

Dismissal of an Expatriate due to Disputes with a Korean Branch Manager

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I. Summary

The applicant, a female Singaporean, entered the communication facility installation company in Singapore where she received required training, and then she was assigned to its Korean Branch, Company A. It is at this time of employment where the applicant was dismissed due to disputes with the Korean branch manager (president). Shortly before the dismissal, the head office in Singapore had already given the applicant a three months advance notice of termination in accordance with her labor contract (termination of contract), because the head office was not satisfied with her work performance. The applicant filed a remedy application of unfair dismissal via her labor attorney arguing that she had been working diligently and without fault or negligence. There were two main controversial issues: The first was whether the three months advance notice of dismissal is justifiable under the Korean Labor Standards Act. The second was whether the dismissal notice from the transferor company could be effective at the transferee company.

II. Background Information

1. The applicant, a Singaporean, was hired in April 2014 by the Singapore head office where she had received the necessary training. In August 2014, she was assigned to its Korean Branch, Company A, where she signed a new labor contract as manager of general affairs and accounting.
2. The sales manager of the head office demanded that the applicant should sign a falsified document stating that 48 million won was used to pay for the moving expenses of the applicant and another expatriate. As the applicant knew that the amount was the labor cost used for illegally employed short-term foreign workers, she refused to sign the falsified document. After this incident, her relationship with the head office deteriorated.
3. Meanwhile, the Company A decided to close its business in March 2016. Because the company was reported to the authorities by a competing company and fined due to its doing business without government permission, it could not continue its sales any longer. At the same time, the Singapore head office established a new business entity called Company B in March 2016 and performed the operations of

the existing Company A, taking over the majority of employees belonging to Company A.

4. On March 16, 2016, the Singapore head office notified the applicant of her dismissal with three months advance notice. Nevertheless, she continued to perform her same duties as a manager of general affairs and accounting for the new establishment, Company B though her original contract was signed with Company A,
5. The branch manager of Company B instructed the applicant in March 2016 to send an email to existing customers of Company A stating that they could remit service charges to Company A's bank account. The applicant suggested the implementation should be done after obtaining the permission from the head office explaining that this could lead to a fine equivalent to 5 million won because of the illegality of the transaction. However, the branch manager of Company B insisted that she should inform the customers without consideration of the law. The applicant thereby notified the head office in Singapore of the contents of the letter and the risk. The Korean branch manager became very angry and said to her, "You are not authorized to communicate directly with the head office. Are you exceeding your authority to become a Korean branch manager?" One week after this incident, the branch manager confirmed that the applicant would be terminated on June 14, 2016, in accordance with the previous letter of her dismissal provided to her on March 16, 2016. She was then dismissed.

III. Company's Claim

1. The applicant had caused complications by carrying out duties beyond her authorities. Since she joined Company A in 2014, she created problems by reporting to the head office more than she had to given that her duties were limited to being a manager of general affairs and accounting.
2. The termination of the contract is implemented legitimately in accordance with her labor contract. Article 9 (Termination of the Contract) of the labor contract stipulates, "Either party can terminate the contract by informing termination in writing three months in advance". The company informed the applicant of the termination in writing on March 15, 2016, three months in advance according to the required procedure. The advance notice period of dismissal under the labor contract was longer than the one month advance period stipulated by the Labor Standards Act.

The company found it necessary to terminate the labor contract based upon the relevant article of the labor contract as the company decided to close its business.

3. The termination of the applicant's labor contract was processed by Company A which was going through a liquidation process. As a result, the establishment and termination of the applicant's labor contract was executed by Company A, which is a different business entity from Company B. Company A conducted procedures for dismissal of the applicant because she was regarded as unqualified for the position at the time of company's liquidation. Therefore, the justification for dismissal should be analyzed solely under Article 23 (Restriction of Dismissal, etc.) of the Labor Standards Act, but rather Article 24 (dismissal for managerial reason) of the LSA should also be reviewed.

IV. Employee's Claim

1. Refuting reason for termination according to the labor contract

The company claimed that it had terminated the contract by giving three months advance notice as stipulated in the labor contract. The relevant article stipulates, "Either party can terminate the contract by informing termination in writing three months in advance". However, Article 23 (1) of the Labor Standards Act regulates, "An employer shall not dismiss a work without justifiable cause." Article 15 of the LSA also stipulates, "a labor contract which has established working conditions which do not meet the standards as prescribed by this Labor Standard Act shall be null and void to that extent. Those parts which are null and void shall be governed by the standards as prescribed by the Labor Standards Act." Therefore, the dismissal provision of the labor contract that violated the Labor Standards Act is null and void, which means the company's dismissal cannot be effective because there was no justifiable cause for dismissal.

2. Refuting the dismissal due to termination of business

The company insisted that the notification to terminate the contract was justifiable because the dismissal was for managerial reasons at the time of Company A's liquidation. However, Company B took over and implemented various business projects conducted by Company A. The majority of employees from Company A terminated their employment and continued working for Company B through re-employment, and the applicant was also promised re-employment. Accordingly, the dismissal of the applicant cannot be a dismissal notification from Company A, but a

dismissal by the president (branch manager) of Company B after her employment was handed over Company B.

Concept of Business Transfer: the business transfer shall take over the employment of employees. (Mar 29, 2002, Supreme Court 2000 do 8448)

A. Business transfer means the transfer of the group organized by certain purposes: namely, the transfer of a group composed of people and property retaining their identity. Partial business transfer is still possible. When the business transfer is implemented, employment of the employees concerned shall be handed over inclusively to the transferee in principle. Although retaining the identity of the business is a matter of fact to be estimated by the generally accepted idea, whether a transfer contract is accepted as a business transfer shall be decided not by how much property was transferred, but by whether the transferred business organization was totally or partially retained. For example, if all properties are transferred after an organization is liquidated, it is not a business transfer. On the other hand, if a business facility retaining its partial organization is handed over and if the transferred portion retains its previous role, this is a business transfer.

B. If the business is transferred, the labor relation between the transferor (employer) and the employee is transferred inclusively to the transferee (new employer) in principle, unless there is special condition imposed in the transfer agreement. If there is a special condition between both parties in the transfer to exclude some employees, those employees excluded will not be transferred. In this case, the special condition shall be justifiable under Article 23 (1) of the Labor Standards Act, because it is equivalent to actual dismissal. Hence, it is not justifiable to dismiss an employee on account of a business transfer.

3. Reason for unfair dismissal

To be determined as a justifiable dismissal, the disciplinary dismissal shall have justifiable reason. In reviewing actual facts of the case, the dismissal by the President (Korean branch manager) for the reasons of the employee's contradictory behavior cannot be regarded as disciplinary dismissal. As dismissal is the severest discipline to sever the employee's means of living, the reason for dismissal and application of disciplinary type shall be justifiable. Therefore, a dismissal that lacks legitimacy shall be null and void and be regarded as abuse of the employer's managerial right.

V. Conclusion

As the company realized that the dismissal case seemed disadvantageous to the company, it accepted the Labor Relations Commission's suggestions for settlement: The company would provide compensation, equivalent to six months' wages excluding severance pay, and let the applicant to stay in the company's rental apartment for three (3) additional months from the date of her resignation. The applicant accepted the settlement and cancelled her application of unfair dismissal against the company.