in view of their procedures, timing, and purpose. (Seoul Appellate Court 2002 nu 11860)
- (5) In one case, a company unilaterally decided that length of employment would be the main criteria in choosing employees to dismiss for managerial reasons. In other words, those who had served the company longer, although they had contributed more than other workers to the company, were still more likely to be dismissed for managerial reasons. Other things, like work attitude, were also considered, but they were not weighted as heavily against an employee in determining dismissal, as length of employment. Therefore, this selection cannot be accepted as rational and fair. (Seoul Administrative Court 99 gu 34600)
- (6) If the employer did not have prior consultations with the employee representative regarding criteria for dismissal for managerial reasons, and the possible methods for avoiding dismissal, dismissal for managerial reasons is illegal since correct procedures were not followed in choosing objective and socially justifiable rationale. (Seoul Supreme Court 99 nu 4930)

2. Criteria deficient in rationality and fairness

- (1) In cases where the employer selected as subject to dismissal for managerial reasons, those employees who did not agree to transfer and also did not agree to

voluntary resignation, this selection cannot be justifiable based upon rational criteria.

(Seoul Administrative Court 2007 Guhap 16103)

An employer notified one of his employees several times of an intention to dismiss him for managerial reasons because of his constant refusal to transfer to another department. So, after consulting with the labor union, the employer dismissed the employee for managerial reasons particularly because he did not agree on a transfer and also did not respond to suggestions to voluntarily resign. This selection for dismissal cannot be accepted as being done according to objective and rational criteria. Even though the employer completed consultation with the labor union, this selection for dismissal violated the principle of the Labor Standards Act and cannot be accepted.

- (2) Even though requirements for dismissal for managerial reasons were satisfied, choosing those to be dismissed for managerial reasons by vote, cannot be admitted as justifiable. (Seoul Adm. Court 99 gu 30967)

An employer selected those employees subject to dismissal only by means of a vote by committee members, without any objective evaluation materials or evaluation criteria. This dismissal for managerial reasons could be affected by individual relationships more than by company criteria, so there is a great possibility to distort the result.

- (3) An employer dismissed an employee who refused to accept an honorary resignation recommended by the employer, even though his dismissal wouldn't have any effect in reducing labor costs. This cannot be accepted as a socially fair and objective dismissal for managerial reasons. (Seoul Appellate Court 97 gu 47660)

As one method to avoid dismissal, the employer proposed honorary resignation and a position transfer to short-term contract employment to an employee who was going to retire from the company in 9 months. As the employer would not be able to reduce his labor costs by dismissing this employee, this dismissal, because the employee would not voluntarily resign, cannot be accepted as fair or objective.

- (4) Even though collective bargaining had stipulated the order of and method by which employees were subject to dismissal, if the employer selected the employees subject to dismissal simply at his own discretion, this selection was not made in a justifiable way, but is a violation of rational and fair criteria. (Seoul Appellate Court 2003 nu

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