Can an accident on the way to the office before a business trip be considered work-related?

I. Introduction

When an accident at work is determined to be work-related, this can provide the injured employee and his/her family the opportunity to more easily get through the misfortune. A certain employee left home two hours earlier than usual to go to his office before beginning a business trip, and got into a traffic accident, which resulted in his becoming paralyzed from the waist down. A branch office of the Korea Workers' Compensation & Welfare Service Corporation (hereinafter referred to as "the Agency") rejected the employee's application for accident compensation, on the grounds that the accident occurred on the way to a gathering place for a business trip, not on the business trip itself, and that an accident occurring on the way to work is not recognized as a work-related accident under current labor laws. The employee appealed to the Agency's head office for a reexamination of his application, claiming that even though the accident involved his own car and occurred on the way to work, the employer assigned the employee to take part in the business trip and designated his car as the main form of transportation. Therefore, the accident could be considered to have occurred during the business trip. The Accident Compensation Appeal Board confirmed that the company had designated his car as the main form of transportation, and that the accident occurred on the way to work to pick up his colleagues, and so it reversed the branch office's rejection of his application for accident compensation.

Herein, we will review the main points of dispute and the criteria for determining whether an accident that occurs during the commute to and from work before a business trip can be considered a work-related accident.

II. Actual Facts & Main Points of Dispute

1. Actual facts

The employee drove away from his house (in Daebang-dong, Seoul) at 5:30 am in his own car, which would be the main vehicle for the business trip, to participate in a meeting in Changwon, South Gyeongsang Province at 11 am, June 26, 2015. On the way to the office (located in Anyang City) to pick up the company president (the employer) and a colleague, his car slid on the road (wet from rain) and hit some trees on the side of the road, causing injuries that resulted in him being paralyzed from the waist down. The employee applied for accident compensation, but the Agency rejected the application.

2. Reasons for the Agency's rejection

In cases where employees receive an order from their employer to take a business trip, are to meet at a certain gathering place and move on to the workplace in a vehicle provided by the employer, the business trip is from the time of meeting at the gathering place to the time of returning to the gathering place at the end of the business trip. Therefore, the time during which the employees travel to the gathering place from their respective residences, and the time during which they return

to their respective residences from the gathering place shall be regarded as outside of the business trip. This means that cases where several employees are ordered to go on a business trip and are asked to meet at a certain gathering place and travel to the working place together in one particular employee's car should be regarded as the same. Therefore, this accident was a traffic accident that occurred on the way to the gathering place while the employee was driving his own car outside the employer's control. Therefore, the accident is an "accident during the commute to and from work" and is not recognized as a work-related accident.

3. The employee's claim

(1) The route and means of transportation had been ordered.

The employee usually left his house around 7:30 am, traveling to work either by public transit or his own car. However, on the day the accident occurred, he left his house around 5:30 am, two hours earlier than usual, to meet his employer and a colleague at the office (in Anyang), as substantially directed the day before (June 25, 2016) by the employer, to take the business trip together in the employee's car.

The place where the accident occurred was on a main road, the typical route the employee used to commute to work from his house. The employer confirmed that the accident occurred while the employee was following company instructions, covered some medical expenses and lost wages, and submitted the Application for Medical Care Benefits on behalf of the employee. Since the employer had designated the applicant's own car as the main transportation for the business trip, the means of getting to the gathering place was restricted to that car, and therefore the route was also determined. Therefore, as the employee's car was used for business purposes from the time he left his house on the day of the accident, the employee's right to use his vehicle had changed hands to the employer, making this accident one that occurred while under the employer's direction.

(2) This accident was an occupational accident regardless whether it occurred during a commute or on the business trip.

The employee had to use his car for the business trip as the employer had directed, and had the accident on the way to the office (in Anyang) to pick up the president and a colleague who were waiting there. This accident should therefore be considered an occupational accident because the employee's car was at the time being operated by the employee while he was acting according to the employer's direction and supervision: the fact that the employee was using his own car for the business trip to Changwon via the company premises in Anyang was in the course of implementing the employer's instructions. Therefore, the vehicle that the employee drove to the office in Anyang was not the vehicle that the employee could choose, but the vehicle the employer chose, making this accident one that occurred while commuting to work under the employer's direction and supervision.

4. Main points of dispute

This case revolves around whether a traffic accident caused by individual negligence can be considered an accident during a business trip or a simple commuting accident. Generally, accidents during the commute to work for the purpose of taking a business trip are not considered

occupational accidents, but in cases where the employer has designated a certain employee's car as the vehicle for the business trip, a traffic accident occurring during that employee's commute to work in that designated vehicle can be recognized as an occupational accident. These controversial issues are the main points of disputes.

III. Legal Principles for Commuting Accidents

1. Related laws

The term "work-related accident" refers to any injury, illness, disability or death of a worker, that occurs in the course of carrying out his/her duties.[1] The criteria for recognition of an accident as work-related: "an accident is admitted as an occupational accident when it happens while the worker is commuting to and from work under the control of the employer, such as using transportation provided by the employer or the equivalent thereof: ① The accident should happen while the worker is using a means of transport which either is provided by the employer for the worker's commute to and from work or can be regarded as being provided by the employer; ② The worker should not have entire and exclusive responsibility to manage or use the means of transport used for his/her commute to and from work." [2]

2. Related judicial rulings

(1) A Supreme Court ruling stipulates, "In considering the content of the above provisions and forms and the legislative intent, Article 29 of the Presidential Decree enumerates some work-related accident examples to give requirements for accidents to be considered work-related. Article 37 of the IACI Act (Accidents while commuting to and from work) regulates that work-related accidents include 'an accident which happens while the worker is commuting to and from work under the control of the employer, such as using transportation provided by the employer or the equivalent thereof.' This Article does not regulate that other work-related accidents occurring while commuting to and from work should be excluded from what can be deemed as occupational accidents. ① In cases where the employee uses the means of transportation provided by the employer or has to use another equivalent means of transportation as directed by the employer; ② In cases where the employee has to fulfill work-related duties while commuting to and from work, or the employee has to conduct urgent assignments before or after ordinary working hours; ③ In cases where the employee did not have any other choice in means of transportation to commute to and from work due to characteristics of the job or special characteristics of the workplace: Such accidents occurring during the commute to and from work can be directly and closely related to work, and so such accidents shall be recognized as work-related accidents occurring while under the employer's direction and supervision." [3]

(2) In cases where an accident occurs during a situation involving commuting and a business trip, judicial ruling determines the following: "Article 34 (Paragraph 4) of the IACI Act's Enforcement Decree regulates that in cases where the employee is injured while commuting to and from work,

[1] Article 5 of the Industrial Accident Compensation Insurance Act
[2] Article 37 of the IACI Act (Criteria for Recognition of Work-related Accidents); Article 29 of the IACI Act's Enforcement Decree (Accidents while Commuting to and from Work).
[3] Supreme Court ruling: November 29, 2015 2001 do 28165; September 25, 2008 2006 du 4127.

only the following two cases are recognized as work-related accidents: ① The accident should happen while the worker is using a means of transport provided by the employer for the worker's commute to and from work; or ② The worker should not have entire and exclusive responsibility to manage or use the means of transport used for his/her commute to and from work. Accordingly, the employee concerned went on a business trip with his team leader and colleagues, then returned to the gathering place, where each person went to their respective homes. On the way back to his house, the employee concerned drove his own car and had a traffic accident. The employee concerned was not under the employer's direction and supervision. He drove at his own volition, so this accident cannot be regarded as an occupational accident." [4]

3. The Agency's criteria for determining accidents while commuting to and from work as work-related: [5]

(1) Basic principle: Whether the traffic accident while commuting to and from work can be recognized as work-related or not shall be determined by whether the course of commuting to and from work was under the direction of the employer. Therefore, it shall consider whether the means of transportation was provided by the employer or whether the employee could decide the means of transportation and his/her commuting route or not.

(2) Whether the traffic accident while commuting to and from work can be recognized as work-related or not shall be determined by the following:

① 1st step: The accident should satisfy the requirements in Article 29 of the Enforcement Decree of the IACI Act. That is, the employee should use a means of transport like the company's commuter bus and its route exclusively, or use its equivalent means.

② 2nd step: Whether the route and means of transportation can be determined by the employee. That is, even though an employee uses his/her own car for commuting, if the employee cannot use another means of transportation or route, it shall be regarded as an occupational accident.

