Dismissal after Refusing to Resign

I. Introduction

Recommended resignation occurs when an employee resigns at an employer's suggestion. In most cases, the employees will refuse to resign, as they do not wish to face the uncertainty and difficulty of finding new employment. In cases where an the employee has been chosen as one of those subject to managerial dismissal and is advised to resign through a voluntary early retirement program due to a deterioration of business, the employees tend to accept recommended resignation as the best option. However, in situations that are not urgent, like when managerial dismissal is the alternative to resignation, or when there is no sufficient compensation offered, the employees tend to refuse. Therefore, there is a need for employers to prepare thoroughly (such as through the employee interviews) before recommending resignation to make it easier for the employees to agree to resign.

The labor case introduced below is an extreme case in which an employer's recommendation to resign was rejected by The employee, leading to dismissal and a long legal dispute that caused significant difficulties for both the employer and The Employee. I would like to use this case as an opportunity to look at the necessity of introducing an adequate system for recommended resignations.

II. Summary of the Case

The details of this case are as follows:

i) Company A (hereinafter referred to as "the Company") employs 150 persons and engages in trading and other business in Seoul.

ii) The Employee B (hereinafter referred to as " the Employee") related to this case began working for the Company as one of the managers of the General Affairs department in 2008, and then in 2009 she was promoted to general manager and was working as head of the General Affairs department in 2009.) The Company proposed a position in Overseas Purchasing, which the Employee accepted as she viewed it as an opportunity to move to Hong Kong in the near future, a place she felt would be good for her children's education. Her superior also stated that she could return to General Affairs in 6 months if she felt Overseas Purchasing did not fit. However, the Employee's superior left the Company three months later, and the head of General Affairs position was filled through internal promotion.

iii) In the early part of 2012 (after 6 months in Overseas Purchasing for the Employee), the Employee felt that Overseas Purchasing did not offer employment security and requested to return to General Affairs. However, as the head position in General Affairs had been filled, the Company turned her down. As the Employee continued to press for a transfer out of Overseas Purchasing, the Company began to reduce her duties. In July 2012, the Company recommended she resign with 6 months' salary as compensation as there was still no position open in General Affairs.

iv) The Company suspended the Employee with pay from July to September 2012 after the Employee rejected the resignation offer. During this period, the Employee applied to the Company for grievance handling, but the Company responded that their investigation

found no violation of personnel management requirements. The Employee submitted a petition to the Ministry of Labor claiming that the Company had not established a Labor-Management Council or a Grievance Handling Committee. When the labor inspector audited the Company workplace, he confirmed that the Company had violated labor law and issued an order for correction to the Company.

v) On September 3, 2012, the Company assigned the Employee to a new position as the person responsible for the Accident Recovery Center. However, there was no detailed job description for this new position, and the offered employment contract was for a lower employment rank (from general manager to manager) and a lower annual salary (from 100 million won to 70 million won). The Employee rejected the Company's offer as unfavorable working conditions, and filed an application for remedy with the Labor Relations Commission (LRC) for unfair waiting and unfair transfer conditions. The LRC rejected the Employee's application on the grounds that suspension with pay and the subsequent department transfer could be somewhat necessary in operation of the business and the absence of financial disadvantage to the Employee. The National Labor Relations Commission (NLRC) also rejected her appeal for the same reasons.

vi) March to April 2013: The Company suspended the Employee with pay again for two months, after which it held a Disciplinary Action Committee hearing and dismissed the Employee for the legal disputes against the Company, revealing company secrets, and repeatedly recording conversations with her superiors. However, once the Employee filed an application for remedy for unfair dismissal with the LRC, the Company could not prove justification for this dismissal as it had been able to after the Employee's first filing. It agreed to settle with her for a considerable amount.

III. The View from Both Parties, Main Issues & Resolution

When reviewing the situations of the Employee and the employer, it becomes obvious that some resolution was badly needed. A review of the LRC's judgments and the resolution processes are in order.

1. The view from both sides

(1) The Employee's situation: The employer had taken strong action to push the Employee to resign: 1) The Employee's duties were gradually decreased without justifiable reason several months before the Company first recommended she resign; 2) When the Employee refused to resign, the Company suspended her with pay, claiming they did not have any work for her. During this suspended period with pay, the personnel team suggested to her several times to resign; 3) When she came back to work, the Company proposed a temporary position with lower employment rank and a lower annual salary. When the Employee filed with the LRC for remedy for unfair personnel transfer, the Company assigned the Employee to an isolated office, cut her off the Company email network and intranet, and did not provide her with any office items except for a personal computer. She was assigned translation duties for most of her working hours, all while being pushed continuously to resign. 4) When the Employee's application was rejected, the Company dismissed her.

(2) The Company's situation: The Employee had voluntarily transferred to Overseas Purchasing, and although showed intention to return to the position of General Affairs head, the new head of General Affairs was already filled meaning there was nowhere for the Employee to return to. As the Company employed a maximum of 150 employees, it did not have vacant positions to fill out with idle manpower. In light of this, the Company had proposed a monetary bonus with sufficient compensation for resigning, but the Employee refused. The Company then suspended the Employee with pay while looking for a new position for her. The Accident Recovery Center was created to make a place for the Employee who was reinstated with a suitable employment rank and an adjusted annual salary. When the Employee filed an application for remedy with the LRC against the Company which was subsequently rejected, the Company decided to dismiss her for refusing to resign and instead showing aggression for filing applications against the Company.

2. Estimates of situation, and settlement

(1) Justification for suspension with pay: The Supreme Court[1] has ruled, "In order for the company to continue to maintain its activities, it is essential to re-assign or adjust the workforce. Personnel management orders including suspension from duties (with pay) are a right the employer has with the authority to manage the workforce. Accordingly, such a personnel management order shall be respected as the employer's discretionary right within necessary boundaries. This cannot be regarded as illegal except for cases where this violates the Labor Standards Act or amounts to an abuse of this right." Based upon this ruling, the Labor Relations Commission estimated that the Company's orders for the Employee to wait at home did not abuse its right to manage its personnel in consideration of the following: 1) There is insufficient evidence that the Company truly planned to allow the Employee to return as head of General Affairs from Overseas Purchasing; 2) It would have caused significant difficulty for the Employee to return as head of General Affairs because another the Employee was already assigned to that position; 3) The Company could suspend the Employee with pay without disadvantage if such an action is required; 4) There had been no lowering of the Employee's wages while suspended.[2]

(2) Justification for transfer:

The Supreme Court[3] has ruled, "Since transferring the employee is included in the employer's original authority to manage its workforce, such a personnel management order shall be respected as one of the employer's discretionary rights. This cannot be regarded as illegal except for cases where this violates the Labor Standards Act or amounts to an abuse of this right. Whether such a personnel transfer amounts to an abuse of this right or not shall be estimated after comparing and considering the necessity of the transfer for operation of the business and financial disadvantage to the employee. If an employee's financial disadvantage due to the personnel transfer is not unreasonable but is an "ordinary difficulty", this personnel order shall be deemed a justifiable right to manage

[1] Supreme Court ruling Aug 25, 2006, 2006 do 5151
[2] NLRC 2012 buhae 1216
[3] Supreme Court on October 11, 2007, 2007 do 11566

personnel, and not an abuse of that right." Based upon this ruling, the LRC estimated that the personnel transfer to the Accident Recovery Center was justifiable and not an abuse. In making this judgment, the LRC considered the following: 1) The Employee's work was not specified such that she was to deal only with general affairs; 2) There had been prior consultation regarding this personnel transfer between the employer and the Employee; 3) The Employee's previous position as head of General Affairs was occupied by another employee; 4) The Employee was assigned to a new position in the Accident Recovery Center as the position she wanted was not available; 5) There had been no real disadvantage to The Employee's wages after the Employee was assigned to this new position.[4]

3. Application for remedy for unfair dismissal

As soon as the Employee's appeal was rejected (after the rejection of her application for remedy for unfair waiting and unfair personnel transfer), the employer suspended the Employee with pay, and dismissed her after holding a Disciplinary Action Committee hearing. The reasons were 1) The Employee transferred many of her emails from the Company's email network, which were classified as confidential, to her personal email account; 2) The Employee filed a petition to the Ministry of Labor for non-existence of a grievance handling committee inside the Company without going through the Company's internal channels; 3) The Employee recorded conversations with her superiors several times, showing a hostile attitude. However, The Employee claimed to have taken these actions in the course of protecting herself after she filed an application for remedy against the Company, and it would be unreasonably difficult to prove her dismissal was justified. The Company decided to settle with the Employee for a considerable amount of money as compensation for her resignation.

V. Conclusion

The recommended resignation system can be the most desirable method for resolving labor disputes between the employer and the employee because the employment relations are terminated after mutual agreement. As labor laws in Korea do not allow employers to dismiss employees without a justifiable reason, companies use many methods to encourage the employees to agree to resign. In cases where there is the employee redundancy, if such an employee refuses to accept a resignation agreement, it becomes very difficult to resolve the situation. The dismissal case in this article may be the worst case that a company may face. As the recommended resignation system with monetary compensation is only rarely used for companies to resolve particular situations, the employees who are pressured to resign suddenly generally feel that the compensation offered is not equal to the uncertainty and urgency of getting another job for the long term. This has usually led to long labor disputes. Accordingly, in order to prepare for cases where an employer shall terminate employment unilaterally without any of the justifiable reasons required by the Labor Standards Act, companies can prevent labor disputes in the near future by introducing a mutually-agreed monetary compensation package in the Rules of Employment or the employment contract.

[4] NLRC 2012 buhae 1216

The Judgment Function of the Labor Relations Commission

1. Introduction

If an employer dismisses, lays off, suspends, or transfers a worker, or reduces wages, or takes other punitive actions against a worker without justifiable reason, the worker may apply to the Labor Relations Commission for remedy. In addition, any labor union whose rights have been infringed by unfair labor practices may also do so (Article 28 of the LSA, Article 28 of the Union Act).

As these labor disputes are dynamic, continuous, and collective, administrative agencies or courts cannot always be expected to handle them fairly, promptly, and reasonably, due to the inflexibility of bureaucracy and lack of experience of some agencies. The Labor Relations Commission is an independent administrative agency that has the authority and the ability to resolve labor disputes fairly, promptly, and in a way that is appropriate to the professional situation at hand. Here, I would like to review the quasi-judicial functions within the Labor Relations Commission, their procedures and operations, and the outcome of its decisions.

2. Organizational structure of the Labor Relations Commission and composition of its judgment function

The Labor Relations Commission has an organizational structure in response to local administration. The National Labor Relations Commission covers the entire country, while 13 district Labor Relations Commissions cover the capital, the metropolitan cities and the provinces. The National Labor Relations Commission can approve, cancel, or change the decisions of the district Labor Relations Commissions. The judicial arm of the Labor Relations Commission is composed of three public interest committee members (including a chairperson or one standing commissioner) and one worker and one employer committee member.

3. Procedures of the judgment function

The Labor Relations Commission reviews applications and admits, rejects or cancels labor cases, determines the eligibility of the parties involved, investigates, conducts interviews and holds judgment hearings within 60 days after the initial application date.

