Korean labor law: Disappointing Decision on the Dismissal of a Foreign Teacher

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I. Summary

For this labor attorney, who has been engaged mainly with the labor cases of expatriates, this was the most disappointing dismissal case where an employee was unable to receive legal remedy.

This case is about an Australian English teacher who was fired by “C” Language Institute (hereinafter referred to as “the Institute”) one week after his arrival to Korea. Before coming, strict employment procedures were followed in hiring him to become an English teacher in Korea. The reason for dismissal was his failure to pass a required one-week training course before being assigned to the Institute. This institute started the training course with eleven new foreign instructors, assigning them to one of three different training levels: beginner, intermediate, and advanced. The only teacher the Institute assigned to the advanced level of training was this employee. This same employee completed the intermediate level, but was not able to pass the advanced level, so the employer dismissed him for failing.

To review the justification given for dismissal in this case, I would like to explain the claims of the employee and the employer, as well as the judgment of the Labor Relations Commission.

The details of this case are as follows:

2019

April 10	The employee applied for a position as an English instructor, as advertised on the internet, and was selected after two weeks of hiring procedures by an Australian field recruiter.
April 27	The employee signed a preliminary employment contract, an ‘Offer of Employment’ with the employer.
May	After 5 weeks, a criminal record check certificate was issued to the employee, who bore the expense.
June 19	The employee signed an employment contract with the employer.
July 10	An E-2 visa was issued to the employee by a Korean Embassy in Australia.
July 16	After his flight to Korea (which he paid for), the employee moved into a hotel provided by the Institute.

July 20 ~ 24	The employee attended the training course, but was dismissed for not passing.
August 6	The employee filed for remedy to the Labor Relations Commission.
October 16	The application for remedy was rejected.
October 26	The employee appealed for remedy to the National Labor Relations Commission.
2020	
January 10	This application was also rejected.

II. The Institute's Claim

"This institute has a firm desire to provide a better education to students than any other institute. Accordingly, we have focused on the quality of foreign teachers, unlike other institutes, and have been selecting foreign teachers by following stricter hiring criteria.

First, we collect applications from native English-speaking applicants, review their resumes and essays, and then interview those applicants. In these telephone interviews, we are evaluating them the same as we would in face-to-face interviews, to see whether they have the desired character and ideology, and whether they are capable teachers. Upon selection after this process, the applicant comes to sign an 'Offer of Employment', in which the applicant agrees to employment by the Institute, and the contents of the training. Soon after, the applicant signs an employment contract and sends the related documents to the Institute, and we then submit these documents to the Immigration Office and receive a visa issuance number. When an applicant receives this visa issuance number, he or she goes through an interview at the Korean Embassy and receives the relevant working visa. The applicant then comes to Korea, has a physical checkup, and is assigned to a position after completion of training.

This employee had a telephone interview and agreed to the 'Offer of Employment'. He entered Korea on July 14 and started the five-day training course at the main institute on July 20, completing the course on July 24. However, the employee did not pass the training course test (Mock-up). The trainer explained to the employee that he could take the Mock-up test again and be assigned to the workplace as scheduled, but the employee refused. As the employee had sufficient ability and potential to be a good teacher, the trainer tried again to persuade him to re-take the Mock-up test, but

the employee again refused. In the end, the employee was dismissed for failing the training course.

III. The Employee's Claim

The employee signed an employment contract with the Institute. He received a visa from the Korean Embassy in Australia based upon his employment contract and came to Korea. The Institute claimed, "this employment contract will become effective when the employee completes the training," but this simply means that the employee shall take the training course before being assigned a position, not that an employment contract has not been made. If the employee had known that the employment contract he had signed while in Australia was in fact a conditional contract and would only become effective upon passing the training course, he would never have come to Korea. The employee was under the impression that the conditional article of the employment contract simply meant that he had to complete the training course. The Institute never informed the employee that his employment would be decided based upon his passing or failing the training course.

The employee had previously graduated from a university in Australia and obtained a TESOL (Teachers of English to Speakers of Other Languages) certificate, and also had one year of English-teaching experience in the Czech Republic. The class that the employee was supposed to teach in the Mock-up test was not an English language class designed for students to learn a foreign language, but a creative thinking class, which is a difficult subject even for native English instructors. The text book, "Reading for Thinking," used in this advanced level is a text book commonly used by college professors for university students in native English-speaking countries.

The Institute had dismissed one American English instructor with the same contract containing the same content, in June 2019, two months before this employee's dismissal, for the same reason. This American instructor told us that if he had known this training course would affect whether the employer hired him or not, he would not have come to Korea either. This instructor had also borne all expenses incurred in the process of coming to Korea, such as airfare, hotel fees, etc. He had to return to America, suffering not only financial damage, but also tremendous disadvantages from lost time, effort, and opportunities. When the Australian employee shared his situation on a popular internet site to ask for help from anyone who had also been dismissed by the Institute, this American instructor related his very unfair dismissal from the Institute.

Judging from this information, if the hiring process of the Institute is not judged to be unfair, the Institute will continue these types of dismissals.

IV. Judgment by the Labor Relations Commission

The main issues to be decided upon in this case are, first; whether an employment contract between employee and employer existed, and second; whether the termination of employment was a resignation or dismissal, and if this termination was dismissal, whether there is a justification for dismissal (including the procedures for dismissal).

The Supreme Court has ruled in the past, “What is required to establish that a contract exists between two parties, is objective consent between the two parties on several expressed intentions. What is required to establish objective consent is agreement on all issues expressed in the intentions of the two parties. If the two parties express their intention to establish a contract based upon a certain important thing, there shall be mutual agreement on this in order to make the contract legitimate and effective.” (Supreme Court Ruling of April 11, 2003: 2001da53059)

In the process of issuing permission to enter Korea for the purpose of engaging in foreign language teaching in a foreign language institute, the Immigration Office shall receive an employment contract from the employer so as to verify work permission, working period and workplace stipulated in a ‘certificate of permission to enter’ according to the Enforcement Ordinance of the Immigration Control Law. The employment contract contained a conditional agreement stating that when the employee received a certificate for completing the training course, this contract would come into effect. The employee passed the intermediate level section of the training course at the training center, but failed to pass the advanced level section. In consideration of all factors mentioned, we cannot find that an employment contract was actually established or in effect, and so the employee’s claim of unfair dismissal must be rejected.

V. Conclusion and Criticism of the Judgment of the Labor Relations Commission

The Labor Relations Commission determined this dismissal to be justifiable because the employee did not complete the training course successfully, which was the condition for the employment contract to come into effect. However, the employee’s

perspective is that this dismissal was unfair for the following reasons: 1) of the 11 trainees in the training course, only this employee was assigned to the advanced level; 2) this employee had never been informed that passing or failing the training course would determine whether or not he would be given employment. He was under the impression that it was simply necessary to complete the training; 3) the lessons that he prepared for in the training were not for regular English class, but a critical thinking class used at the university level in native English-speaking countries. I respect the Labor Relations Commission's judgment as they are making decisions based upon the law and related judicial rulings, and applying the same criteria as they would for Koreans. Unfortunately, their decision has not taken into consideration the different circumstances surrounding foreign instructors and their fulfillment of hiring procedures. So, I'm disappointed that this judgment will have set a negative precedent by leaving room for employers to take advantage of a contractual loophole in the future.