(3) Choice of route and means are determined to be limited in the following cases:

① The employee carries out assigned duties during the commute to and from work;

② The employee carries out urgent duties related to work before or after the usual contractual working hours; and

③ In view of other job characteristics or special characteristics of the workplace, the employee's choice of means of transportation and route for the commute to and from the workplace is limited by the employer.

However, in ① and ②, until the employee completes his/her duties and tasks and returns to the ordinary commuting route, his/her trip is treated as a business trip, and any accident occurring after the employee returns to the ordinary commuting route shall be determined as an "accident while commuting to and from work." [6]

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[4] Supreme Court ruling on September 4, 2002 2002 do 5290: The employee died on the way back home from the business trip. The accident occurred out of the regular route and means, and so could not be recognized as a work-related accident.

[5] Guidelines for handling accidents occurring while commuting to and from work: The Agency's Compensation Department – 10195 (December 17, 2013) The Agency distributed guidelines that included a wider recognition of accidents while commuting to and from work to be determined as work-related.

[6] The Agency's Compensation Department – 7065ho, August 30, 2013.

IV. Decision by the Industrial Accident Review Committee & Evaluation

1. Decision

The employee usually used the subway to commute and only used his own car when he had a business trip, usually two or three times per week. In the morning, he arrived at the office around 8:30. On the day when the accident occurred, he was directed by his employer to use his own car, and drove it towards the office to pick up the president and a colleague before leaving together on the business trip. The employee left his house around 5:30 am, two hours earlier than ordinary, and had the accident at 6:16 am. The accident occurred on the regular commuting route. In consideration of these things, the employee's accident is considered a work-related accident occurring while under the employer's direction and supervision as per the means of transportation and route, so the Committee unanimously reversed the Agency's earlier rejection.

2. Evaluation

The day before the accident, the employer had designated the employee's car as the means of transportation for the business trip. The employee did not use public transit as he normally did and instead drove his own car to work to use for the business trip as directed. On the way to the office, he got into an accident. Even though the car was his own, it was designated by the employer for company use, so the accident can be regarded as work-related as the employee used the car as designated by the employer under the employer's direction and supervision.

Ⅴ. Conclusion

The courts have continuously expanded the range of recognition as work-related those accidents occurring while commuting to and from work, and on December 17, 2013, the Agency distributed updated work-process guidelines reflecting recent judicial rulings. The accident in this article was recognized as work-related accident in accordance with this gradually-widening recognition as work-related those accidents occurring while commuting to and from work.

Recently, revision of the Industrial Accident Compensation Insurance Act has been proposed to the National Assembly to extend the range of recognition as work-related these types of commuting accidents. Currently, in general terms, accidents occurring while commuting to and from work are not recognized as work-related accidents, even though they are the most frequent type of accidents and seriously hinder employees' abilities to make a living. At present, commuting accidents are generally only admissible as work-related for government employees, which also goes against the principle of equal treatment for employees in the private sector. I look forward to such private-sector employees receiving equal protection under the principles of industrial accident compensation. As the legal representative for the employee in the case described in this article, it was with great satisfaction that I was able to assist him in successfully appealing the Agency's rejection of his application for compensation, and thereby provide his family some hope and relief for the future.

Business Transfers & Employment Relations

I. Introduction

Due to the deteriorating economy, corporate business adjustments, mergers and acquisitions have recently become frequent. As corporations are restructured, employees often continue to maintain employment while their employer changes. This is known as a business transfer: the employees and their duties remain the same, but the employer does not. As there is no clear explanation stipulated in the Commercial Act, the Civil Act or Korean labor law of how business transfers are to affect employment relations or working conditions for employees, we have to depend on judicial precedent for issues that arise. Herein I will review the legal principles of business transfers, the details and limitations of transferred employment, and relation with the rules of employment or collective agreements.

II. Legal Principles of Business Transfer

1. Basic principles

(1) Business transfers involve the transferring of a business from one entity to another, while retaining the people, property, and business identity. Partial business transfers are also possible. When a business transfer occurs, responsibility for employment of the employees concerned shall be handed over inclusively to the transferee in principle. Whether an employee previously transferred from another company is accepted as part of a business transfer shall be decided not by how much property was transferred, but by whether the transferred business organization was totally or partially retained. For example, if all properties are transferred after an organization is liquidated, it is not a business transfer. On the other hand, if a business facility partially retains its organization when it is handed over, and if the transferred portion retains its previous role, this is a business transfer. [7]

(2) Business transfers can involve the entire business or a particularly important portion being transferred. In order for the transfer of a particularly important portion to be accepted as a business transfer, the transferred business must be able to at least operate its systematic function and perform the particular business involving the business facilities and the employees therein in the same way before and after the business transfer. [8]

(3) Whether a business transfer has occurred or not shall be determined by whether the transferred business can perform the same profitable business as before through the transferred property as a systematic organization while also managing the previous level of business without starting anew. [9]

[7] Supreme Court ruling of March 29, 2002, 2000doo8455 (Unfair dismissal); July 27, 2001, 99doo2680
[8] Supreme Court ruling of June 9, 2005, 2002da70822
[9] Supreme Court ruling of November 25, 1997, 97da35085

2. Exceptions

(1) Conditional business transfers : If a business is transferred, labor relations between the transferor (original employer) and the employees are transferred inclusively to the transferee (new employer) in principle, unless there are special conditions imposed in the transfer agreement. If one of the conditions between the parties involved in the transfer is to exclude some employees, those excluded employees will not be transferred. Such a condition shall be justifiable under Article 23 (1) of the Labor Standards Act, because it is equivalent to actual dismissal. However, it is not justifiable to dismiss an employee on account of a business transfer. [10]

(2) Contract for sale and purchase of property: When POSCO (the transferee) purchased a particular business section operated by Sami Special Steel Company (the transferor), the transferee took over only the assets of the plant but not claims and liabilities. The transferee took on most of the employees from the transferor, but employed them individually after dismantling the previous personnel organizations upon transfer and hiring them again under a probationary period, after which it placed them in new positions according to the transferee's new business schedule. This was not a business transfer, but rather a transfer of an asset.[11]

III. Business Transfers & Employment Relations

1. Principles

(1) When making a contract to purchase some parts of a business of another company, in cases where the buying company agrees to take over the rights and duties of the employees working at that business section inclusively, their employment is transferred to the buying company in principle. However, the employment relations transferred at this time refer to the employment conditions the buying company agreed to as of the signing date of the contract, but does not include an employee who was dismissed from that business section prior to the contract-signing date and who was in the middle of a legal dispute regarding claims of unfair dismissal.[12]

(2) In the event of a business transfer, an employee's employment relations are transferred to the transferee company and considered to be continuous. Just because the transferred employee received severance pay at the time of business transfer, does not mean that the employee was terminated by the previous company (the transferor), beginning new employment with the company that purchased the business. Provided, that if the employee submitted a resignation letter voluntarily and then received severance pay, it can be regarded that the employee agreed to the termination of employment. In contrast, in cases where an employee had to resign and be re-hired by the company according to its unilateral decision and in accordance with its business policy,

[10] Supreme Court ruling of June 28, 1994, 93da33173
[11] Supreme Court ruling of July 27, 2001, 99doo2680: Sami Special Steel; Lim Jongyul, "Labor Law", Parkyoung Sa, 14th edition, page 522.
[12] Supreme Court ruling of May 25, 1993, 91da41750; July 14, 1997, 91da40276

even though the employee receives severance pay, the employment has not been terminated. [13]

2. Exceptions

(1) Employment relations transferred in a business transfer refer to those with the employees working at the particular section being transferred as of the signing date of the contract, but do not apply to employees who were dismissed from that business section prior to the contract signing date, even if they were in the middle of a legal dispute over claims of unfair dismissal. However, if it is clear that the transferee company knew that the orders of the transferor company to the transferring employees were not valid (as the employees rejected them), and accepted the business transfer clearly knowing this fact, the employment relations of those employees would be transferred to the transferee company as is.[14]

(2) In the event of a business transfer, employment relations with the employees concerned are transferred inclusively in principle, but if opposing the transfer to the transferee company, the employees can choose to stay with the transferor company or resign from both the transferee and the transferor companies. The employee may also choose, upon his/her own volition, to resign from the transferor company and thereby terminate continuous employment, and then seek a new job with the transferor company. At this time, the employee's intention to oppose the business transfer should be expressed to the transferor company or the transferee company within a reasonable time from the date that the employee came to be aware of the business transfer.[15]