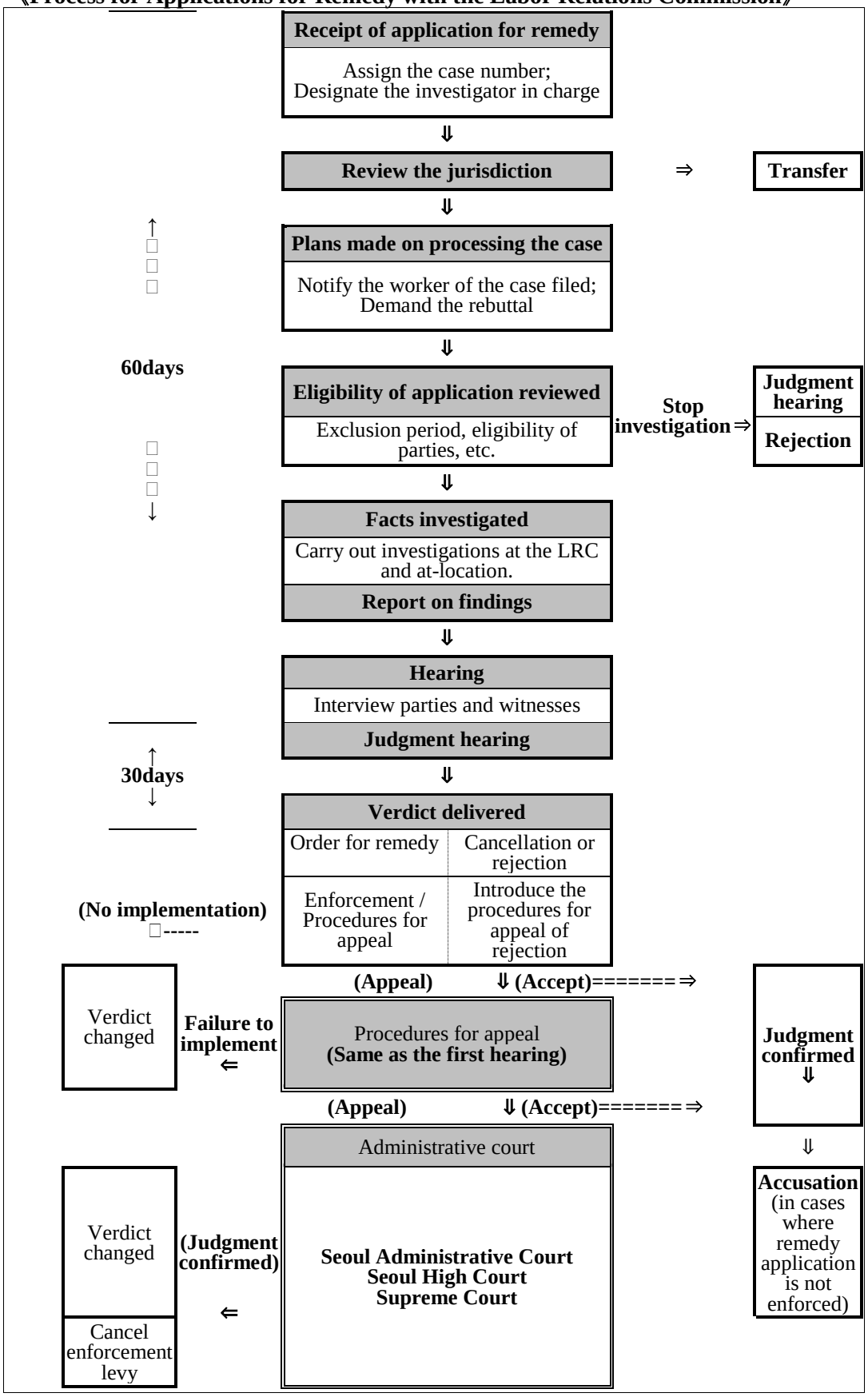
(1) Application for Remedy

If an employer dismisses or treats a worker unfairly, the worker may apply to the Labor Relations Commission for remedy. This application for remedy shall be made within three months from the date on which the unfair dismissal and/or related actions took place (or from the date of termination in cases where such activities continue). The worker must apply for remedy with the Labor Relations Commission nearest his/her workplace regarding unfair dismissal or unfair labor practice.

(2) Investigation

The Labor Relations Commission shall, without delay, conduct necessary investigations and inquiry of the parties concerned, upon receipt of an application for remedy. The Labor Relations Commission shall ① designate an investigator responsible for the process of investigation, ② demand the applicant submit evidence of the reason(s) for the application, ③ deliver a copy of the application for remedy or statement of reasons to the employer, and give opportunity for rebuttal and associated evidence to explain the employer's actions, and, ④ if necessary, order the parties, witnesses or other related persons to attend a hearing and give their testimonies. Further investigation will then be carried out as deemed necessary (Article 45 and 46 of the Implementation Rules of the LRC Act).

《Process for Applications for Remedy with the Labor Relations Commission》



(3)Hearing

The Labor Relations Commission shall hold a hearing within 60 days from the date the application was received. This hearing is to review documented evidence both parties have submitted, and information gathered during investigation, and then decide whether unfair dismissal or unfair labor practice actually took place. The committee members (public-interest, worker and employer representative members) assigned to the case shall attend the hearing, have both parties verify their claims, and interview witnesses and other related persons. At the judgment hearing right after the hearing, the public interest committee members shall decide whether unfair dismissal or unfair labor practice took place. The worker and employer committee members may also interview the parties to the case and witnesses, and give their opinions before the public interest committee members give their decision during the judgment hearing.

<Burden of Proof>

1)Regarding decisions disadvantageous to certain personnel such as dismissal, the first bur den of proof is on the employer to verify whether the worker committed a particular action, whether such action violated the Rules of Employment, and whether the disciplinary action, severity and suitability of punishment is justified. Regarding unfair labor practice, the first burden of proof is on the worker and the labor union to verify the employer's intention to commit the unfair labor practice, unfair treatment, and/or the existence of domination and interference. (Supreme Court ruling on Aug 14, 1992, 91da29811)

2) However, regarding an employer's statements of reasons for decisions disadvantageous to certain personnel such as dismissal, the burden of proof then falls on the worker to verify that he/she did not commit a particular action, that he/she did not violate the Rules of Employment, and/or that the punishment was too severe or unsuitable to the violation. Regarding unfair labor practices, the employer also has a burden of proof to verify that he/she did not intend to commit an unfair labor practice, or give disadvantageous treatment to the company personnel due to their union activities, or obstruct those union activities, or cause deterioration to the union organization. (Supreme Court ruling on Sep 10, 1996, 95nu16738)

(4) Settlement

Labor cases filed for remedy at the Labor Relations Commission are often resolved between the two parties peacefully before going to the judgment stage of the Commission’s activities. Such settlement not only helps to restore labor-management stability, but also aids implementation of the employer’s agreement more effectively than a remedy order from the Labor Relations Commission. The Labor Relations Commission can always recommend or arrange a draft of settlement for both parties in the process of investigation and interview. Once settlement is established, the statement of settlement is composed, which has the same effect as settlement decided by a court (Article 16-3 of the Labor Relations Commission Act).

(5) Judgment

The judgment hearing is for the purpose of determining whether unfair dismissal or unfair labor practice has occurred, and takes place after the hearing. The judgment hearing is held with all three public interest committee members, and resolutions pass with approval from at least two of the three committee members. The Labor Relations Commission issues an order for remedy to the employer when it is deemed that unfair dismissal or unfair labor practice has occurred, or cancels the application for remedy if it is deemed that they have not. The Labor Relations Commission shall deliver a letter of the verdict to the employer and workers concerned within 30 days of the date of judgment.

<Example judgment statements>

#1: Application for remedy regarding unfair dismissal (Order for Remedy)

1. The employer in this case shall agree that dismissal of the applicant on Month/Day/Year was an "unfair dismissal".
2.The employer in this case shall reinstate the employee within 30 days from the day this adjudication statement is received and shall pay an amount not less than the amount of wages he/she would have received if he/she had worked during the period after he/she was dismissed.

#2: Application for remedy regarding unfair dismissal (Dismissal / Rejection)

The application by the worker has been dismissed or rejected.

#3: Application for remedy regarding unfair dismissal (Order for monetary compensation)

1. The employer in this case shall agree that dismissal of the applicant on Month/Day /Year was an "unfair dismissal".
2. The employer in this case shall pay an amount not less than the wages the applicant would have received if he/she had worked during the period after he/she was dismissed, in lieu of ordering his/her reinstatement within 00 days from the date this remedy order is received.

#4: Application for remedy regarding unfair labor practice (Order for Remedy)

1. The employer removing labor union notices on the bulletin board of the labor union office on Month/Day/Year is determined as an unfair labor practice: domination of or interference with labor union activities.
2. The employer in this case shall post a notice apologizing for the removal of the union notices without permission and shall post a notice on company bulletin boards that such actions will not be repeated.

#5: Application for remedy regarding unfair dismissal & unfair labor practice (Orders for Remedy)

1. The worker's dismissal by the employer in this case on Month/Day/Year is determined as an "unfair dismissal" and the related discrimination as an "unfair labor practice".
2. The employer in this case shall reinstate the employee immediately and shall pay an amount not less than the wages he/she would have received if he/she had worked during the period after he/she was dismissed.
3. The employer shall post a notice on company bulletin boards declaring that such dismissals will not happen again.

#6: Application for remedy regarding unfair dismissal & unfair labor practice (Orders for Remedy for Dismissal, but Rejection of Unfair Labor Practice application)

1. The worker's dismissal by the employer in this case decided on Month/Day/Year is determined as an "unfair dismissal."

2. The employer in this case shall reinstate the employee immediately and shall pay an amount not less than the wages he/she would have received if he/she had worked during the period after he/she was dismissed.
3. Other applications have been rejected.

#7: Application for remedy regarding unfair dismissal & unfair labor practice (All applications rejected)
All applications that the worker and labor union submitted have been rejected.

(6) Monetary compensation system

The monetary compensation system was introduced so that workers not wishing to be reinstated can still receive remedy. Under the monetary compensation system, the Labor Relations Commission may order the employer to pay the worker an amount not less than the wages he/she would have received if he/she had worked during the period after he/she was dismissed, in lieu of ordering that the worker be reinstated. The amount equivalent to wages (or more) includes some additional compensation as well, which shall be determined by the Labor Relations Commission after considering such things as any worker fault, and degree of unfairness of the dismissal, etc. This monetary compensation system has contributed to worker rights by providing alternative methods for receiving remedy for unfair dismissals. However, in actual practice this monetary compensation system has been used on a limited basis because this system permits the minimum compensation equal only to the wages the worker would have received during the period after dismissal. Accordingly, in order to promote the monetary compensation system, it would be reasonable to require compensation equal to the total salary during the period after dismissal, a certain amount of compensation for the trouble and inconvenience of taking action, and the costs related to the application for remedy.

