

Precedents Following the Supreme Court's Unanimous Decision on Ordinary Wages

Bongsoo Jung / Korean Labor Attorney at KangNam Labor Law Firm

I. Introduction

Ordinary wages refer to predetermined compensation agreed upon for the hours an employee is contractually obligated to work. It is mandated that the employment contract explicitly specify both ordinary wages and contractual working hours (Article 17 of the Labor Standards Act). Ordinary wages serve as the basis for calculating additional compensation for overtime work, holiday work, night work, and similar categories. To maintain ordinary wages at the lowest possible level, employers have introduced a system of annual regular bonuses. Consequently, the wage structure in our country consisted of 50% ordinary wages and 50% non-ordinary wages. The groundbreaking decision that significantly rectified this distorted wage structure was a unanimous Supreme Court ruling in 2013. The core meaning of this decision can be summarized into two key points. Firstly, the decision established that regular bonuses paid at certain intervals exceeding one month as remuneration for work are considered part of ordinary wages. Secondly, any consensus reached among employers and employees to exclude certain wages, falling under ordinary wages according to the Labor Standards Act, from ordinary wages, is invalid.¹

The Supreme Court's 2013 decision regarding ordinary wages has provided clear guidelines for the components and payment methods of ordinary wages. Nevertheless, disputes have arisen in practical application. Firstly, while it was ruled that regular bonuses paid on specific dates and only to incumbent employees (not those who resigned before those specific payment dates) and not settled on a daily basis upon resignation should not be considered ordinary wages, subsequent judgments contradict this. Secondly, there is ambiguity concerning whether retroactively claiming an allowance calculated as a new ordinary wage when a fixed bonus is included in ordinary wages contradicts the principle of good faith.

In connection with these issues, I would like to examine the criteria for judgments related to ordinary wages only paid to incumbent employees and delve into specific application of the good faith principle concerning retroactive claims for allowances.

II. Criteria for Determining Payment only for Incumbent Employees

¹ Supreme Court ruling on Dec. 18, 2013, 2012Da89399 *En Banc* Unanimous Decision.

The 2013 Supreme Court decision on ordinary wages established that wages designated to be paid only to incumbent employees at specific points in time, regardless of whether they have actually worked their regular hours, become eligibility criteria for receiving wages at those particular points in time. Such wages are generally withheld from individuals who were previously engaged in labor but were not in active service at those specific points in time, while individuals in active service at those specific points in time typically receive them without regard to the nature of their previous work. In cases where wages are paid under such conditions, it is difficult to consider them as compensation for contractual working hours worked. Even if an employee provides labor, if they resign before the arrival of that specific point in time, they will not receive the corresponding wages. Therefore, whether the payment condition will be met at the time when the employee provides labor is uncertain, suggesting little connection to work already provided.

Hence, the courts have determined that such payments only to incumbent employees are not considered ordinary wages. However, it was noted that if bonuses are paid in proportion to the number of days worked even if an employee resigns before a specific point in time, there is no substantial difference from wages paid for each day worked. Therefore, in cases where wages are paid proportionally to the number of days worked, the absence of connection to work already provided is not considered a factor.

Normally, regarding regular bonuses, if an employee resigns before the wage payment date, a daily settlement is calculated and paid. However, holiday bonuses or summer vacation allowances, for instance, are often intended to be paid on specific dates, and, therefore, they are not paid if an employee resigns before those dates. Thus, the criteria for payments only to incumbent employees should be limited to such special bonuses.

Nevertheless, precedents have applied the incumbent employee criteria even to regular bonuses and have not recognized them as ordinary wages if the employee is no longer actively employed at the time of payment. Fortunately, recent precedents have ruled that the incumbent employee criteria do not have any bearing on the determination of ordinary wages for regular bonuses. In other words, the argument that regular bonuses, which are regularly, uniformly, and consistently paid as remuneration for labor, should be excluded from ordinary wages solely based on the incumbent employee criterion at the time of resignation is considered erroneous. Several such cases are pending before the Supreme Court's decisions, awaiting a final decision.² Consequently, there is an urgent need for clear guidelines at this juncture.

² Seoul High Court Decision 2016na2087702 is awaiting a Supreme Court (2019da244942); Busan High Court Decision 2018na55282 is awaiting a Supreme Court (2019다289525) decision.