IV. Applicability of the Rules of Employment & the Collective Agreement

1. The rules of employment

(1) If employment relations were transferred inclusively, the employee can expect to have the same working conditions with the transferee company as he/she had with the previous company (transferor). In cases where the employer intends to change the rules of employment unilaterally or require the transferred employees to agree to comparatively disadvantageous rules of employment with the transferee company (the new employer), the employer shall obtain the consent of the majority of employees to whom the transferor company's rules of employment apply, by means of a collective decision-making process. Without this type of agreement, the employees concerned shall not be subject to the transferee company's rules of employment, but shall remain subject to the previous rules of employment as they are.[16]

(2) In cases where employment relations are transferred inclusively due to business transfer or company merger, the transferor employer's contract working conditions shall be transferred. If the severance pay regulations from the transferor company are superior to the severance pay

[13] Supreme Court ruling of November 13, 2001, 2000da18608: Severance pay
[14] Supreme Court ruling of May 31, 1996, 95da33238
[15] Supreme Court ruling of May 10, 2012, 2011da45217: Severance pay
[16] Supreme Court ruling of January 28, 2010, 2009da32362

regulations of the transferee company, the inferior transferee severance pay regulations shall not apply after the transfer unless the transferee company obtains the transferred employees' consent through the collective decision-making process stipulated in Article 94 (1) of the Labor Standards Act. After the employment relations are transferred inclusively, if the transferee company's severance pay system is inferior to that of the transferor company, the transferor company's severance pay system shall be continuously applied to the employees from the transferor company. As a result, two different severance pay systems would be operated in one company. In this exceptional case, two different severance pay systems can be legitimately established and applied.[17]

2. Relation to the collective agreement

(1) Even though employment relations were transferred inclusively in the business transfer, if the company newly agrees with the labor union through a collective agreement that the previous working conditions would change, or be adjusted or unified with the transferee company's working conditions, this new collective agreement shall be applicable.[18]

(2) Even though multiple companies are merged, the collective employment relations and working conditions between the merged companies and their employees are transferred and continue to apply as they were in the pre-merger companies until the labor union representing those employees can make a new collective agreement that unifies the different working conditions. Even though the labor union of the new company has a union shop membership system, the merged companies' employees will not automatically become members of the new company's labor union, until the labor union representing all employees (including the merged companies' employees) agree on union shop membership or conclude a collective agreement on the issue with the employees from the merged company.[19]

V. Conclusion

If employees are re-hired selectively through a contract for sale and purchase of property, and if that contract substantially represents a business transfer, such dismissals can still be deemed unfair. For business transfers, the employees are generally transferred inclusively, but if the contract is for the sale and purchase of property, the employees working on such property are not considered eligible for reemployment. Accordingly, we can see many cases where transferee companies take advantage of this legal application by formally dismissing the transferor company's employees through a contract for sale and purchase of property, despite the transaction being substantially a business transfer. Sticking to strict application of the legal principles of a business transfer is required to prevent such abuse.

[17] Supreme Court ruling of December 26, 1995, 95da41659: Severance pay
[18] Supreme Court ruling of October 10, 2001, 2001da24051: Wage
[19] Supreme Court ruling of May 14, 2004, 2002da23185

Comparison between the Labor Relations Commission and the Teachers' Appeals Commission

I. Introduction

A foreign professor of a private university visited this Labor Law Firm for a consultation regarding his unfortunate employment case. This professor had had his employment contract renewed every year for the past 5 years, but this had not been done this past February. The university stated that his employment contract had expired, as he was a fixed-term employee. The professor thought that his employment contract would be renewed according to the university regulations, as he had better-than-average scores in the teacher evaluation. He took legal action by submitting to the Labor Relations Commission an application for remedy for unfair dismissal, but his claim was rejected. He visited me to apply for an appeal.

Reviewing the details of his case, it was determined that, as he had been an assistant professor, he should have taken his original application for remedy to the Teachers' Appeals Commission instead of the Labor Relations Commission. This individual could have been protected from the unfair rejection if he had known of the procedures of the Teachers' Appeals Commission. This was a very unfortunate situation. [20]

In cases where an employee receives an unfair personnel disposition, he or she can find resolution by applying for remedy with the Labor Relations Commission. In 2015, the Labor Relations Commission handled 13,000 unfair dismissal cases, whereas in comparison, the Teachers' Appeals Commission only disposed of 588, a relatively small number of cases, although the number is gradually increasing.[21] Foreign professors, in particular, can be confused as to whether a claim should be made with the Teachers' Appeals Commission, as they are fixed-term employees, but at the same time have the status of a teacher. The information below will enable the reader to understand the procedures of the Teachers' Appeal Commission as they compare to the procedures for remedy with the Labor Relations Commission.

II. Comparison of Functions between the Labor Relations Commission & the Teachers' Appeals Commission

1. Division of Scope

Individuals subject to applications for remedy with the Labor Relations Commission are employees working for a company that employs five or more employees. Provided, that government servants working for state or local governments, and teachers, are excluded. Those government servants and teachers to whom Korean labor laws do not apply can submit applications for remedy through the

[20] Similar case: NLRC 99 Buno 165, Buhae 610, Jan 31, 2000. Railroad employees, to whom the Government Servant Law applies, submitted a claim of unfair dismissal to the Labor Relations Commission, rather than to the Appeals Commission. Due to this, the case was rejected.
[21] Teachers' Appeal Commission, "Collection of Decision Cases", 2014

Appeals Commission. The State Administration has an Appeals Commission for public servants and the Teachers' Appeals Commission for teachers, while local administrations have an Appeals Commission for local public servants. The legislative branch and judicial branch of the national government, the Constitutional Court, and the Central Election Management Commission all have their respective appeals commissions.

Teachers have rights of education, guarantee of status, and guarantee of freedom of speech, while at the same time they often have the duties of educating and conducting research and maintaining their professionalism as teachers, but are banned from political activities. Of particular interest, the system related to the guarantee of status is with the Teachers' Appeals Commission, which deals with teachers' disciplinary dispositions (such as expulsions, dismissals, suspensions from office, wage reductions, and written warnings), and disadvantageous dispositions (such as forced leaves, dismissals, and removal from one's position), and this system can involve a kind of administrative trial.[22]

Specifically, teachers are classified as kindergarten "directors and assistant directors" (Article 20 of the Early Childhood Education Act), teachers at elementary schools, middle schools, high schools, advanced technical high schools, and "principals and vice-principals" at special schools (Article 19 of the Elementary and Secondary Education Act), as well as those at universities, colleges, colleges of education, and "presidents, deans, professors, vice-professors, associate professors, assistant professors, and full-time instructors" at open schools (Article 14 of the Higher Education Act). Accordingly, employees engaged in a private school's administrative work, and fixed-term employees, (Article 32 of the Public Educational Officials Act, Article 54-4) do not fall within the scope of the Teachers' Appeals Act. Instead, they may apply for remedy with the Labor Relations Commission.

2. Legal Procedures of the Labor Relations Commission & the Teachers' Appeals Commission

Item	**Labor Relations Commission**	**Teachers' Appeals Commission**[23]
Composit-ion	○ Related law: Labor Relations Commission Act. ○ Organization: Under the Ministry of Employment & Labor, National Labor Relations Commission (1) and regional Labor Relations Commissions (12). The National Labor Relations Commission (NLRC) is located in Sejong City, while regional Labor Relations Commissions (LRC) are located in their respective regions. ○ Purpose: To provide judgments for rapid and equitable resolution of unfair dismissal claims, unfair labor practices, etc.	○ Related law: Special Act on the Improvement of Teachers' Status. (Related Enforcement Decree: Regulation Regarding the Teachers' Appeals Commission). ○ Organization: Under the Ministry of Education. There is one Teachers' Appeals Commission in Sejong City. ○ Purpose: As a collegiate administrative agency, to provide a review and judgment equitably based upon related laws and judicial rulings for disciplinary actions and disadvantageous dispositions related to

[22] Dongchan Lee, "A Study on the Teachers' Appeals Commissions", Hanyang Law Study, 22, February 2008, p. 370.
[23] Teachers' Appeals Commission in the Ministry of Education,「Renewal of Teachers' Employment Contracts」, Publishing Company, Intelligence Space, 2016