4. Failure to comply with orders for remedy and procedures for appeal

(1) Failure to comply with an order for remedy (Enforcement levy)

Employers are required to obey orders for remedy, and penalties are applied if they fail to do so (Article 111 of the LSA, Article 89 of the Labor Union Act). **However, this criminal punishment is valid after the remedy order is confirmed finally.** If an employer, after receiving the remedy order from the Labor Relations Commission and a decision on reexamination concerning a remedy order from the National Labor Relations Commission, fails to comply with a remedy order by the compliance deadline, an enforcement levy in the amount not exceeding 20 million won shall be imposed on the employer. The Labor Relations Commission may impose an enforcement levy twice a year for two years from the date the initial order for remedy was issued, or until the order is complied with. If an order for remedy issued by the Labor Relations Commission is canceled in accordance with a decision rendered by the National Labor Relations Commission after reexamination or a confirmed court ruling, the Labor Relations Commission shall immediately stop imposing the enforcement levy and return any monies already paid, by virtue of its authority or at the request of the employer. Controversy may arise when deciding "fulfillment" of the employer's remedy order if there are no criteria to determine "fulfillment" of the orders from the Labor Relations Commission. There will be

disputes among parties and the Labor Relations Commission in understanding the conditions related to complete fulfillment. So, the purpose of pursuing complete fulfillment is to prevent these disputes, ensure the effectiveness of an order for remedy, and resolve labor disputes in the early stages (Article 79 of the Rules on the LRC).

1. Fulfillment of an order to reinstate the worker to his/her previous job is when the employee has been assigned the same position the employee had when he/she was dismissed, with the same kind of work duties, or when the employee has been assigned other work duties with his/her prior consent. However, if the same position or work is no longer available for unavoidable reasons, assigning a similar position or work duties to the employee can be regarded as fulfillment of the order for remedy.
2. Fulfillment of the duty to pay the amount equivalent to wages is when the total amount of wages that the worker would have received, up to the time of complete payment, is paid to the worker.
3. Fulfillment of an order for monetary compensation is when the amount stipulated in the written judgment is paid.
4. Fulfillment of other orders for remedy occurs when the items stated in the written judgment are implemented.
5. In cases where the parties agree to a settlement other than an order for remedy for unfair dismissal, fulfillment occurs when that settlement is implemented.

(2) Procedures for appeal

If an employer or worker is aggrieved by an order for remedy or decision to dismiss rendered by a Regional Labor Relations Commission, he/she may apply to the National Labor Relations Commission for reexamination within ten days of the date on which he/she received the notice of the order for remedy or decision to dismiss the application. The procedures for application to the National Labor Relations Commission are the same as the procedures for application to the Labor Relations Commission. An employer or worker may file a lawsuit in accordance with the Administrative Litigation Act against the decision made by the National Labor Relations Commission after the reexamination within fifteen days from the date on which he/she received the notice of decision on the reexamination. If an employer or worker is aggrieved by the decision of the National Labor Relations Commission and appeals to the Administrative Court, the National Labor Relations Commission becomes a defendant and the worker (the employer) becomes a defendant assistant participant. If no application for reexamination is made and no administrative lawsuit is filed within the periods listed above, the order for remedy, decision to dismiss or decision on reexamination shall be considered confirmed.

The Mediation Committee of the Labor Relations Commission

1. Introduction (Purpose)

The Labor Relations Commission is established both to identify unfair dismissals and unfair labor practices in labor relations and to implement adjustments for disputes between company and labor union interests promptly and fairly. As these labor disputes are dynamic, continuous, and collective, if administrative agencies or courts were the only organizations to handle them, fair, prompt, and reasonable solutions would be difficult to expect, due to the inflexibility of bureaucracy and lack of experience of some agencies. The Labor Relations Commission is an independent administrative agency that has the authority and the ability to resolve labor disputes fairly and promptly. Here, I would like to review the composition of the Mediation Committee within the Labor Relations Commission: what issues they handle, the procedures they follow, and the outcomes.

2. Summary

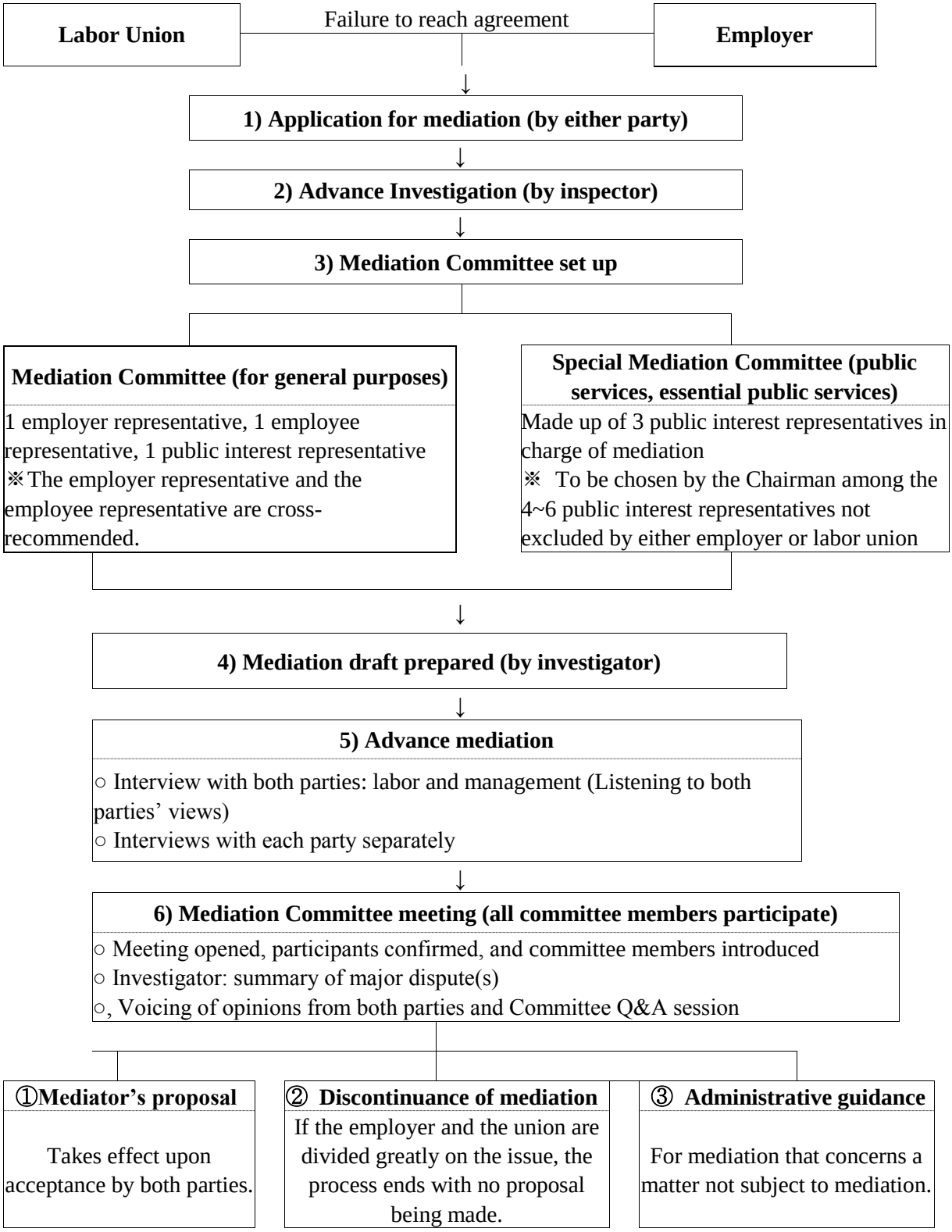
The Mediation Committee refers to public mediation that both parties shall go through before the labor union takes industrial action (Article 45 of the Labor Union Act). The term “labor disputes” in the Labor Union Act means any controversy or difference arising from disagreement between the employer and the labor union concerning the determination of terms and conditions of employment such as wages, working hours, welfare, dismissal, or other treatment, etc. Accordingly, the Mediation Committee in the Labor Relations Commission shall deal with disputes concerning each party’s interests, but disputes related to each party’s rights shall not be subject to bargaining or mediation procedures.

3. Composition of Mediation Committee

The Mediation Committee shall be composed of three members (an employer representative, employee representative, and a public interest representative. The Mediation Committee members shall be designated by the Chairperson of the Labor Relations Commission from among members of the Labor Relations Commission concerned so that each Mediation Committee member can represent employers, workers, and the public interest. The employee representative shall be chosen from a list recommended by the employer, and the employer representative shall be shall be chosen from a list recommended by the labor union. However, in cases where a list of recommended Mediation Committee members is not submitted within three days prior to a meeting of the Mediation Committee, the Chairperson may designate the members him or herself. The Chairperson of the Mediation Committee shall be the public interest representative. Special Mediation Committees shall be composed of three public interest representatives.

4. Procedures for Mediation

< Procedures for Mediation >



< Mediation Committee Activities>

<table>
<tr><td rowspan="2">①Suggested proposal</td><td colspan="2">Accepted by both parties</td><td>Mediated agreement (Yes)</td><td>Mediation done</td></tr>
<tr><td colspan="2">Rejected by one or both parties</td><td>Mediated agreement (No)</td><td>Industrial action possible</td></tr>
<tr><td rowspan="5">No proposal</td><td>② Mediation stopped</td><td>Apparent disagreement</td><td>Collective Agreement (No)</td><td>Industrial action possible</td></tr>
<tr><td rowspan="4">③ Administrative Order: no mediated agreement (return)</td><td>No eligible party</td><td>Return</td><td>Industrial action impossible</td></tr>
<tr><td>No justification for Industrial action</td><td>Return</td><td>Industrial action impossible</td></tr>
<tr><td rowspan="2">Lack of bargaining (not due to disagreement)</td><td>Employer side reason</td><td>Industrial action possible</td></tr>
<tr><td>Employee side reason</td><td>Industrial action impossible</td></tr>
</table>

(1) Mediation Activities

The Mediation Committee or a single mediator, as the case may be, shall specify a date for the parties concerned to appear so as to verify the main points of their respective claims. The Chairperson of the Mediation Committee may restrict attendance to the hearing to the parties concerned and witnesses. The Mediation Committee shall prepare a proposal to be presented to the parties concerned, with recommendation for their acceptance. If the Mediation Committee determines that further proceedings are not warranted due to the parties' refusal to accept the proposal, it shall terminate mediation and notify the parties concerned. If an application for mediation is determined as unsuitable for mediation or arbitration, the Labor Relations Commission shall inform the applicant of the reasons for rejection of the application and other possible courses of action (Administrative order).

(2) Interpretation and Implementation of the Mediation Committee Proposal

If the parties concerned, after accepting the Mediation Committee proposal, do not agree on any of the interpretation or implementation measures of the proposal, they shall request the Mediation Committee to provide clarity. Upon receiving such a request, the Mediation Committee shall clarify the measures within seven days of the date of receipt of such request. None of the parties concerned shall conduct industrial action on issues for which clarity on interpretation or implementation has been requested, until such clarity is rendered by the Mediation Committee.