III. Precedents Recognized as Ordinary Wages for Regular Bonuses Despite Payment only to Incumbent Employees

1. Supreme Court Decision dated November 10, 2022, Case No. 2022da252578³

In this case, the defendant stipulated in salary regulations that regular bonuses would be paid "only to those who remain employed at the time of payment." Accordingly, they paid regular bonuses to those who were still employed at the time of payment. The regular bonuses, paid regularly and continuously to employees at a rate of 600% annually, can be considered as definitively paid as long as the employees provide regular labor. Hence, it is reasonable to categorize them as ordinary wages, which are fixed, uniform, and consistently paid. Additionally, considering the significant proportion that these regular bonuses occupy of total wages, including factors such as the amount, payment method, and payment frequency, it becomes evident that these regular bonuses are not merely a form of compound fringe benefits, indemnification, or gratuitous compensation, nor are they remuneration for specific periods of service. Instead, from the employee's perspective, they can be regarded as wages that are expected to be received as a fundamental and definitive compensation, akin to the base salary, as long as the employee provides regular labor.

2. Seoul High Court Decision dated December 2, 2020, Case No. 2016na2032917

In this case, the annual amount of the bonus was determined to be 800% of the monthly base salary, and such an amount was firmly established as remuneration for annual regular labor. Therefore, this bonus can be considered a fixed wage that is granted to employees simply for providing annual regular labor, irrespective of the achievement of additional conditions. Furthermore, the "incumbent employee criterion" in this case, even if it results in unpaid or excess amounts when compared to calculations made for employees who provided regular labor for a full year but resigned prematurely, is merely a matter of calculation for the sake of convenience. It does not negate the nature of this bonus as a fixed wage. In particular, even when assessing connection to labor provided, the exceptional circumstance of "resignation," which occurs only once during the employment period, cannot be used as a basis for negating such connection.

3. Seoul High Court Decision dated December 18, 2018, Case No. 2017na2025282 (Transferred to the Supreme Court's Unanimous Decision Process (2019da204876))⁴

³ Supreme Court Decision on November 10, 2022, Case No. 2022da252578; Court of Original Jurisdiction: Seoul High Court Decision on May 4, 2022, Case No. 2019na2037630. Wage Claim Case by the Financial Supervisory Service.

⁴ Seoul High Court Decision on December 18, 2018, Case No. 2017na2025282: Wage Claim Lawsuit by SeAH Besteel

Withholding payment for labor already provided, even when an employer unilaterally adds an incumbent employee condition to regular bonuses and an employee resigns before the payment date, constitutes a unilateral withholding of accrued wages and cannot be considered valid. Furthermore, even in cases where the incumbent employee condition is stipulated in valid employment rules or individual employment contracts, withholding payment for the portion corresponding to the labor already provided is invalid as it amounts to preemptively waiving the wages that should be received as compensation for labor that has already been provided.

4. Seoul High Court Decision dated May 14, 2019, Case No. 2016na2087702
(Transferred to the Supreme Court Grand Bench (2019da244942))⁵

Regular fixed payments of a fixed amount continuously and periodically paid constitute compensation for labor, even if the payment period is on a multi-month basis: it is merely an accumulation of compensation for labor over those months. Even if an employee resigns before the regular fixed payment date, they should naturally be entitled to receive the payment corresponding to the labor they have actually provided. However, not paying basic performance bonuses and evaluation performance bonuses based on the "incumbent employee criterion" is difficult to validate as it unilaterally withholds payment for labor already provided. This practice also makes it difficult to recognize the effectiveness of preemptively waiving accrued wages. In this particular case, given that 1) basic performance bonuses and evaluation performance bonuses were paid alternately on a bi-monthly basis, 2) the amount exceeded 50% of the monthly base salary, and 3) they were paid regardless of evaluation results, from the employee's perspective, these payments were considered as fundamental and definitive compensation, provided they fulfilled their labor obligations.

IV. Precedents Where Regular Bonuses Paid only to Incumbent Employees Were Not Recognized as Ordinary Wages

1. Supreme Court Decision dated April 9, 2020, Case No. 2017da4638

The defendant annually paid the plaintiffs an 800% bonus, consisting of 100% of their ordinary wages in even-numbered months and during major holidays such as New Year's and Chuseok. The salary regulations specified that "bonuses shall be paid only to those who remain employed at the time of payment," and in practice, only those employees still employed at the time of payment received bonuses. The defendant calculated ordinary

⁵ Seoul High Court Decision on May 14, 2019, Case No. 2016na2087702: Wage Claim Lawsuit by the Korea Technology Finance Corporation (KTFC).

wages based on the collective agreement, employment rules, etc., excluding fixed bonuses, and paid statutory allowances such as overtime pay, holiday pay, special pay for extra hours, and annual leave pay, among others, on the basis of the agreed-upon ordinary wages. The defendant paid fixed bonuses only to employees still employed at the time of wage payment and did not pay bonuses to those who resigned before the payment date. Therefore, since this bonus was paid only to employees still employed at a specific point in time, it cannot be considered fixed.