	○ Applicable to: All employees to whom the Labor Standards Act (LSA) applies. ○ Composition of judgment panel: 3 members representing the public interest, 1 member representing employee interests, and 1 member representing government interests. ○ Target: Claims of unfair dismissal under Article 23 of the LSA; Claims of unfair labor practice: Article 81 of the Trade Union & Labor Relations Adjustment Act. Correction of discriminative treatment: Article 9 of the Fixed-term Employee Act.	teachers. ○ Applicable to: Teachers working in national, public and private kindergartens, elementary schools, and universities. ○ Composition of judgment panel: 8 committee members, with a majority attending. ○ Target: -Disciplinary actions handled: expulsion, dismissal, suspension from office, and warning letters. -Other disadvantageous actions handled: rejection of contract renewal, dismissal, removal of job title, and forced leave.
Applicati-on for remedy	-The employee shall apply for remedy for unfair dismissal or unfair labor practices, etc. within three months from the date on which such action took place (Article 28 of the LSA, Article 82 of the Trade Union and Labor Relations Adjustment Act). -Jurisdiction: The Labor Relations Commission that is located in the district where such actions have occurred (Article 29 of the LRC Regulation).	The employee shall apply for remedy within 30 days from the date on which the action took place. -If the employee has applied for remedy to the Teachers' Appeals Commission regarding expulsion or dismissal, the school shall not appoint a successor until the Commission makes its final decision. Provided, appointment of a successor can be done after the applicable period for remedy claims has expired.
Receipt of applicatio-ns	The adjudication committee is assembled when a remedy application is received. -Composed of three representatives of the public interest to be in charge of adjudication. -Appointment of an investigator. -Request correction of any missing required items for remedy application. -Add or change the purpose for applying.	When a remedy claim is received, the Commission official shall immediately appoint an investigator to be in charge. -When it is determined that the remedy application is missing required information, a request for correction should be made within 7 days from the date on which the case was filed. If such required correction is minor, the Commission will correct it directly.
Providing and demandi-ng written response	-The Commission sends the parties in charge of the presentation information to advise on preparing a statement of reason, response documents, and the judging procedures. -The Commission will forward a copy of the	The Commission will, within 3 days, send a copy of the remedy application and request the written responses. -The Commission will forward a copy of the remedy application and may request the

s.	remedy application and statement of reason, and request submission of response documents.	submission of written responses.
Investigat-ion & submissio-n of evidence	The Commission requests the documents needed for the case, and if necessary, may request attendance of the parties concerned or witnesses. If necessary, the investigator may visit the workplace for investigation purposes.	Receives the statement of reasons and forwards copies of such documents within 20 days. -Upon receipt of the written response from the school, one copy will be sent to the applicant. If necessary, the investigator may visit the workplace for investigation purposes.
Providing informati-on on hearing dates	A hearing date is announced 7 days in advance. -The hearing may be delayed for justifiable reason.	A hearing date is announced 7 days in advance. -The hearing may be delayed for justifiable reason.
Hearings	The hearing panel will consist of three representatives of the public interest, one member representing the employee, and one member representing the employer. -Meeting procedure: Confirm the case → Confirm the parties → Questions and statements → Decision. -Persons wishing to attend the meeting must receive permission in advance. -The chairperson can designate a witness and question him or her. In such cases, both parties will have equal opportunity to ask questions.	○ Hearing of the appeal. -Participants: the chairperson, commission members, commission official, investigator in charge, both parties and witnesses. -Meeting procedure: Confirm the case → Confirm the parties → Questions and statements → Decision. -Range of review: The commission cannot explore issues other than the remedy claim.
Decisions	A judgment hearing is held. Presentations are made to the three representatives of the public interest, who make decisions by majority vote. -Results: Admission, rejection, cancellation, or settlement. -Monetary compensation: Admission of unfair dismissal, and monetary compensation instead of reinstatement	-Method: The hearing requires attendance of two-thirds of the registered members, and is decided by the majority vote of the registered members in attendance. -Deadline: The decision should be made within 60 days, with an additional 30 days allowed when necessary. -Decisions: cancellation, dismissal, reduction of disciplinary action, Order of implementation, etc.
Sending of decisions	Sending the decision: For remedy applications, the verdict shall require implementation of the order within 30 days.	The decision will be sent within 15 days. -When the decision document is complete, it is sent to both parties.

Follow-up measures and appeals	-Enforcement levy: If the employer has not complied with the decision of the Commission, an enforcement levy of up to 20 million won per person will be charged. Such levy may be charged twice per year, for up to two years. If the employer wins the case in the appeal commission or court, all levies previously paid will be refunded. -An appeal may be entered within 10 days from the date on which the party received the decision.	-If the Commission's decision cannot be admitted, the teacher or the private school can file an administrative litigation. -Teachers working for a public school may file administrative litigation against the public school concerned. However, the public school cannot file a lawsuit but must comply with the decision. -Administrative litigation should be filed within 90 days from the date of the decision.

3. Characteristics of the Teachers' Appeals Commission

The Teachers' Appeals Commission has many positive characteristics, as the system was designed to fit the needs of teachers as follows: ① The Commission cannot implement the worst of the original dispositions on the applicant (Article 16 of the Teachers' Appeals Regulation). ② When the applicant receives a disposition of expulsion or dismissal, the school cannot assign a replacement until a decision is made (Article 9 of the Special Law for Teachers' Status). ③ There is no fee for filing an appeal, and the decision on an appeal can be made much quicker than in civil litigation: within 60 days with a possible additional 30 days (Article 10 of the Special Act on Enhancement of Teachers' Status). Accordingly, the Teachers' Appeals Commission is the best system for practical remedies by considering the teachers' guarantee of status, as in the aforementioned items.

III. Conclusion

The foreign professor recognized that the rejection by the Labor Relations Commission was not due to the particulars of his case, but due to the wrong commission being asked to handle the case. He also understood that any appeal to the National Labor Relations Commission would not be valid due to the different legal procedure. In his case, there were two options that he could pursue: file a civil litigation, or look for a new job after acquiring a D-10 (job-seeking) visa. In this instance, I suggested that he look for another job instead of filing a civil litigation due to the fact that it could be almost impossible for a foreigner to pursue such civil action due to the expenses and time required. It was disappointing to realize that this was the result simply because he did not know the proper legal protection procedures. Obviously, employees need to become familiar with their applicable legal protection in order to avoid losing their legal rights.

Judgment Criteria for Justifiable Disciplinary Action

I. Introduction

The employer exercises his right to take disciplinary action by punishing an employee who violates company regulations in order to maintain managerial order and promote productivity. The purpose of this disciplinary action is to prevent reoccurrence of identical violations by properly punishing the employee who violates company service regulations, and to restore company order. The employer's authority to take disciplinary action is discretionary, but shall be exercised within boundaries set by the Labor Standards Act. That is, "No employer shall dismiss, lay off, suspend, or transfer an employee, or reduce wages, or take other punitive measures against an employee without justifiable reasons" (Article 23 (1) of the Labor Standards Act). Therefore, disciplinary action without justifiable reason is null and void, as it is an abuse of the employer's right.

In cases where an 'application for remedy from unfair dismissal' is made at the Labor Relations Commission, judgment criteria for justifiable disciplinary action may be classified under the following three principles: 1) Whether there was a justifiable reason for disciplinary action, 2) Whether the severity of punishment was appropriate, and 3) Whether disciplinary process was observed. In judging the criteria for disciplinary action, there has been no dispute over the "reasons for disciplinary action," but there has been a lot of dispute over "the severity of punishment" and the "disciplinary process." I would like to look at some concrete guidelines and labor cases related to the three judgment criteria for disciplinary action.

II. Reasons for Disciplinary Action

1. Justifiable reasons

The employer shall clearly stipulate reasons for disciplinary action related to company service regulations in the Rules of Employment or other appropriate document, in order to implement disciplinary action. This regulation of disciplinary action shall satisfy the need for justifiable reason under the precondition that "the employer cannot discipline the employee without justifiable reason" from Article 23 (1) of the Labor Standards Act.