(3) Effect of Mediation Committee Proposal

If the parties accept the Mediation Committee proposal, all members of the Mediation Committee shall prepare the mediated agreement in writing, and sign or seal it together with the parties concerned. The labor disputes shall be considered resolved, and the mediated agreement shall have the same effect as a collective agreement. Clarity on the interpretation and implementation measures rendered by the Mediation Committee shall have the same effect as an arbitration ruli

Cause of Death Verified as Occupational Illness through Epidemiological Investigation

I. Introduction

When an employee applies for compensation for an occupational illness, the Korea Workers' Compensation & Welfare Service (hereinafter referred to as "COMWEL") determines whether the employee has an occupational illness or not through its own investigation, the opinions of a medical professional (or professional agency), and a review by the Occupational Disease Determination Committee. In cases where its own investigation is unable to determine whether there is a relationship to work, COMWEL can ask a professional agency to conduct an epidemiological investigation, through which it will determine whether the illness in question is an occupational illness or not. Such illnesses as black lung disease (Pneumoconiosis) and lead poisoning, and conditions such as noise-induced deafness are more easily linked to occupation than some other illnesses such as cancer, hemoptysis (vomiting blood), asthma, and dermatitis are not so easy to link. In this case, gathering information on the working environment will be of considerable help.

I would like to introduce a case of occupational illness which resulted in death from vomiting of blood. The employee in question had had a lung illness for a long period of time, and along with severe coughing, became worse from his harmful working environment. The labor attorney for this case claimed, on the basis of a statement from his surviving family, that the industrial illness victim (hereinafter referred to as "the employee") died from his long-term illness deteriorating through exposure to harmful chemicals like sulfuric acid in the process of zinc smelting. The labor attorney submitted an application for survivor's benefits without a direct investigation. After receiving the application, COMWEL asked a professional agency (the Occupational Lung Disease Research Institute[5]) to conduct an epidemiological investigation. Once the results were in, COMWEL concluded a close relationship between the employee's workplace environment and the exacerbation of his illness, accepting his death as due to a work-related illness.

II. Summary[6]

(1) The employee had worked at a zinc smelting factory since 2006. When he died at Aju University hospital at age 61 on December 16, 2011, his spouse applied for Survivor's Benefits on February 29, 2012 to the COMWEL Youngju Office.

(2) On December 9, 2011 when the employee began vomiting blood and experienced difficulties in breathing, he was admitted to Wonju Christian Hospital where he continued to vomit blood and suffer from pneumonia. He died from respiratory and organ failure on December 16, 2011.

(3) Since joining OO zinc smelting company[7] on June 12, 2006, the employee had worked as a machine operator in charge of a filter press machine for a total of 5 years and 3

[5] The Occupational Lung Disease Research Center (run by COMWEL and under the Ministry of Labor) was established in Ansan Sanje Hospital for the purpose of clinical and preventive studies on Lung Diseases.

[6] Survivor's Compensation Case (Daegu-2013-0000296, May 9, 2013) – Park, Kyuhee , Labor Attorney of Kangnam Labor Law Firm represented the case.

months. The smelting process at a filter press extracts zinc by dividing cake (solids) and filtrate (liquid) after melting sludge coming from a sludge container. The employee swept up the cake on the floor when it fell in the process of dividing from the filtrate. In this smelting process, sulfuric acid[8] was used and the employee was continuously exposed to the sulfuric acid gas.

(4) Before beginning employment at OO company, the employee had worked as a street cleaner from 2001 to 2005 (aged 51 to 55) from 4 am to 4pm, during which he began suffering from, and receiving treatment for, bronchitis and obstructive lung disease due to early morning cold air.

(5) As mentioned, the employee had been exposed to sulfuric acid gas, mineral dust, etc. continuously at the workplace while suffering from existing bronchitis and obstructive lung disease. In addition to this, the employee had to work longer hours than normal for a long period, which, combined with the stress from worry he would lose his job due to his poor health, was claimed to have caused pulmonary (lung) hypertension, resulting in his vomiting blood and ultimately his death.

(6) Fifteen months after his spouse applied for Survivor's Benefits, during which COMWEL conducted an investigation, received medical opinions, and the results of an epidemiological investigation, the Occupational Disease Determination Committee agreed that the employee died from an occupational illness.

III. The Limits of Investigation and Request for Epidemiological Investigation

1. The applicant's difficulties in investigating for herself

In the application for Survivor's Benefits, the applicant claimed that the employee had suffered from chronic fatigue due to working in two shifts for a long period of time; had stress and insomnia due to worries over losing his job because of his illnesses; and had been exposed to a harmful working environment (including sulfuric acid), which had caused pulmonary hypertension, vomiting of blood, and his death. The claim that the employee suffered from fatigue and stress could be causes for stroke or heart disease, but not for vomiting blood. Accordingly, the applicant had to verify that the workplace's harmful substance (sulfuric acid) had exacerbated the employee's existing conditions of bronchitis and obstructive lung disease and had caused pulmonary hypertension and vomiting of blood. However, the applicant was not able to gain access to the workplace, and had to depend on the COMWEL investigation. The following is the result of the epidemiological investigation from the professional agency commissioned by COMWEL.

2. COMWEL request for an epidemiological investigation

When there is difficulty in determining whether an illness is occupational or not, COMWEL can ask for professional opinions from a medical doctors' advisory council, the industrial safety and research centers of the Korea Industrial Safety Corporation, or other agencies that can evaluate occupational diseases.[9] Also, the Medical Care Processing

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[7] Zinc smelting process: mining ore → milling → smelting → refinement. Then, 90% of zinc is retrieved.

[8] Sulfuric acid (H2SO4) is a highly corrosive mineral acid. It is a pungent, ethereal, colorless to slightly yellow viscous liquid which is soluble in water at all concentrations.

[9] Enforcement Rule-Article 39-2 of the Industrial Accident Compensation Act

Rules describe that when it comes to difficulty in determining recognition of an occupational illness concretely, COMWEL may ask relevant institutes (such as medical doctors' associations or industrial safety research institutes) to give advice and participate in the investigation.[10] This includes cases 1) where it is difficult to verify whether the employee's existing illness affected the occupational illness, 2) where meaningful difference exists between the medical doctor in charge and the advisory doctor regarding clinical signs that will show the degree of the employee's exposure to harmful materials, 3) where it is difficult for a doctors advisory council to determine relation of an illness to occupation, or where there are no criteria for the occupational illness, and 4) where an epidemiological investigation is necessary to recognize whether a cause-and-effect relationship exists between work and illness. Upon concluding this investigation, as long as there is no clear evidence to disprove the illness was work-related, it should be accepted as an occupational illness.[11]

3. Epidemiological investigation and recognition of the occupational disease by the Occupational Lung Disease Research Center

(1) Understanding workplace environment

The employee's work was to operate the filter press (F/P disintegration) machine to retrieve a small amount of metal out of sludge coming from a sludge container. In this process, the employee was exposed to steam and carbon monoxide (CO) from the leftover liquid and cake. There is no artificial ventilation system in the disintegration process of the filter press, but there is natural ventilation in the roof of the three storey building. The agency measured the air quality of the workplace twice: on October 10, 2012, for 5 hours and 40 minutes to check the internal air of the workplace with a multiple gas measurement instrument; and on March 26 & 27, 2013, for 20 hours to check carbon monoxide concentrations in the air near the filter press, with a carbon monoxide measurement device. Additionally, workers' individual exposure was measured by affixing the measurement instruments to the waists of three workers onsite for twenty hours.

The results of measurement showed an average density of 38ppm of carbon monoxide in the work area around the filter press. At the height the worker was breathing at the top of the F/P machine, concentrations exceeded 500ppm, the limit of the measurement instrument. Individual measurement done for 20 hours averaged 19ppm, 60% of the exposure limit according to the Ministry of Labor. However, as time passed, the density of carbon monoxide increased up to a maximum of 185ppm. Besides carbon monoxide, hydrogen sulfide was detected at an average of 5.1ppm.

(2) Effects of carbon monoxide & hydrogen sulfide on the human body

The normal concentration of carbon monoxide is 0.1~0.2 ppm. This carbon monoxide combines with hemoglobin delivering oxygen to the body, and results in carboxy-hemoglobin, causing hypoxia (low oxygen levels in the blood). This contracts blood vessels in the lungs and increases resistance of lung vessel (lung rigidity), which causes pulmonary hypertension. As mentioned, hydrogen sulfide was also measured at an average of 5.1ppm

[10] Article 24 of the Medical Care Processing Rules

[11] Kim Kyusang, "Examples of Occupational Disease", Monthly Labor Law Magazine, Jan 2008, JoongAng Economy Publishing Company

around the filter press. If a healthy adult is exposed to hydrogen sulfide up to a density of 50ppm, pulmonary edema (fluid into the lungs) appears. Exposure to a density of 5.1ppm of hydrogen sulfide could not cause lung damage, but hydrogen sulfide just like carbon monoxide is also chemical material to influence lung hypertension. Accordingly, as the employee had repeatedly been exposed to a high concentration of carbon monoxide, this mixed exposure to hydrogen sulfide could have affected the occurrence of lung hypertension.

(3) Occupational illness

The employee, who had been exposed to a density of carbon monoxide since December 2006, experienced headaches and a decline in physical abilities that could have been due to the carbon monoxide exposure. Moderate lung hypertension was diagnosed in August 2010, four years after beginning employment at the zinc smelting company. This had become severe hypertension by October 2011. Upon reviewing medical records from that time, no diseases were diagnosed that would be responsible for lung hypertension. It could, however, have occurred from the repeated exposure to a high density of carbon monoxide in the course of working at his last workplace, and possibly from the exposure to hydrogen sulfide. Lung hypertension causes vomiting of blood. This hemoptysis (vomiting of blood) does not reverse easily, and can easily reoccur even upon improvement. It was therefore concluded that the employee died from the vomiting of blood, caused by lung hypertension.

IV. Conclusion & Content of the Letter on Determination of Occupational Illness

1.Conclusion: Making a determination of whether occupational illness exists or not through epidemiological investigation requires time and money, but provides objective and scientific processes, allowing both the employee and the decision-making body to easily accept the findings. Accordingly, the use of a professional agency to conduct the epidemiological investigation is recommended, and can help stop further occupational illness in the early stages by providing accurate data on harmful factors in the workplace.

2.The letter on determination of occupational illness[12]

1) According to the epidemiological investigation submitted by the professional agency that COMWEL commissioned, the employee had been exposed to carbon monoxide and hydrogen sulfide together, causing lung hypertension which in turn resulted in vomiting of blood and death. It is therefore determined that the employee's death was from occupational illness.

2) The advisory medical doctor to COMWEL stated that lung hypertension had been the result of repeated exposure to a high concentration of carbon monoxide, which had caused acute respiratory failure and acute pneumonia, leading to death.

3) The Occupational Disease Determination Committee reviewed the investigation findings, the examinations submitted by COMWEL and based on medical opinions, and the measurements of the workplace environment conducted by the professional agency. The Committee determined that the employee's lung hypertension was the result of repeated exposure to carbon monoxide and hydrogen sulfide, with complications such as vomiting blood, and resulted in the employee's death.

Based upon the above facts and medical opinions, this employee's death can be admitted as a result of occupational illness according to Article 37 of the Industrial Accident Compensation Insurance Act.