2. Supreme Court Decision dated September 21, 2017, Case No. 2016da15150 (Hyundai Steel) ⁶

The collective agreement in this case stipulated that "the company shall pay an annual bonus of 750% to all employees still employed at the time the bonus is paid." In practice, bonuses were paid only to employees whose employment relations had not terminated at the time of the bonus payment date, and no bonuses were paid to employees who resigned before that date. Consequently, it can be acknowledged that the defendant was required to pay the bonuses only to employees that were still employed by the bonus payment date, making it uncertain whether the payment condition would be met at the time when the employee provides labor. Therefore, there is no clear connection to labor provided and cannot be considered ordinary wages.

3. Supreme Court Decision dated September 26, 2017, Case No. 2017da232020 (ThyssenKrupp Elevator) ⁷

The defendant company had been paying employees an 800% bonus, totaling 100% of their base salary and allowances for even-numbered months, as well as on the Chuseok and New Year holidays, in accordance with a collective agreement. However, when calculating ordinary wages, the defendant excluded this bonus. The defendant company did not pay this bonus to employees who were not employed at the time the bonus was paid, as employees were required to remain employed on the payment date. Since this bonus was conditional on the employee still being employed on the payment date, it cannot be considered part of ordinary wages due to the absence of both compensation for regular labor and connection to labor provided.

⁶ Busan High Court Decision on February 17, 2016, Case No. 2015na3044 (Appeal); Supreme Court Decision on September 21, 2017, Case No. 2016da15150 (Appeal Dismissed) (Hyundai Steel).

⁷ Seoul Southern District Court Decision on April 27, 2017, Case No. 2016na60674 (Trial Court); Supreme Court Decision on September 26, 2017, Case No. 2017da232020 (ThyssenKrupp Elevator Korea Wage Claim Case).

V. Recognition and Non-recognition of Retroactive Claims for Allowances

1. Principles for determining good faith

The court's position is that in cases where a good faith agreement between labor and management violates the mandatory provisions of the Labor Standards Act, the agreement is of no effect. In other words, the standards set by the Labor Standards Act are minimum standards, so mandatory provisions should take precedence over good faith agreements. However, exception can be made when a company is facing financial difficulties. In such cases, good faith agreements may be recognized.

(1) Supreme Court Decision dated March 11, 2021, Case No. 2017da259513

When determining whether to apply good faith agreements over mandatory provisions that regulate labor relations, it is necessary to consider the legislative intent of the Labor Standards Act, which establish minimum standards for working conditions to ensure and improve the basic livelihood of workers. Moreover, companies are the ones responsible for running businesses, and the business situation can change frequently due to various economic and social factors both inside and outside the company. Rejecting additional statutory allowances claimed by employees based on the recalculation of ordinary wages, on the grounds that it would cause significant operational difficulties for the employer or jeopardize the company's existence, could effectively shift the business risks to employees. Therefore, the question of whether an employee's additional statutory allowance claim would cause significant operational difficulties for the employer or jeopardize the company's existence, in violation of good faith principles, should be assessed with caution and rigor.

(2) Supreme Court Decision dated December 16, 2021, Case No. 2016da7975

Whether an employee's additional statutory allowance claim based on the recalculation of ordinary wages causes significant operational difficulties for a company or jeopardizes its existence should be determined by considering multiple factors such as the size of the additional statutory allowance, the real wage increase resulting from payment of the additional statutory allowance, the rate of increase in ordinary wages, the company's net profit and its fluctuation, the available funds, total labor costs, revenue, the company's continuity and profitability, and overall trends in the industry to which the company belongs. Even if a company is temporarily facing operational difficulties, if the employer made reasonable and objective predictions regarding its operations, and there is a possibility of overcoming such operational difficulties in the future, good faith agreements should not be easily rejected to deny employees' claims for additional statutory allowances.