2. Classification of disciplinary reasons

(1) Individual behaviors

1) Misrepresentation of career
2) Absence without permission
3) Poor personal work evaluation
4) Verbal/physical violence, or causing injury
5) Interference of business

6) Neglecting to protect company secrets
7) Embezzlement, misappropriation and diversion
8) Sexual harassment at work
9) Falsified reports or documents
10) Character defamation
11) Disregard for rules
12) Stealing company property
12) Accepting or offering bribes
13) Use of company facilities without permission

(2) Disobedience to company directions
1) Refusing to be assigned to another workplace
2) Refusing a job transfer or transfer to another division or subsidiary
3) Refusing to work overtime
4) Refusing to submit a written apology
5) Refusing to follow company directions

(3) Delinquency in private life
1) Causing a traffic accident
2) Gambling
3) Arrest, detention, indictment for a criminal offense
4) Scandalous criminal offense

(4) Illegal group activities or union activities
1) Union activities during working hours
2) Distribution or posting of leaflets
3) Wearing a union ribbon or armband
4) Obstructing other employees from working
5) Illegal occupation of company facilities

III. Severity of Disciplinary Punishment

1. Principles

(1) In regulating reasons for disciplinary action in the Rules of Employment, the company can stipulate various levels of disciplinary punishment for identical cases. The company can regulate standard types of disciplinary punishment for violations, but it can also stipulate heavier punishment according to the severity of the violations. For the most part, it is up to the company what disciplinary punishment they wish to give. However, this discretion requires a socially acceptable balance between the reasons for disciplinary action and the disciplinary punishment. In cases where the employer gives a very heavy punishment for a light violation, the disciplinary action becomes an abuse of the employer's right and becomes null and void. (Supreme Court, Jan

11, 1991, 90daka21176)

(2) In cases where there are several violations of company regulations that the employee should be punished for, whether disciplinary dismissal is justifiable shall not only be determined by each individual violation. Instead, the employer shall include all violations when considering dismissal, and reach a decision based on whether the violations are serious enough to discontinue employment relations in terms of socially acceptable common sense. (Supreme Court Dec 9, 1997, 97nu9161)

(3) In choosing a type of disciplinary punishment, an employer shall first review the employee's previous attitude, performance results, and severity of the violations. (Supreme Court Feb 12, 2004, 2003du127578)

2. Related cases

(1) An employer dismissed an employee for a minor violation, even though the employee had received awards several times. As this disciplinary action was the heaviest form of punishment, it went beyond the employer's right to take disciplinary action. (Supreme Court Sep 13, 1978, 76nu228)

(2) An employer dismissed an employee for one incident of misbehavior. From all the options available, the employer chose what appeared to be the heaviest form of punishment. Furthermore, as this employee's one incident of misbehavior was not judged to be a common sense reason to discontinue employment relations, the disciplinary dismissal was determined to be an abuse of the employer's right to take disciplinary action, and was null and void. (Supreme Court, Mar 22, 1996, 95nu3763)

(3) After a transfer to another department, an employee did not show any improvement in attitude over a long period, and despite receiving repeated warnings for negligence at work, so dismissal was justifiable. (Seoul District Court, Oct 20, 2006, 2005guhap35810)

Since having been transferred to the Business Department, an employee's intentionally negligent behavior at work became reason for disciplinary punishment under the company's service regulations. Providing labor is the most fundamental obligation that an employee has, and his high position as a general manager would make him more likely to become a target for criticism. Although the company had warned him several times directly and indirectly, through transfer, reprimand, and employment without a specific job, etc. for his repeated negligence, he did not show any regret or improvement. His behavior infringed seriously enough on the need for mutual reliability with the company that it decided to break the employment contract. In considering motives, causes, and process of the employee's negligence, it was judged that the dismissal of this employee was within the realm of the employer's right to take disciplinary action. Accordingly, the Seoul District Court agreed with the National Labor Commission's ruling that this dismissal was justifiable.

IV. Disciplinary Process

1. Written notification of reasons for dismissal

An employer who wants to dismiss an employee should give written notice as to the cause for dismissal, the date of dismissal, etc. If the employer dismisses the employee without giving such written notification, the dismissal shall be rendered null and void. (Labor Standards Act (Article 27)

2. Observation of disciplinary process

An employer shall observe the disciplinary process guidelines described in the Collective Agreement and Rules of Employment to guarantee fair implementation of disciplinary action and to promote rational operation of the disciplinary system.

(1) In cases where the disciplinary process has been regulated in the Collective Agreement, Rules of Employment, etc., the disciplinary process must be observed. If there is no procedural provision stipulated, disciplinary punishment may still be valid. (Supreme Court Jan 24, 1989, 88daka7313)

(2) According to disciplinary regulations based on collective bargaining and the Rules of Employment, the company shall include the union chairman in the disciplinary action committee and shall give the employee in question opportunity to attend, state his/her opinion, and submit verification documents. However, if the company dismisses an employee without observing the disciplinary process guidelines, even if disciplinary punishment is justifiable, this dismissal is invalid because the company did not follow the disciplinary process. (Supreme Court Jul 9, 1991, 90da8077)

(3) The Rules of Employment stipulate that the employee in question shall be given an opportunity to express his/her opinions in the disciplinary process, which means that the company shall give the employee opportunity to attend and state his/her opinion at the disciplinary action committee. Therefore, the company shall inform the employee of the time and place of the disciplinary meeting so as to provide the employee ample time to prepare his/her statement and verification documents. When a specific disciplinary action committee met at 2pm on January 26, 2001 and concluded with disciplinary dismissal, the employee in question received notification of the disciplinary hearing by mail, just that day. This did not give the employee enough time to prepare his statements or verification documents, so such delayed notification is illegal. (Supreme Court Jun 25, 2004, 2003du15317)

(4) The Collective Agreement includes guidelines for disciplinary dismissal if an employee is absent without permission or leaves early without permission. If a company dismisses an employee for these behaviors, without engaging in the decision-making process through a disciplinary action committee (thereby following the entire disciplinary process), disciplinary dismissal cannot be recognized as a valid course of action. (Seoul Appellate Court Jul 8, 2008, 2007nu34776)

Required Disciplinary Procedures: Related Cases

I. Importance of Disciplinary Procedures

Justifiable disciplinary action is estimated by whether the following three aspects are justifiable: reasons for discipline, severity of punishment, and disciplinary procedures. Of special note is that if the employer does not follow appropriate disciplinary procedures, the disciplinary action is null and void even though there is sufficient reason for disciplinary action and the severity of punishment is reasonable. Disciplinary procedures fall into two categories. The first is a written notice (of dismissal etc.): if the employer fails to issue a written notice of dismissal, any dismissal will be considered unfair even though there is justifiable reason for dismissal. Secondly, if a provision exists in the Rules of Employment or collective agreement stipulating disciplinary procedures, the employer shall observe these procedures to ensure disciplinary action is justifiable. If these procedures are not observed, disciplinary action cannot be considered in effect despite the justifiability of the reasons. However, if no regulations are stipulated in the Rules of Employment or collective agreement concerning disciplinary procedures such as opportunity for the employee to attend the disciplinary action hearing and represent his/her own views, disciplinary action is considered to be in effect without disciplinary procedures. In this article, required disciplinary procedures will be clarified, using as reference related labor cases that Kangnam Labor Law Firm has represented.

II. Case One: Written Notice[24]

Located in Mokdong, Seoul, “G” Institute employed about 20 teachers, both native English and Korean, to teach elementary and middle school students. Intending to balance the number of native teachers with Korean teachers, the principal of the institute verbally notified two foreign teachers in the middle of August of their coming dismissal, due to being estimated as the teachers with the lowest skills. On August 27, these two teachers were dismissed. The employer then sent written notification of dismissal to the two teachers (hereinafter referred to as “the Employees”) by text message and regular mail. The Employees applied to the Seoul Labor Commission for remedy on November 24, 2010.

The Labor Commission held a judgment hearing and stated the following: “Both parties have stated their claims in this dismissal case, and the main point is placed on justification for dismissal: whether or not the reasons, procedures, and severity of punishment are appropriate. In estimating the justification for dismissal in this case, Article 27 of the Labor Standards Act states this basic requirement: ‘If an employer intends to dismiss an employee, the employer shall notify the employee of the reasons for dismissal and the date of such dismissal in writing. Dismissal shall take

[24] Seoul LC 2010buhai2283: unfair dismissal by GKI Language Institute. Mr. Jung was the legal attorney for this case.

effect only after written notification is given to the employee.' The employer claimed that he sent the employees written notification of dismissal by regular mail, but since the employer could not verify this fact with evidence, it is hard to believe that the employer properly implemented the procedures of giving written notice for dismissal stipulated in Article 27 of the Labor Standards Act. Accordingly, these dismissals are unfair without having to review whether the reasons for dismissal are justifiable. This Labor Commission has concluded that the employer should pay each employee 9.5 million won, which is the amount that the employees were supposed to receive each month in lieu of reinstatement."