[12] Occupational Disease Determination Committee (Daegu-2013-0000296, May 9, 2013)

The Discrimination Correction System concerning Non-regular Employees[13]

I. The Discrimination Correction System

1. Concept of the discrimination correction system

The discrimination correction system is based on guidelines newly introduced in the "Act concerning Protection, etc. for Short-term and Part-time Employee" (hereinafter called "Short-term Employee Act") and the "Act concerning Protection, etc. for Dispatched Employees" (hereinafter called "Employee Dispatch Act"), which together are referred to as the "Non-regular Employee Protection Act". The discrimination correction system is designed to prohibit disadvantageous treatment (without justification) regarding wages and other working conditions of non-regular employees (a short-term, part-time, or dispatched employee) in comparison with target employees (a term-less contract employee, ordinary employee, or directly hired employee). The discriminative treatment can be rectified through the remedy process of the Labor Relations Commission.

The discrimination prohibition system for non-regular employees does not mean that the employer shall treat all working conditions of non-regular employees the same as working conditions of regular employees, however, the employer is prohibited from disadvantageous treatment without justification. That is, the employer is allowed to discriminate if there is a justifiable reason based on productivity, job skill, etc.

II. The Discrimination Correction System for a Short-term and Part-time Employee

1. Applicant for discrimination correction

The applicant for discrimination correction who can be protected from an employer's discriminative treatment shall be an employee of the Labor Standards Act and shall also be short-term employees or part-time employees.

2. Estimating time for the status of short-term and part-time employees

The time to estimate the status of short-term and part-time employees is not the time of filing an application for discrimination correction, but the time the employer engaged in the discriminative behavior.

3. The scope of 'wages and other working conditions' in prohibiting discrimination[14]

The scope of 'wages and other working conditions' deals with ① working conditions

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[13] Administrative Guidelines, June 2007

[14] (Implemented from Sep 23, 2013) Article 2 of the Employee Disptach Chapter.
The term "discriminatory treatment" means giving unfavorable treatment without any justifiable reasons for the following items:

a. Wages in accordance with the Labor Standards Act: Article 2 (Subparagraph 1, 5 ho);
b. Bonuses paid regularly such as regular bonus and special holiday bonus;
c. Incentive in accordance with business performance; and
d. Items regarding other working conditions and welfare.

regulated in the Labor Standards Act and working conditions stipulated in the Collective Bargaining Agreement, Rules of Employment and/or Labor Contract. Therefore, the scope includes not only wages, but also working hours, holidays, leave, safety, health and industrial accident compensation.

4. Target employee for comparison

The judgment of discrimination for short-term and part-time employees shall require the existence of target employees for comparison. The target employees do not only play a role as comparison criteria to estimate disadvantageous treatment, but also play a role as the basis and criteria for the Discrimination Correction Committee to determine parameters of the correction order. In comparison with short-term employee, the target employees shall be term-less contract employees engaged in the same or similar job in the business or workplace (Article 8(1) of the Short-term Employee Act). In comparison with part-time employee, the target employees shall be ordinary employees who were engaged in the same or similar job in the business or workplace (Article 8(2) of the Short-term Employee Act).

The 'same or similar job' means the job that is similar in job classification, duties, and job specification. That is, it will be considered synthetically based on the possibility of substitution within each group of employees.

5. Disadvantageous treatment

Disadvantageous treatment means that short-term and part-time employees receive low treatment in wages and other working conditions in comparison with target employees. In judging whether or not there is disadvantageous treatment, it is a principle that detailed items relating to wages and working conditions paid to short-term and part-time employees shall be compared with detailed items paid to target employees.

As disputes occur, comparable wages and working hours shall be categorized and compared as follows: ① In cases where some aspect of wages and working conditions are better for target employees, but other aspects are lower; and ② in cases where short-term and part-time employees are treated disadvantageously in comparison with target employees on particular wages and working conditions; and (3) in cases where the employer provides other purpose-based wages and working conditions. In this case, payment in accordance with actual provision of labor service (overtime, nighttime, holiday work allowance, etc.) shall be exempted from the scope of comparison.

In cases where it is hard or impossible to compare detailed items or categories because of the inclusive wage system or annual salary system, the wages and working conditions of target employees shall be compared and estimated overall.

As part-time employees' wages are determined based upon hourly wages, it is required to calculate ordinary employees' wages into hourly wages to confirm whether or not there is disadvantageous treatment. In this case, the comparison basis shall be hourly wages calculated based upon ordinary wages per contractual working hours.

6. Justifiable reason

1) Concept of justifiable reason

If there is a justifiable reason that the employer treats short-term and part-time employees disadvantageously in comparison with target employees, disadvantageous treatment can be justifiable and will not be considered discriminatory.

2) Short-term employee and employment period

When the employer applied wages and other working conditions in proportion to the employment period for short-term employees and this resulted in disadvantageous treatment, it can be accepted as justifiable.

3) Part-time employee and principle of protection by time proportion

Working conditions of part-time employees shall be determined on the basis of a relative ratio computed by comparing the work hours of part-time employees with those of full-time employees engaged in the same kind of work at the pertinent workplace, which is an application of the proportional time principle (Article 18(1) of the Labor Standards Act). Accordingly, it is justifiable to apply wages and divisible working conditions in proportion to time.

4) Disadvantageous treatment in accordance with short-term employment

The difference in wage and working conditions in accordance with characteristics of short-term employment, such as employment type (e.g., short-term employee), can be regarded as justifiable. It will also be considered as justifiable when the employer excludes short-term employees from wages and working conditions paid based on long-term employment and/or continuous service, such as long-term service allowance and compensational special bonus for those who retiring after long-term employment.

5) Disadvantageous treatment due to employment condition and criteria

If an employer discriminates against an employee justifiably on account of different employment factors (such as career, certification of qualification, etc.), the disadvantageous treatment can be justifiable when such factors determine wages, etc.

6) Disadvantageous treatment based on employment methods and procedures

Even though employment methods and procedures (open employment/closed employment, written test/interview, etc.) are different, if shot-term and part-time employees provide labor service with the same conditions as target employees, then disadvantageous treatment is not justifiable solely because of different employment methods and procedures. However, if the employer applies employment methods and procedures differently in order to reflect different work performance ability, it can be utilized as indirect evidence to confirm differences in work performance ability.

7) Difference in the job scope

As the job scope is directly related to quality and quantity of work and becomes an important factor in determining wages, target employees shall be selected carefully in consideration of differences in job scope. Disadvantageous treatment in wages and working conditions due to differences in the job scope can be regarded as justifiable.

8) Difference in authority and responsibility related to job

It can be justifiable to discriminate based on wages in accordance with the level of authority and responsibility. If the employer pays allowances (position allowance, title allowance, etc.) corresponding to the level of authority and responsibility, even though the level of authority and responsibility were not reflected in determining wages, it can be justifiable to exclude such allowances for short-term and part-time employees who do not have such authority and responsibility.

9) Low labor productivity

If the reason short-term and part-time employees' labor productivity is low is because of previous experience and/or prejudice and not the result of their service, then discriminatory practice is not justifiable. However, it is justifiable if the employer discriminates on wages according to a wage system based on low labor productivity in comparison with target employees.

10) Disadvantageous treatment in accordance with decision factors for wages and working conditions

It can be regarded as justifiable when the employer considers relevant factors (duty, ability, skill, technology, qualification, career, education background, service year, responsibility, achievement, performance, etc.) of labor service in determining wages and pays discriminative wages in accordance with such differences.

11) Legal allowances

Legal allowances, which are allowances to be paid by law, are additional allowances (Article 56 of the LSA) for overtime, nighttime and holiday work, annual paid leave allowance (Article 60(5) of the LSA), etc.

III. The Discrimination Correction System for a Dispatched Employee

1. Characteristics

A using employer as well as a sending employer is prohibited from discriminative behavior under the Employee Dispatch Act. Even though the discrimination correction system for dispatched employees is regulated identically to the discrimination prohibition for short-term and part-time employees, the system is different in content and interpretation because of the characteristics of dispatch employment.

In terms of both the legislative consideration of the discrimination prohibition system in the Employee Dispatch Act and the special characteristics of dispatch employment, the scope of prohibition shall be limited to 'wages and other working conditions' established in accordance with the dispatched employees' labor provisions and entry to the workplace.

The using employer and sending employer are both considered parties to prohibit discriminative behaviors and, therefore, will share the responsibility of implementing any correction order, including fines levied for failure to implement the correction order.

2. Applicant for discrimination correction

1) Dispatched employee as an applicant for discrimination correction

The term "dispatched employee" means a person who is subject to employee dispatch as a person employed by a sending employer (Article 2(5) of the Employee Dispatch Act). Regardless of the form of contract, if the employee is a dispatched employee in reality, then he/she can be an applicant for discrimination correction.

2) Illegally dispatched employee as an applicant for discrimination correction

Under the Employee Dispatch Act, an illegal dispatch occurs when the employer: ① violates the permitted jobs of a dispatched employee; ② violates the length of dispatch period, and ③ operates a non-licensed dispatch business.

3.Subjects prohibiting discriminative treatment: sending employer and using employer

The Employee Dispatch Act (Article 21(1)) states that "A sending employer and a using employer shall not treat a dispatched employee in a discriminatory manner on account of them being a dispatched employee." Accordingly, the persons responsible for prohibiting discriminatory behavior are the sending employer and the using employer. In addition, they will become the employer concerned for correcting discrimination. According to Article 34 of the Employee Dispatch Act, a sending employer is responsible for wages, annual paid leave, etc. as per the Labor Standards Act, while a using employer is responsible for working hours and recess, use of leave, etc.

4. The prohibition scope of discriminative treatment

In regards to discriminatory treatment, the dispatched employees' 'wages and other working conditions' are analyzed differently from that of short-term and part-time employees, because the dispatched employee has particular characteristics of employment. Working conditions established in relation to the dispatched employee's labor provision and entry to the using employer's workplace shall not be discriminatory, and a sending employer and a using employer shall not discriminate against the dispatched employee by treating them less favorably than employees the using employer hired directly. However, such things like family allowance paid to directly hired employees, are not related to working conditions established by labor provisions and entry to workplace. Accordingly, such things are not prohibited.

5. Target employee in comparison

The dispatched employee's target employee for estimating discrimination shall be "an employee engaged in the same or similar job in a using employer's workplace" (Article 21(1) of the Dispatch Employee Act).

6. Disadvantageous treatment and justifiable reason

1) Basic principle

Whether there is disadvantageous treatment or not and whether such treatment is justifiable or not shall be estimated by considering the dispatch employment characteristics. Even though there is disadvantageous treatment, it can be justifiable if

the reason is attributable to the type of dispatch employment (e.g., exclusion of promotion opportunity).

2) Wages of a dispatched employee

If a dispatched employee is subject to disadvantageous treatment in regard to wages, as the responsible person for the payment of wages is the sending employer, the dispatched employee can apply for a correction against the sending employer. In this case, when the amount that a dispatched employee received from the sending employer is less than the amount paid to the employee (target employee in comparison) engaged in the same or similar job, it is be discrimination.

3) Other working conditions of a dispatched employee

"Other working conditions" of a dispatched employee shall include items related to working conditions in accordance with "① labor provision of a dispatched employee" and ② "entry to a using employer's workplace".