2. Cases recognizing good faith agreements

(1) Supreme Court Decision dated July 9, 2020, Case No. 2015da71917 (GM Korea)

In this case, the regular year-end bonus amounted to 700% of the monthly ordinary wages, and considering the overtime work routinely performed by production workers, the statutory allowances that the defendant would have to additionally bear based on the recalculation of wages significantly exceeded the range of statutory allowances used as reference during wage negotiations. The defendant's accumulated net profit was negative, reaching around minus KRW 6 trillion from 2008 to 2010 and minus KRW 8 trillion from 2008 to 2014. The defendant's debt ratio from 2008 to 2014 was significantly higher than that of similar companies, and the current ratio did not match that of similar companies. Additionally, the amount of borrowed funds exceeded KRW 2 trillion as of the end of 2014. Considering these circumstances, the plaintiff's claim for additional statutory allowances for the regular year-end bonus, calculated by including it as part of ordinary wages, would result in the pursuit of unexpected benefits far exceeding the agreed-upon wage level between labor and management. It would also impose an unforeseen financial burden on the defendant, potentially causing significant operational difficulties or endangering the defendant's existence. Therefore, the plaintiff's claim could not be allowed, as it would violate the principle of good faith.

(2) Supreme Court Decision dated July 9, 2020, Case No. 2017da7170 (SsangYong Motor)

If the year-end bonus were included in ordinary wages, the estimated additional amount that the defendant would have to pay to functional employees each year from 2010 to 2012 would be around KRW 20 billion. The defendant had been incurring significant losses since 2008, and around 2009, the defendant's very existence was threatened. Starting in 2009, labor and management (the defendant) agreed to various cost-cutting measures, such as freezing the basic wages of the defendant's employees, reducing bonuses, and not paying certain welfare benefits, in order to overcome the defendant's crisis. Considering these circumstances, if the plaintiff's claim for statutory allowances related to bonuses and retirement payments were granted, the plaintiffs would gain unexpected benefits that would exceed the originally agreed-upon wage level, while the defendant would face unforeseen financial expenses, potentially leading to significant operational difficulties. Therefore, the plaintiffs' claim was in violation of the principle of good faith.

3. Cases where an agreement was not recognized as being in good faith

(1) Supreme Court Decision dated March 11, 2021, Case No. 2017da259513 (Kumho Tire)

If the bonuses in this case were included in ordinary wages, the ordinary wages of the

defendant's employees could significantly increase compared to the agreed-upon ordinary wages. Consequently, the total wage amount that the defendant would have to pay would also increase substantially, resulting in a new and unforeseen financial burden. However, when considering the size and trends of the defendant's annual revenue, gross profit, net profit, total debt, and total equity, which far exceed the KRW 2 trillion being maintained for the additional statutory allowances that were recognized in this case, it cannot be considered that these circumstances would directly and substantially cause significant operational difficulties or endanger the existence of the defendant.

(2) Supreme Court Decision dated December 16, 2021, Case No. 2016da7975 (Hyundai Heavy Industries)

The deterioration in the financial situation as described cannot be regarded as a circumstance that the defendant could not have foreseen. Risks and disadvantages due to fluctuations in domestic and international economic conditions are within the range that companies, like the defendant, which have been engaged in large-scale business for a long time, can anticipate or bear. Given the size of the defendant's business, this can be seen as a temporary difficulty that could be overcome.

(3) Supreme Court Decision dated April 23, 2019, Case Nos. 2016da37167 and 37174 (Hanjin Heavy Industries)

Examining the following circumstances in light of legal principles, it cannot be concluded that paying additional statutory allowances by including regular bonuses in ordinary wages would directly and substantially cause significant operational difficulties for the defendant or endanger the existence of its business.

① The additional statutory allowances that the defendant would bear due to the plaintiffs' claims amounted to approximately KRW 500 million. The defendant's annual revenue remained stable at around KRW 5 trillion to KRW 6 trillion without significant fluctuation. The size of these additional statutory allowances accounted for only about 0.1% of the defendant's annual revenue.

② The defendant's cash assets held annually far exceeded the amount required to cover the additional statutory allowances by approximately 160 times.

③ The defendant had no significant difficulties in securing the funds needed to cover the additional statutory allowances, given the smooth cash inflow from its business operations.

VI. Conclusion

The Supreme Court's unanimous decision in 2013 regarding ordinary wages can be considered a groundbreaking event in South Korea's wage structure and payment

methods. It simplified the components of wages that were previously complex. Through this, it clarified that wages are compensation for labor and played a substantial role in reducing actual working hours. Despite its significant role, some companies continue to maintain the existing fixed bonus system by setting criteria for employee resignation dates, even though fixed bonuses should technically be included as part of the basic salary. This has led to the persistence of distorted wage systems. It is hoped that a prompt and clear judgment from the Supreme Court on the criteria for employees will occur. Additionally, while the application of the principle of good faith to retroactive claims related to the existing method of calculating ordinary wages is recognized as an exception, disputes still arise in practice, indicating the need for clear interpretations through legal precedents.