The employer claims that it would not be fair to give 20 million won as compensation, instead of a few hundred thousand won, on account of one missed document: written notification of dismissal. However, Article 27 of the Labor Standards Act clearly regulates that employers shall give written notification of dismissal, along with reasons for dismissal and effective date, before the dismissal takes effect. This means that written notification is an essential requirement for dismissal to be legally effective. This act is designed to make the employer seriously consider the effects dismissal has on employee security, and to clearly resolve labor issues such as unfair dismissal and unpaid severance pay.

III. Case Two: Labor Case on Disciplinary Procedures[25]

MeeHang Transportation operated a taxi business in Yeosu, South Jeolla Province, with 40 employees. In August 2006, the company decided to raise the taxi drivers' daily deposit in an attempt to reduce a deficit that had accumulated over several years, but failed to do so due to opposition from the labor union. Intending to push the labor union into agreeing to the driver deposit increase, the company notified union members that the current regular 12-hour work day would be reduced to 8 hours, as stipulated in the Collective Agreement. Union members refused to agree to this, so the company sent each union member a letter warning they would be suspended or dismissed for any further violation of company orders. On September 6, 2006, two employees (hereinafter referred to as "the Employees") led a group of about 10 union members to the president's office to protest, swore at the employer and threatened to disclose company corruption to the police.

The company called a Disciplinary Action Committee hearing with four committee members appointed by the company according to the Rules of Employment, and determined disciplinary action for violation of employee responsibility: suspension for three months without pay. On October 26, 2006, the Employees applied to the JeonNam Labor Commission for remedy for unfair disciplinary action. The Labor Commission ruled in favor of the Employees and ordered the company to remedy the situation on December 19, 2006. The employer appealed to the National Labor Commission (NLC) on January 30, 2007, but the NLC agreed with the first ruling. The ruling explains

[25] NLC 2007buhai92: Mihany Taxi Company's unfair suspension case. Mr. Jung was the legal attorney for this case.

that while there is certainly justifiable reason for disciplinary action, justification for the disciplinary procedures followed is lacking.

The National Labor Commission's judgment was as follows: "The reason for disciplinary action against the Employees was for cursing the employer in the process of protesting company decisions, which has been proven as actual fact after looking into voice recordings, related employee statements, and related video materials.

"However, even though reason exists for disciplinary action against the Employees, justification for disciplinary action requires legality in disciplinary procedures as well as reasons for disciplinary action. The employer claimed 'disciplinary action was justifiable since the company formed a Disciplinary Action Committee according to the Rules of Employment. The collective agreement was invalid as of May 1, 2005 due to cancellation by the employer on October 29, 2004. This means that rules related to composition of the disciplinary action committee are considered contractual parts of the collective agreement, not normative. Therefore, normal disciplinary procedures do not have to be followed in this case.' However, according to Article 31(1) of the Labor Union Act, standards concerning working conditions and other matters concerning the treatment of employees as prescribed in the collective agreement are given normative effect. This normative portion would be transformed to working conditions of individual employees and remain effective in their labor contracts, even in cases where the current collective agreement has expired and a new collective agreement has not yet been concluded. These normative portions consist of matters concerning wages, various allowances, working hours, holidays, leave, kinds and benefits of industrial accident compensation, severance pay, service regulations, promotion, reward and punishment, and dismissal. Accordingly, regulations concerning the composition of a disciplinary committee shall be considered normative (Supreme Court ruling on Feb 23, 1996, 94 nu 9177)."

"If so, although disciplinary action against the Employees follows justifiable procedures according to the collective agreement, the employer did not compose the Disciplinary Action Committee of three persons representing labor and three representing management, as regulated by the collective agreement, at the time of punishing the employees concerned. Instead, the employer punished the Employees with a Disciplinary Action Committee consisting of members selected only by the employer in accordance with the Rules of Employment. This disciplinary action therefore had procedural mistakes, is unfair, and lacking justification."

In conclusion, despite having a justifiable reason for suspending the Employees without pay, this disciplinary action was judged as unfair because the employer did not observe disciplinary procedures. Upon judgment by the first Labor Commission, the company should have taken new disciplinary action according to legitimate disciplinary procedures, as this is possible. "In cases where a conclusion of unfair dismissal is reached due to a violation of disciplinary procedure, the employee is considered to have never been dismissed. The employer can then take new disciplinary action by following corrected disciplinary procedures, as this does not violate the principle of good-faith or of prohibition against double punishment" (Supreme Court ruling on Dec 5, 1995, 95da36138).

IV. Details of Disciplinary Procedures

1. General disciplinary procedures

In general, disciplinary procedures are implemented in the following order. However, if the company does not have any procedures in its regulations, these steps are not necessary.

(1) Occurrence of reason for disciplinary action → (2) Investigation of actual facts and obtaining of evidence → (3) Approval from employer for disciplinary action → (4) Directions from the employer to the chairman of the Disciplinary Action Committee to take disciplinary action → (5) Employee is informed of time and place of the Disciplinary Action Hearing → (6) Disciplinary Action Hearing held → (7) Determination of disciplinary action → (8) Employer is notified of actions taken → (9) Final decision on disciplinary action by the employer → (10) Employee is informed of the final decision on disciplinary action.

2. Composition of Disciplinary Action Committees

If the company has in its Rules of Employment or collective agreement that disciplinary action shall be taken through its Disciplinary Action Committee, then this regulation shall be observed. In principle, this Disciplinary Action Committee is composed of those appointed by the employer. However, in cases where the Disciplinary Action Committee in the collective agreement is regulated to be composed of an equal number of representatives from the labor union and the company respectively, or shall include the labor union chairman, this disciplinary procedure must be observed in order for disciplinary action to be justifiable.

3. Employee Opportunity to Represent Own Views

If, according to the collective agreement, the employee concerned is to be given an opportunity to state his/her own views or submit related evidence, this procedure shall be observed. In this case, the employer shall inform the employee of the hearing date, time, and place with considerable advance warning in the course of providing this opportunity to the employee concerned to represent his/her own views.

4. Articles Requiring Labor Union Consultation or Consent

In cases where the collective agreement requires, the employer shall consult with or receive agreement from the labor union in advance concerning disciplinary decisions.

Rejection of Remedy Application for Unfair Dismissal

I. Summary

The applicant (hereinafter referred to as “the Employee”) had been working for a Japanese company selling Taekwondo uniforms (hereinafter referred to as “the Company”) and was dismissed on August 20, 2010, for poor work performance and negligence. The Employee, claiming that he had always worked hard and dismissal was unfair since he had never made any mistakes, applied to the Seoul District Labor Relations Commission (hereinafter referred as “the Labor Commission”) for remedy. The Company claimed that it had given several verbal warnings to the Employee for negligence, but there had been no improvement, and that, particularly, the Company was not subject to application for remedy for unfair dismissal according to the Labor Standards Act (LSA) because it had only 3 employees. The Employee claimed that there were 6 employees while he was working, including a Japanese director, but the Company claimed that two were a marketing director and general affairs director who were not employees because they worked on a commission-only basis according to their contracts. These issues meant the key point of this dispute was that the Labor Commission needed to estimate whether application for remedy for unfair dismissal could be made, before determining whether the dismissal was fair or not.

II. Employee Claims

The Employee was hired November 9, 2009 and had been engaged in marketing and sales support. He had never refused company orders, but worked hard regardless of time and place. He took business trips that included weekly holidays (Sundays), worked overtime and even during holidays, but never received extra payment for this. He also did not take any vacations. The Employee was dismissed unfairly by the Japanese managing director in August 2010, for poor work performance and disobedience. However, these reasons for dismissal - poor work performance and disobedience – were not true. The Company just blamed its lowest-ranking employee for poor business. If the Company planned to dismiss the Employee for the reasons they claimed, the Company should have given sufficient opportunity for the Employee to improve, but no chance was ever given.

There were 6 employees at the time of his dismissal: a marketing director, a general affairs director, the Employee, an assistant manager, and a newer employee. As a company with 5 or more employees, the LSA was applicable.