IV. Discrimination Correcting Procedures

In cases where a short-term employee, part-time employee, or dispatched employee is subject to discriminative treatment, the employee can make a correction application to the Labor Relations Commission within six months from the occurrence date of the discriminative treatment (or the last day in case of continuing discriminative treatment) (Article 9(1) of the Short-term Employee Act, Article 21(2) of the Employee Dispatch Act).

In regards to the penal provision, it shall not be applied to the discriminative behavior itself. If the employer does not implement the correction order after the Labor Relations Commission has found discriminative treatment, the Minister of Labor can level a fine of up to 100 million won against the employer. Also, the Minister of Labor can order the employer to implement the correction order, and if the employer does not follow the order without a justifiable reason, he can be fined up to 5 million won.

Limit on Employment Period of Fixed-term Employees and its Exceptions[15]

I. Introduction

We can distinguish the employment contract into three categories based upon employment period. They are 1) the contract without fixed-term, 2) the contract necessary for the completion of a project, and 3) short-term employment contract within two years. Since the protection laws for irregular employees were enforced starting July 1st, 2007, the employment period is determined within two years, excluding the contract without fixed period, and in cases where the labor contract has been repeated, exceeding more than two years, the contract is transformed to the one without fixed term. Accordingly, as the employment contract reaches two years' period, the employer shall decide to change him/her to permanent position or terminate the employment.

Even thought the employment contract has been renewed repeatedly several times previously, the employment was estimated to be terminated due to the expiration of its period as the employer did not renew his/her last employment contract. In reality, the employer had to receive a judicial judgment through the labor commission or the court to make sure whether the employment that had been renewed repeatedly several times could be an employment contract without fixed period. Generally in the court ruling, in cases where the fixed term employee had worked for about five years and renewed his/her employment contract more than four times, the contract was regarded as expired when there was no more renewal in his/her last contract; but in cases where the fixed term employee had worked for about six years and renewed his/her employment contract more than five times, the contract was regarded as transferred to employment without fixed term when there was no more renewal.[16] The protection laws for irregular employees limit two years for the period of the fixed-term employment to clarify any disputes coming from the employment period. However, even though the employment period for fixed-term employees is regulated mandatorily, some exceptions were introduced due to the business characteristics, work characteristics, relations with other laws, and legislative policies.

The following will explain its contents and purposes concerning the limit on the effective service period and exceptions of its employment period.

II. Limit on Employment Period of Fixed-term Employees

"The Act on the Protection, etc. of Fixed-term and Part-time Employees (hereinafter referred to as 'the Fixed-Term Employee Act)", its Article 4 regulates that "an employer may hire a fixed-term employee for a period not exceeding two years (In the case of repeated fixed-term labor contracts, the sum of the periods of such contracts shall not exceed two years.)" Accordingly, the employer cannot use fixed-term employees more

[15] Reference: Article 4 (Employment of Fixed-term Employees) of the Fixed-Term Employee Act; Article 3 (Exceptions to Limit on Employment Period of Fixed-term Employees)

[16] National Human Rights Commission, "Survey on human rights of fixed-term employees' labor conditions" Nov 2008

than two years, but in using more than two years it is regarded as employed as regular employees. That means, if the employment contract was terminated after exceeding two years, the employee's status is changed to a regular position or a position without fixed-term. Accordingly, the Fixed-Term Employee Act was designed to get rid of any disputes over repeated and renewed employment by stipulating two years' limit on the employment period, and to promote temporary employees into regular positions. The reasons to limit the employment period of fixed-term employees are firstly to prevent legal disputes coming from renewed or repeated employment contract, and secondly to estimate two years' period as appropriate period to induce fixed-term employment to regular positions.

In using fixed-term employees, many foreign countries regulate restrictions on reasons for employment, but Korea does not regulate any restriction, but protects them by regulating the limit on employment period.

III. Exceptions for Employment Period of Fixed-term Employees and its Purposes

1. Cases where the period is needed to complete a project or particular task

If a construction project is proved objectively to be a fixed-term business requiring a certain amount of time to complete, it is allowed to make the employment contract for the period required to complete the project exceeding two years. In this case, this project-based exception is limited to the characteristic of temporary or one time business. Such businesses or tasks to complete a project or particular task are as follows: 1) construction project; 2) temporary surveyor during statistical survey period; 3) temporary commissioned projects; and 4) secretary of the part-time director with three-year contract period.

2. Cases where the fixed-term employment contract is made with the aged

"The Aged Employment Promotion Act" is established to promote the employment of old aged people, and the aged refer to the age of 55 years. The aged are exempted from application of limited employment period at the fixed-term employment contract.

3. Cases where a job requires professional knowledge and skills

Those cases refer to those falling under any of the following: 1) In cases where a person, who holds a doctoral degree is engaged in the relevant field; 2) In cases where a person, who holds a national technical qualification of a technician level, is engaged in the relevant field; and 3) In cases where a person, who holds a professional qualification (25 fields) is engaged in the relevant field.

Those with a doctoral degree, a national technical qualification of a technician level, and a professional qualification issued by the government for 25 fields are generally recognized as a specialist with professional knowledge and skills for a particular field. This exception was adopted by reflecting characteristics of those professional specialists. The technician refers to a person who holds a national technical qualification of a technician level pursuant to the National Technical Qualifications Act. Professional certificate holder means a specialist who was qualified at the 25 fields recognized by the government by the relevant law.

1. A certified architect according to the Article 7 of the Certified Architect Act
2. A certified public labor attorney according to the Article 3 of the Certified Public Labor Attorney Act
3. A certified public accountant according to the Article of 3 of the Certified Public Accountant Act
4. A customs house broker according to the Article 4 of the Customs Law
5. A patent attorney according to the Article 3 of the Patent Attorney Act
6. A lawyer according to the Article 4 of the Lawyer Act
7. An Actuary according to the Article 182 of the Insurance Business Act
8. A loss adjuster according to the Article 182 of the Insurance Business Act
9. A real estate appraiser according to the Article 23 of the Act concerning the Notification of Real Estate Price and Appraisal and Assessment on Real Estate
10. A veterinarian according to the Article 2 of the Veterinary License Act
11. A certified tax attorney according to the Article 3 of the Certified Tax Attorney Act
12. A pharmacist according to the Article 3 of the Pharmaceutical Affairs Law
13. An oriental medicine pharmacist according to the Article 4 of the Pharmaceutical Affairs Law
14. An oriental medicine salesman according to the Article 45 of the Pharmaceutical Affairs Law
15. A oriental medicine dispensing chemist in the attachment article 2 of the enforcement decree of the Pharmaceutical Affairs Law
16. A doctor according to the Article 5 of the Medical Law
17. A dentist according to the Article 5 of the Medical Law
18. A oriental medicine doctor according to the Article 5 of the Medical Law
19. A certified management consultant according to the Article 46 of the Act concerning the Promotion of Small and Medium Companies and their Products
20. A certified technology consultant according to the Article 46 of the Act concerning the Promotion of Small and Medium Companies and their Products
21. A business pilot according to the Article 26 of the Civil Aeronautics Law
22. A transportation pilot according to the Article 26 of the Civil Aeronautics Law
23. An air traffic controller according to the Article 26 of the Civil Aeronautics Law
24. A flight engineer according to the Article 26 of the Civil Aeronautics Law
25. An aviation specialist according to the Article 26 of the Civil Aeronautics Law

4. In cases where a separate law defines the employment period of fixed-term workers differently

(1) “The Regulations for Contractual Position of the Public Servants” regulate that the employment period for contractual position of the public servants shall be a necessary period within five years.

(2) “The Enforcement Decree for Staffing Educational Personnel” and “The Private School Act” regulates that the employment period of fixed-term teachers shall be within one year, and if necessary, can be extended up to 3 years.

(3) “The Act on Foreign Workers’ Employment” regulates that foreign workers can be employed within three years since entering Korea.

5. In cases where there is a rational reason

(1) The fixed-term employee is needed to fill a vacancy arising from a worker's temporary suspension from duty or dispatch until the worker returns to work: In cases where the employee took leave of absence due to giving birth, disease, joining the military service, etc., and took a long-term dispatch, a fixed-term employee can replace its position.
(2) The period needed for a worker to complete schoolwork or vocational training is defined: When the employee took a change to develop his/her job capability, his/her employment period shall be exceptional for its limit.

6. Consideration of legislative policies (this exception is gradually extended.)

(1) In cases where the earned income falls within the highest 25% (Introduced from July 12, 2010)

In cases where the earned income of persons engaged in occupations like managers, professionals, and other similar jobs according to the Korean Standard Classification of Occupations falls within the highest 25% (or 48,855,000 won per year as of year 2010), these fixed-term employees does not belong to the limit of employment period. The earned income is evaluated based on the average annual earned income of the past two years.

(2) In cases where jobs are provided to develop the public's vocational competency, promote employment and offer necessary social services in accordance with other laws such as the Basic Employment Policy Act and the Employment Insurance Act

(3) In cases where jobs are provided to promote the employment of discharged soldiers and stabilize their livelihoods pursuant to Article 3 of the Support for Discharged Soldiers Act

(4) In cases where a person who has professional military knowledge or skills recognized by the Minister of Defense is engaged in the relevant field or where a person teaches national security and military science in a university pursuant to subparagraph 1 of Article 2 of the Higher Education Act (Introduced from Feb 4, 2010)

(5) In cases where a person, who has exceptional experience, is engaged in a field related to national security, national defense, diplomacy or unification (Introduced from Feb 4, 2010)

(6) Where a person is engaged in work specified in any of the following items in a school under Article 2 of the Higher Education Act (including graduate schools under Article 30 of the same Act):
1) Work of a teaching assistant under Article 14 of the Higher Education Act; and 2) Work of an adjunct teacher, professor emeritus, part-time instructor, visiting teacher, etc., under Article 7 of the Enforcement Decree of the Higher Education Act.

(7) In cases where a part-time worker's weekly working hours, under Article 18 of the Labor Standards Act, is evidently short

(8) In cases of sports athletes under subparagraph 4 of Article 2 of the National Sports Promotion Act and where a person is engaged in teaching sports pursuant to subparagraph 6 of the same Article.

(9) Where a person is directly engaged in research work or directly involved in research work as an assistant, such as by carrying out an experiment, a survey, etc., in any of the following research institutions (Introduced from Feb 4, 2010):
1). National or public research institutions; 2) Government-invested research institutions established under the Act on the Establishment, Operation and Fosterage of Government-Invested Research Institutions and the Act on the Establishment, Operation and Fosterage of Government-Invested Science and Technology Research Institutions; 3) Specific research institutions under the Support of Specific Research Institution Act; 4) Research institutions established under the Act on the Establishment and Operation of Local Government-Invested Research Institutes; 5) Public institution-affiliated research institutions under the Act on the Management of Public Institutions; 6) Company- or university-affiliated research institutions; and 7) Research institutions which are a corporation established under the Civil Act or any other Act.