III. Company Claims

The Company was established in May 2009 and hired the Employee to supplement marketing, but due to his inexperience in this field (he had been a cook previously), the Company had him work in sales support. This start-up company needed positive and aggressive sales activity from the Employee, but instead, the Employee read newspapers from 9 am (the time he arrived at the office) to 10:30, and then usually went out to take care of his personal banking for the rest of the morning. In the afternoon he would call his friends, and generally show a clear lack of enthusiasm for his sales responsibilities. He would not fill out daily sales reports, would not use honorific words when addressing the Japanese managing director simply because they were the same age, and did not like to obey his superiors, so the Employee was dismissed.

The Company only employed three persons including the Employee, so, according to the LSA, application for remedy for unfair dismissal could not be made. The marketing director and the general affairs director were not employees (there was no employment contract with the Company), but rather business partners who worked on commission. They received commissions of four million won per month each and had agreed in their contracts to receive 10% of company stock when stock volume increased. Recently, the Company had not been able to pay commissions to these directors due to deterioration in sales. The directors had submitted a petition to the Labor Office to receive unpaid wages, but they were denied by the Labor Inspector after he concluded they were not employees according to the LSA. At the time of this application for remedy, the two directors had begun filing a civil suit against the Company to receive their commissions.

IV. Related Laws, Judicial Rulings and Guidelines

1. Reasons for rejection given in the judgment hearing: Reference – Regulations of the Labor Commission (Article 60):

(1) eligible period for redress according to the related laws has passed;
(2) the applicant has not submitted any required documentation despite being asked two or more times;
(3) the parties are determined to be ineligible;
(4) the specific details of the applicant's situation are determined to not be subject to orders for remedy by the Labor Commission;
(5) the identified applicant submits repeated applications for remedy for the same situation, resubmits an application for remedy for a situation already finalized in a judgment hearing, or submits an application again after the related case has been closed after judgment;
(6) the stated remedy in the application cannot be realized by law or in reality, or there is no

benefit to the applicant; or

(7) the applicant twice fails to attend the hearing, the mailed notice to attend is returned two times or more due to the address being unknown or the applicant simply did not see it, or the applicant admits he/she has given up on the case for other reasons.

2. Criteria for determining employee characteristics (Supreme Court ruling on Sep 11, 2008, 2008 da 27035)

Whether a person is considered an employee under the LSA shall be decided by whether that person offers work to the employer as a subordinate of the employer in a business or workplace to earn wages in actual practice, regardless of whether the type of contract is an employment contract or service agreement under Civil Law. Whether a subordinate relationship with the employer exists or not shall be determined by collectively considering: 1) whether the Rules of Employment or service regulations apply to a person whose duties are decided by the employer, and whether the person has been supervised or directed during his/her work performance specifically and individually by the employer; 2) whether his/her working hours and workplaces were designated and restricted by the employer; 3) whether his/her position can be substituted by a third party hired by the person; 4) who owns the equipment, raw material or working tools; 5) whether payment is remuneration for work and whether basic wage or fixed wage is determined in advance; 6) whether work provision is continuous and exclusive to the employer; 7) whether the person is registered as an employee by the Social Security Insurance Acts and other laws, and the economic and social conditions of both sides.

3. Criteria for determining ordinary number of employees (Kungi 01254-150, Feb 1, 1993)

(1) The LSA applies to all businesses or workplaces in which five or more employees are ordinarily employed. “Ordinarily employed” means that, in objective estimation based upon socially accepted ideas, if the company hires five persons or more regularly on average, it is regarded that the company hires five persons or more, even though the number of employees is less than five at times. When evaluating violations of the LSA per separate working condition, the applicable period related to each case shall be considered. That is, as for the dismissal case, the “number of employees” shall be considered the ordinary number of employees working for the month prior to the dismissal date.

(2) The Civil Code (Article 49) stipulates that the director shall register his/her name and address in the corporate registration certificate, and the Commercial Law (Article 382-(2)) regulates that relations between the company and the director comply with the rules concerning commissions. Therefore, the director, the representative of the corporate entity or labor union, or the executive

directors are not employees in principle because they hold authority as business representatives or business executives without exclusive supervision from the employer. Even though he/she holds one of these types of positions, if such person is under supervision and control of a person with authority as a business executive and is in reality engaged in provision of the actual labor service for the purpose of earning money, such person shall be considered an “employee.”

(3) If the head office and its business office are in separate locations, in principle the two offices shall be regarded as separate business entities. However, if the two offices are dispersed locally, if this business office is not independent enough in terms of ability to handle business on its own, the two offices shall be regarded as one identical business.

V. The Labor Commission’s Decision

As the two parties were in dispute as to the reasons for dismissal, the Labor Commission determined that the key point of this case was whether the Company had 5 employees or more. This needed to be done by judging if the marketing director and general affairs director were employees to which the LSA applied.

The marketing director and the general affairs director had signed a service commission contract with the Company, and worked accordingly. In more detail, the general affairs director was also working for another company at the same time, and in fact neither director worked exclusively for the Company, so their attendance was not strictly controlled. They worked on commissioned tasks independently at their discretion rather than receiving specific and direct orders, and just reported their progress to the employer. Accordingly, they were commissioned with a certain authority to give work orders to or supervise and direct employees, including the Employee concerned in this case. According to the commission contract, the marketing and general affairs directors received commissions and reimbursement of their expenses, and were to receive a certain number of stocks when the company increased them in the near future, unlike the other employees, including the Employee in this case. What they received or would receive in commissions for work cannot be regarded as remuneration in return for labor service. Furthermore, they were not registered for the four social security insurances. Considering all these factors, the marketing director and the general affairs director cannot be treated as employees providing a labor service under the employer’s supervision.

When excluding the marketing director and the general affairs director, the Company had hired fewer than five employees, which means that the Company is exempt from application of Article 23 (1) of the LSA: evaluation of unfair dismissal. Therefore, the application for remedy for unfair dismissal shall be rejected.

Dismissal during a Probationary Period

I. Principle

Even though an employee is hired under a probationary period, his dismissal shall be for a 'justifiable reason' in accordance with Article 27 of the Labor Standards Act. (Feb. 12, 1999, Seoul district court 98 gu 15558)

Even though an employee is hired under a probationary period, his dismissal shall be for a 'justifiable reason' in accordance with Article 27 of the Labor Standards Act, because his labor contract was established just like that of a non-probationary employee. Provided, that the probationary system is designed to set a probationary period in order to judge whether or not the probationary employee shows competence for the job before confirming regular employment. The employer does not have to apply the identical requirements of the regular employee's dismissal for the decision of whether he may accept or cancel the regular contract at the time of completing his probationary period or during a probationary period. Accordingly, it is possible to refuse to hire him because of negative evaluations relating to job eligibility. It is also possible to dismiss him or to refuse regular employment when there is a justifiable reason for dismissal. Under this view, the probationary period plays a role in easing restrictions for dismissal. (Jan. 11, 1994, Supreme Court 92 da 44695; Sep. 8, 1987, Supreme Court 87 daka 555)

Justification for dismissal of the probationary employee during a probationary period (Aug. 4, 2006, Labor Standards Team-4040)

The employer shall not dismiss the employee without a justifiable reason in accordance with Article 30 of the Labor Standards Act. Whether or not there is a justifiable reason for dismissal shall be estimated on a case by case basis according to whether there is a special reason why the employer cannot continue to maintain employment of the employee. However, the probationary period shall be the period for deciding whether or not to offer formal employment for the new employee by evaluating his ability to be able to fulfill his duties. Accordingly, the scope of justifiable reasons for the new employee's dismissal is wider than that for a regular employee.

The employer shall not take disciplinary action, such as dismissal, toward the probationary employee without a justifiable reason, however, the range of justifications is wider compared to the regular employee. (Nov. 12, 1990, Kungi 01254-15636)

The employer shall not take disciplinary action, such as dismissal, toward the probationary employee without a justifiable reason; however, the range of justifications is wider compared to the regular employee. Provided, that the probationary period shall be a reasonable period in consideration of the job characteristics. If the period is extended unfairly, its extended probationary period is not effective in the view of social rationality: in cases where the probationary period exceeds 3 months, the advance notice of dismissal stipulated in Article 27 (2) of the LSA shall apply.