IV. Conclusion

Since the enforcement of protection laws for irregular employees, the discrimination correction is strictly applied, but the employment period has introduced more exceptions gradually. These exceptions are those who earned more than highest 25 percent in the earned income, separate applications to those temporary teachers at schools and lecturers at the universities, those applicable to other compulsory laws, etc. Due to the enlargement of exceptions to the limit to the employment period, the target temporary employees to be able to be under the protection of the law are gradually reduced. The reason to stipulate two years' maximum period to use fixed-term employees in the protection law was to promote the employment of temporary employees after using two years. If the exception to the limit on the employment period is extended gradually, the purpose of the protection laws for irregular employees cannot be achieved, and further it would not carry out right roles as protection laws. Accordingly, while keeping the purpose to protect irregular employees, minimum exceptions of two years' limit shall be allowed in consideration of business distinct characteristics and occupational differences.

<Criteria for Distinguishing Dispatch and Outsourcing>

I. Necessity for Criteria

The greater utilization of dispatched employees has benefited Companies in maintaining labor flexibility and in reducing labor cost. However, the ban of hiring dispatched employees for more than two consecutive years has consequently forced Companies to seek internal outsourcings. Although the Company may offer an outsourcing contract, it treats the employee like a dispatched employee in practice. Addressing this issue, the Supreme Court clearly distinguished the difference between a dispatched employee and outsourcing employee with its judicial ruling on July 10, 2008. This article will review the main contents from the ruling that outlined dispatch and outsourcing and the criteria for 'Worker Dispatch' (Joint guidelines of the Ministry of Labor and the Ministry of Justice, April 19, 2007).

II. Criteria for Distinguishing Dispatch and Outsourcing – Judicial Ruling

"When Youngin Company—outsourced by Hyundai Mipo Shipbuilding Company—declared bankruptcy, its 30 employees filed a suit to seek their employment status, claiming that they had been employed by Hyundai Mipo Shipbuilding Company since July 2000, according to the Provision of the 'Worker Dispatch Act'. Upon careful review, the Supreme Court ruled, "Youngin Company performed a subsidiary role as one of business departments of Hyundae Mipo Shipbuilding Company or as a substitute organization to manage workforce, and its employees provided labor service under subordinate relations with Hyundai Mipo Shipbuilding Company. Therefore, it can be concluded that there was already an implicit employment contract as if Hyundae Mipo Shipbuilding Company directly hired the employees"

An employee who is hired by the primary employer, but engaged in providing labor service for the third party at its location, can be regarded as the employee of the third party. (July 10, 2008, Supreme Court 2005 da 75088)

The defendant (Hyunda Mipo Shipbuilding) signed a formal outsourcing contract with the third company (Youngin Company) and received labor service from the plaintiffs (employees of Youngin Company). However, the third company does not technically have any authority regarding work or business management, but merely serves a subsidiary role as one of business departments of Hyundae Mipo Shipbuilding Company or as a substitute organization to manage its workforce. Furthermore, the defendant received labor service from the plaintiffs while maintaining subordinate relations and determining their wages in addition to other working conditions. Therefore, it can be concluded that there was already an implicit employment contract between the defendant and the plaintiffs as if the dependent directly hired the plaintiffs.

III. "Guidelines to evaluate the criteria of 'Worker Dispatch'

(Joint guidelines of the Ministry of Labor and the Ministry of Justice, April 19, 2007, Irregular Employee Handling Team-1303).

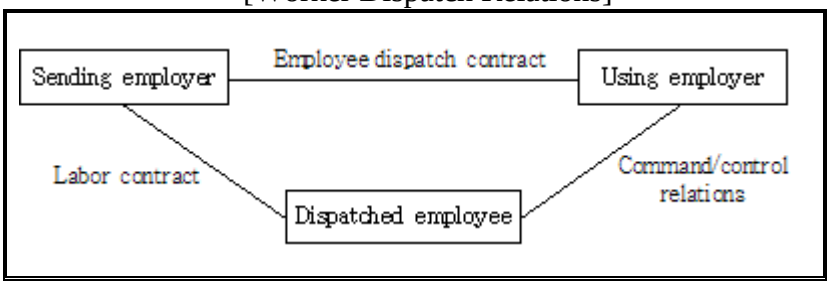
1. Purpose

The purpose of setting guidelines is to stipulate the judgment criteria in distinguishing 'Worker Dispatch" from non-worker dispatch in accordance with Article 2 (1) of 「Act Relating to Protection, etc. for Dispatched Workers」 (hereinafter called "Worker Dispatch Act" to maintain proper operations by regulating employment types in violation of the Worker Dispatch Act.

2. Subjects of Composition

The 'Worker Dispatch' in accordance with Article 2 (1) of the Worker Dispatch Act is composed of tripartite relations: the 'Sending Employer' who performs as the dispatch employee agent, 'Using Employer' who hires the employee under a worker dispatch contract, and 'Dispatched Employee' who is hired by the Sending Employer and subject to worker dispatch.

[Worker Dispatch Relations]



3. The Structure of Judgment

(1) Order of Judgment

1) Whether it is subject to rules under 'Worker Dispatch' of Article 2 (1) of the Worker Dispatch Act shall be judged by whether the Sending Employer, subcontractor, etc. contracted with the employee (hereinafter referred to as "Sending Employer, etc.") can remain as a substantial entity of the employer.

2) In the case where the Sending Employer, etc. is not admitted as a substantial entity of the employer, the Using Employer, contractor, etc. not contracted with the employee (hereinafter referred to as "Using Employer, etc.") shall be judged for violations of relevant labor laws upon assumption that the corresponding employee has been directly hired.

3) In the case where the Sending Employer, etc. is admitted as substantial entity of the employer, the corresponding employee shall be investigated whether he/she is under direction or order of the Using Employer, etc, and the corresponding employment contract shall also be evaluated for compliance to rules of 'Worker Dispatch'.

(2) Judging method (synthetic judgment)

Whether rules of 'Worker Dispatch' of Article 2 (1) of the Worker Dispatch Act shall subject to each article of the following paragraph 4 (1) and (2) collectively. In this case, 1), 2) and 3) of the subparagraph B shall be important criteria to judge the worker dispatch.

4. Criteria of judgment

(1) Judgment on substantial entity as the employer concerning the Sending Employer

Regardless of the name, form, etc. of the service contract made between the Using Employer and the Sending Employer, in the case where the Sending Employer does not have jurisdiction over the following items, it is difficult to admit the Sending Employer as a substantial entity of the employer, and cannot be regarded as "the Sending Employer who maintains the employment relations after hiring" in the definition of 'Worker Dispatch', from Article 2 (1) of the Worker Dispatch Act.

1) Decision-making right for hiring, dismissal, etc.

※ Interview-check list, rules of employment, labor contract, safety training for newly hired employees, and other dismiss-related document shall be confirmed.

2) Responsibility for raising and spending necessary money

※ Lease contract of the office, payment of the establishment expenses, in case of a stock company, ownership rate of stocks, allotment of shares, etc. shall be confirmed.

3) Employer's responsibility according to laws

※ Certificate of joining four social security insurance, various tax related documents such as resident tax, corporate tax, etc. service contract made between the Using Employer and the Sending Employer, whether directors can be rotated, other collective agreement-related document, etc. shall be confirmed.

(2) Judgment on direction and order of the Using Employer

Regardless of the name, form, etc. of the service contract made between the Using Employer and the Sending Employer, in the case where the Using Employer exercises the following authorities for the corresponding employee, it is determined that "the Sending Employer engages the employee in work under the direction and order of the Using Employer" in the definition of 'Worker Dispatch', from Article 2 (1) of the Worker Dispatch Act.

1) Decision-making right for work assignment and transfer

※ Working plan, manpower assignment plan, meeting materials, other work assignment-related documents and repeated practices, etc. shall be confirmed.

2) Right of work direction and supervision

※ Daily work order, safety training record, morning meeting minutes, method to deliver work-related direction, etc. shall be confirmed.

※ Especially, when dispatched employees perform identical or similar work to that of the directly hired employees, the right to implement work direction and supervision shall be carefully considered.

※ In the case where the contents or purpose of work are so abstract that the Using Employer's direction can only clarify such contents and work assignments, or the

terms are too broad to outline specific work, the Using Employer may be admitted for his/her right of work direction and supervision.

3) The right to manage attendance for leave, sick leave, etc. and the right of disciplinary action

※ Leave, absence, leaving early, work outside, tardiness, attendance record, other disciplinary action-related document shall be confirmed.

4) The right to evaluate work performance

※ Evaluation sheet concerning work performance or achievement, whether the employee of the Sending Employer supervises or evaluates or not, correction measures or repeated practice in case false work performance is found, etc. shall be confirmed.

5) Decision-making right for extended, holiday, night time work (provided, that it is excluded for jobs required by work characteristics.)

※ Details of used annual and monthly paid leave, daily work status, other working hours-related documents shall be confirmed.

IV. Conclusion

The criteria to distinguish dispatch and outsourcing are based on whether or not the contractor (company) implements the substantial right of personnel and labor management, and whether or not the subcontractor (company) maintains autonomy in management. The company often tries to evade employer's responsibilities of labor laws through various types of the employment contract such as commission and outsourcing, but judicial rulings consistently scrutinize labor contract through substantial labor relations. Accordingly, when the company converts its dispatched employee into an outsourcing employee, it shall not direct or supervise work, but shall permit autonomous governance to the outsourcing company. Also, to continue to maintain the type of outsourcing contract, the outsourcing company shall manage and directly supervise its outsourcing employees as substantial employer and maintain separate governance in management from the contractor (company).

Disguised Outsourcing Cases and Criteria for Judgment

I. Introduction

Issues surrounding the use of irregular workers in Korea began with the introduction of two legal provisions during the Asian economic crisis in 1998: 'dismissal for managerial reasons' in the Labor Standards Act and the Employee Dispatch Act. The increased use of irregular workers by companies hoping to save on labor costs and ensure flexibility in management of personnel has resulted in greater polarization of society. As this polarization has worsened, laws designed to protect and benefit irregular employees began coming into effect in July 2007, with the aim of encouraging employers to hire them as regular employees. The main thrust of the laws is to limit the use of irregular employees to two years, and eliminate any discrimination between them and regular employees doing the same work. Even though the laws have restricted the increase in the use of irregular workers, many companies have been using loopholes in the laws to continue hiring irregular employees. There have been two recent cases heard by the Supreme Court which provide good examples of this. In this article, I would like to look at the details of the Supreme Court rulings and review the criteria used in making their decisions.

II. Dismissal of Employees Outsourced to Hyundai Mipo Shipbuilding Company

1. Summary

Hyundai Mipo Shipbuilding Company (hereinafter "the Shipbuilder") terminated its service contract with Yongin Company (hereinafter "the Subcontractor") when a labor union was established inside the Subcontractor. Right after termination of this contract, all 30 employees (hereinafter "the applicants") of the Subcontractor were dismissed, and the company closed down on January 31, 2003. The applicants filed a "claim for confirmation of employee status" against the Shipbuilder. Busan Appellate Court rejected this claim on the grounds that the service agreement between the Shipbuilder and the Subcontractor could be recognized as an outsourcing contract, but the Supreme Court overturned the Appellate Court's decision, stating that it was possible to recognize the Shipbuilder and the Subcontractor's employees as having an implied employment contract.

2. Supreme Court Ruling (July 10, 2008, Supreme Court 2005da75088)

A. Legal principles for implied employment: As a person hired by the original employer provides labor service for a third party at the third party's location, to be regarded as an employee of the third party, his employment shall satisfy the following: 1) The original employer does not have independence in management and works as an agent of the third party in managing employees; 2) The original employer's business entity is nothing more than formal and nominal, and the employee shall be subordinate to the third party in reality; 3) The party that actually pays wages to the employee is the third party; 4) The party to which the person provides labor service is the third party. Based on these criteria, it should be concluded that there was already an implicit employment contract made between the employees and the third party (Supreme Court, Sep 23, 2003 2003du3420).

B. Confirmed facts: The Subcontractor where the applicants had been employed had worked exclusively for the Shipbuilder as an outsourcing partner to inspect and repair marine engine heat exchangers, safety valves, etc. for the previous 25 years. The Shipbuilder required that employees who wished to work for the Subcontractor pass a skills test before being hired by the Subcontractor. They were then qualified to receive an additional allowance directly paid by the Shipbuilder. Furthermore, the Shipbuilder had substantive authority for employment and promotion of the Subcontractor's employees, including the ability to demand disciplinary action or choosing candidates for promotion.

In addition, the Shipbuilder directly monitored the applicants' attendance (including if they left work early), leaves, overtime, hours worked, and their work attitude. The Shipbuilder also determined the volume of work, working methods, work orders, and when and how the applicants would cooperate, and directly assigned work duties or placed applicants for substantive work duties through the Subcontractor's responsible manager. The Shipbuilder required the applicants to complete its own work assignments in addition to work given by the Subcontractor, paying a certain wage even when there was no work from the Subcontractor by assigning other duties such as receiving education, cleaning of the workplace, and assisting other departments in their work. The Shipbuilder directly supervised and managed the applicants.

Furthermore, the Subcontractor was, in principle, supposed to receive a service fee calculated by multiplying each time unit by the volume received, to which the Shipbuilder added the wages paid when Subcontractor employees were engaged in other Shipbuilder-assigned work not directly related to the Subcontractor duties (such as fixing the marine engines). The Shipbuilder also paid bonuses and severance pay directly to the applicants.

While the Subcontractor handled income tax deductions, income reports, and bookkeeping for its employees under its own business name and registration, it used offices provided by the Shipbuilder, as well as all required facilities such as rooms for its own employee education.

C. Judgment: Upon review of the confirmed facts in B above, and based on the legal principle mentioned in A, it can be determined that even though the Subcontractor had made a formal outsourcing contract with the Shipbuilder and had a formal structure in which its own employees (the applicants) performed the necessary labor service, the Subcontractor did not substantially manage itself in terms of work performance or management of its business. The Subcontractor worked just like a department of the Shipbuilder would, or as a labor management agency for the Shipbuilder. Rather, as it is assumed that the Shipbuilder received subordinate labor service from the applicants and decided their working conditions (including wages), an implied employment should be estimated to exist between employees of the Subcontractor and the Shipbuilder, just as if the Shipbuilder had hired the applicants directly.

III. Disguised Outsourcing Case of Hyundai Motors Company

1. Summary

While Yesung Company (hereinafter "the Subcontractor"), an in-house outsourcing company of the Hyundai Motors Factory – Ulsan (hereinafter "HMC"), was engaged in assembling automobile parts, it dismissed its 15 employees (hereafter "the applicants") on

February 2, 2005, due to union activities. The applicants then filed for 'remedy for unfair dismissal and unfair labor practices' against HMC and the Subcontractor, immediately after the Subcontractor closed down. The applicants' claims were not accepted in the lower courts, who determined that the Subcontractor, who had already closed down, was their real employer, and not HMC. While the Supreme Court did not determine an implied employment relationship existed between HMC and the Subcontractor, it determined that a dispatch relationship did. According to the Employee Dispatch Act before its revision, in cases where a dispatched employee has served more than two years, the applicant is determined to be a direct employee of the using employer.

2. Supreme Court Ruling (February 23, 2012, 2011du7076)

A. Legal principles for employee dispatch: Whether employment is employee dispatch or not shall, regardless of the formal and nominal contract made between the two parties, be determined by collectively considering the purpose of the contract or job characteristics, specialty and technology, business registrations of the contracting parties and managerial independence, and the using employer's actual command and control.

B. Confirmed facts: Of the work processes directly and indirectly necessary to produce cars, assembly on the conveyer belt system does not require the Subcontractor to possess much in the way of technological or specialized skills, and the Subcontractor can give few instructions to its employees in this process.

The applicants were placed on either side of the conveyor belt assembly line together with regular employees of HMC, carrying out simple and repetitive tasks according to the various instructions prepared and distributed by HMC, and using HMC's own facilities, parts, and supplies. In this manufacturing process, the Subcontractor did not supply its own unique technology or make capital investment.

HMC possessed the general rights to give the applicants their work duties and change their work area, and determined the volume of work to be finished, working methods and working procedures. HMC directly managed the applicants or indirectly gave them substantial work orders through an on-site manager of the Subcontractor. In considering the characteristics of the applicants' work, the responsibility of the on-site manager was simply as the messenger of HMC orders to the applicants.

HMC decided the starting and finishing times of each work shift, recess hours, overtime and night work, shift duties, the pace of manufacturing, etc., for the applicants, and in cases where HMC's regular employees were absent due to occupational accidents or leaves, the applicants would fill in.

C. Judgment: The Appellate Court ruled that, based upon legal principles for employee dispatch and the confirmed facts, the employees were, in actuality, working under HMC's direct supervision after hiring by the Subcontractor and dispatch to HMC.

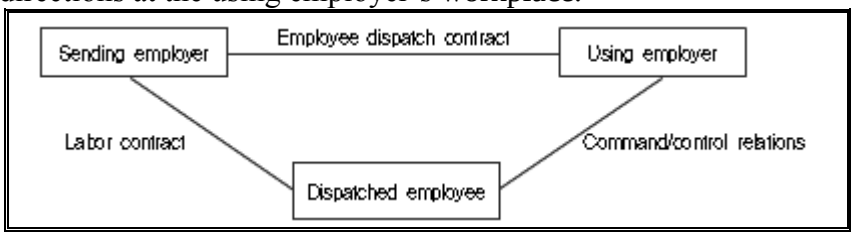
IV. Criteria for Evaluation

1. Guidelines for determining "employee dispatch"[17]

A. Employment relations: 'Employee dispatch' refers to a business situation where the

[17] Joint guidelines of the Ministry of Labor and the Ministry of Justice, April 19, 2007

'Sending Employer', who acts as an employee dispatch agency, hires an employee and sends him/her to a third party (the 'Using Employer') according to the employee dispatch contract. The dispatched employee carries out his/her duties in accordance with the using employer's directions at the using employer's workplace.



B. Judgment method

1) Whether employment is subject to rules under 'employee dispatch' shall be determined by whether the sending employer who made the employment contract with the employee can retain the substantive entity of "employer".

2) In cases where the sending employer is not considered to have the substantive entity of "employer", the using employer (who did not hire the dispatch employee) shall be judged as having directly hired the dispatch employee.

3) In cases where the sending employer is considered to have the substantive entity of "employer", the situation of the corresponding employee shall be investigated as to whether he/she is under the direction or authority of the using employer. The corresponding employment contract shall also be evaluated to determine whether his employment is direct or dispatch.

C. Criteria for judgment

1) Determination of a sending employer as having the substantive entity of "employer"

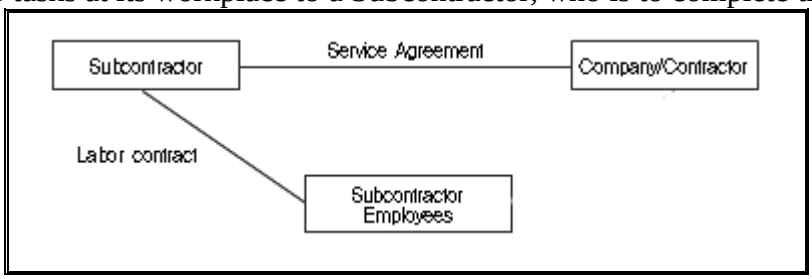
If the sending employer does not have authority over the following items, it is unlikely that he/she shall be considered as having the substantive entity of "employer": ① Rights to hire, dismiss, etc.; ② Responsibility to raise funds and make the necessary expenditures; ③ An employer's legal responsibilities (the four social security insurances, corporate taxes, etc.); ④ Responsibility for providing machinery, facilities, tools and instruments; and ⑤ Responsibility and authority to make plans related to professional skills and experience.

2) Judgment on directions and orders from the using employer

If the using employer has authority over the following items for a dispatched employee, the sending employer has engaged that employee in work under the direction and authority of the using employer: ① Decision-making regarding work assignments and transfers; ② Directing and supervising work; ③ Monitoring sick leaves and other types of leave etc. and the right to take disciplinary action; ④ Evaluating work performance; and ⑤ Decision-making regarding assignment of overtime, holiday and night work.

2. **Guidelines for auditing internal outsourcing (July 2004, The Ministry of Labor)**

A. Employment relations: Outsourcing is a business situation where one party promises to complete a particular work, and the other party promises to pay compensation in return for completing that work (Civil Law, Article 664). Internal outsourcing (subcontracting) is a type of outsourcing where a company (the Contractor) assigns a certain task or tasks at its workplace to a Subcontractor, who is to complete the work.



B. Method and criteria for judgment

If the Subcontractor's situation does not satisfy the criteria of both 'independence in personnel management' and 'independence in management of business,' the Subcontractor shall be regarded as an 'employee dispatch business.'

1) "Independence in personnel management" refers to the Subcontractor being the source of work instructions to its employees and being the exclusive manager of the following items: ① Hiring, dismissing etc.; ② Decision-making regarding work assignments and transfers; ③ Directing and supervising work; ④ Jurisdiction over working methods and evaluation of work performance; ⑤ Whether the Subcontractor's employees work with the Contractor's employees, and the difference of work between them; ⑥ Monitoring sick leave and other forms of leave, etc.; ⑦ Decision-making regarding assignment of overtime, holiday and night work; ⑧ Other conditions determining status as an employer according to the Labor Standards Act and the Labor Union Act.
2) "Independence in management of business" refers to the Subcontractor carrying out its work duties independently from the Contractor in terms of the following:
① Responsibility to raise funds and make the necessary expenditures; ② Retention of an employer's legal responsibilities; ③ Responsibility for providing machinery, facilities, tools and instruments; and ④ Planning, professional skills and experience.

V. Conclusion

The two cases in this article are typical examples of disguised outsourcing. The first, with Hyundai Mipo Shipbuilding, shows the most common disguised subcontract where, despite the fact that an outsourcing service contract was made between the two parties, an implied employment relationship existed, in light of the lack of Subcontractor independence in personnel management or management of business. The second, with Hyundai Motors, deals with an illegal employee dispatch. Even though a service contract was evidently recognized between the two parties, the Contractor was the one who directed and supervised both its own and the Subcontractor's employees while they worked together in the conveyor belt assembly line, which, again, means there was no subcontractor independence.