II. Justifiable Dismissal

It is justifiable to refuse formal employment of an employee under a probationary period on account of poor performance, negligence of duty, non-cooperative relationships with other coworkers, etc. (May 22, 2005, Seoul District Court 2004 guhap 30122)

The employee joined the company as a probationary employee with a six-month probationary period. Since the probationary employee showed remarkably poor performance compared to other probationary employees, was insincere at work, and could not get along with coworkers, superiors or other workers of related companies, the team leader gave him low evaluation rating. The employer made a decision to refuse to hire the probationary employee because of the low evaluation rating. Based on circumstances, the refusal of regular employment cannot be seen as an unfair dismissal.

It is justifiable to refuse to hire a probationary employee. (Jul. 2, 2001, NLRC 2001 Buhae 199)

The company estimated that continuous employment was unsuitable and refused to hire an employee applying the probationary period stipulated in the Rules of Employment. The reason was that the hotel manager (a probationary employee) on duty spoke violently to and threatened the managing director who was checking attendance. In the view of the purpose of a probationary period, the dismissal shall be objective, reasonable and justifiable according to the socially accepted idea.

It is justifiable to refuse to hire a probationary employee who did not describe his key role in a district labor union in his resume. (Jun 8, 2001, NLRC 2001 Buhae 144)

The probationary employee did not describe in his resume his experience as a vice-training/PR chief of Metal Workers Union in Seoul - East Area when he submitted a job application, and so the company could not evaluate his character comprehensively. It was considered justifiable for the company to refuse to hire him because of the omission of his previous union career in his resume and negligence of duty.

It is justifiable to dismiss a probationary employee on account of negligence of duty. (Aug. 11, 2000, NLRC 2000 Buhae 282)

The probationary employee received complains from customers because there were more dishes or less dishes available due to his miscalculation for the necessary amount of dishes. Furthermore, he resisted his supervisor's warnings and disturbed the company's order. Therefore, the company dismissed him because of negligence of duty, which can be seen as justifiable fulfillment of the employer's personnel right.

It is justifiable fulfillment of the personnel right when the employer dismissed a probationary employee on account of negligence of duty. (Jan. 21, 2000, NLRC 99 Buhae 626)

It is justifiable fulfillment of the personnel right for the employer to dismiss a probationary taxi driver in the probationary period because of indulgence of duty when he quarreled over the superior's directions and was late for work.

Even though the employer made a comprehensive personnel evaluation with some subjective aspects during a probationary period, which became a reason for dismissal, it would not be unfair enough to deny the whole evaluation result. (Apr. 8, 1999, NLRC 99 Buhae 64)

Even though the employer made a comprehensive personnel evaluation with some subjective aspects during a probationary period, which became a reason for dismissal, it would not be unfair enough to deny the whole evaluation result. **Because th**e employee cannot verify that the company manipulated the evaluation result afterwards, his dismissal is a justifiable dismissal.

It is justifiable to dismiss a probationary employee without disciplinary process on account of negligence of duty in accordance with the Rules of Employment. (Mar. 16, 1998, NLRC 97 Buhae 329)

For the employee in the middle of a three month probation period, it is justifiable to dismiss him without disciplinary process for his negligence of duty shown during the period.

III. Unfair Dismissal

Despite the employee being under a probationary period, it is unfair to dismiss him on account of the lack of job eligibility when he did not receive any customer orders within a short period of time (i.e., only two months). (Jan. 16, 2004, Seoul District Court 2003 Kahap 54613)

According to the company's personnel regulations, newly hired employees shall have a two-month probationary period and the company can cancel the employment for the probationary employees because of job ability, qualifications, and other job eligibility issues during a probationary period. The employee was hired with an expectation to receive orders from 000 company and its subsidiary, but he did not have any customer orders and even did not make an effort to attract any sales order. Therefore, the company cancelled its probationary employment due to the poor job performance in accordance with its regulations. Despite the employee working in a probationary period, it is hard to conclude his job eligibility by the fact that he did not receive any sales orders within a short period of time (i.e., about two months). And there is no verification evidence to justify his dismissal. Accordingly, this dismissal is null and void because it was implemented without a justifiable reason.

As long as the result of probationary evaluation did not have an objective or reasonable reason as much as to refuse the regular employment, the refusal of employment is an unfair dismissal that abused the right of reserved cancellation. (Aug. 27, 2002, Administrative Court 2002 guhap 7210)

The company has not cancelled the employment of any probationary employees since its foundation. The probationary employees had not been informed regarding the criteria and methods for evaluating their work. Furthermore, the probationary evaluation system measured by the evaluation table was not yet introduced until the last month of the probationary period (i.e., June 7, 2001), and so it is difficult to judge whether the probationary employees had been evaluated continuously during a probationary period. In considering all those aforementioned conditions, even though they received the grade 'C', low enough to cancel employment, this was not judged objective and reasonable enough to refuse regular employment on account of a negative evaluation for their occupational ability and job eligibility according to the socially accepted idea. Therefore,

the employer's refusal of regular employment was unfair dismissal that abused the right of reserved cancellation.

As long as the labor contract did not contain a clear article that applied a probationary period, the employee shall be regarded as a regularly employed, and cancellation of his labor contract is not termination of the contract, but dismissal of the employee. (Nov. 12, 1999, Supreme Court 99 da 30473)

Unless there was a clear article to apply a probationary period in the labor contract between the employer and employee, the employer shall be regarded as a regularly employed employee and not a probationary employee. The dismissal of the employee concerned shall be evaluated by whether or not there is a justifiable reason for dismissal of the regular employee.

It is unjustifiable to cancel employment immediately because of errors in the employment application document without giving an opportunity to rectify the errors and without an evaluation of job ability and attitude during a probationary period. (Aug. 22, 2002, LRC 2002 Buhae 104)

The probationary work system is to set a probationary period for the purpose of estimating the employee's vocational ability in the process of regular employment before making a confirmative labor contract. Therefore, because this is a system to reserve a certain period of time for whether or not to make a confirmative labor contract, it plays a role to ease dismissal restrictions. However, despite the probationary employee whose contract period is fixed for a certain period of time, the employee was hired just like the regular employees and his dismissal shall require a 'justifiable reason' in accordance with Article 30 of the Labor Standards Act.

Where there is no probationary period stipulated, it is to an abuse of the right of personnel to dismiss an employee for an abstract reason. (Jul 25, 2002, NLRC 2002 Buhae 288)

The employer hired an experienced employee through an internet advertisement. Although the employer informed the employee of the three-month probationary period verbally in the job interview, there was no evidence to verify it. The employer said that the employee was dismissed due to the lack of foreign language ability and interpretation skill and the low adaptation of human relationship at work and in the organization based on the employer's subjective judgment. In the disciplinary process, it is an abuse of the right of personnel to dismiss an employee for an abstract reason where the existence of a probationary period is in doubt.

Despite the justifiable reason for dismissal, it is unfair to cancel employment unilaterally without a disciplinary process for the employee who passed a probationary period. (Aug. 14, 2001, LRC 2001 Buhae 73)

Under the company's Collective Bargaining Agreement (CBA), the employee's probationary period shall expire in six months despite the absence of a company regulation regarding same unless there is special agreement between the mutual parties. As a temporary probationary driver, the company argued that the employee did not fall under the CBA and was dismissed due to a car accident occurring after the probationary period and unexcused absences from work. At the company, a majority of employees with the same kind of job fall under the CBA, and so an employee

who has already passed a probationary period shall follow the disciplinary process stipulated by the CBA.

Justification of refusing regular employment for a contracted employee under a probationary period. (May 14, 2001, NLRC 2001 Buhae 32, 33)

The educational foundation, Chun Hae School, refused regular employment with probationary employees due to their negligence of duty, violation of directions, and evaluation as disqualified persons based on their personnel ratings. However, the employer did not provide concrete data showing that probationary employees did not follow the superiors' directions. Despite whether or not the personnel ratings were reasonable, the employer did not have relevant regulations in place and also there was no evidence that personnel ratings had been taken objectively and fairly. In an identical university, probationary employees have continued to work after an expiry of the probationary period, which gave them an expectation to be hired continuously. It is unfair dismissal for the employer to terminate the labor contract due to the expiry of a contract period for probationary employees without objective and justifiable reasons.

Justification of refusing regular employment for a probationary employee. (Mar. 21, 2001, NLRC 2000 Buhae 574)

The employer dismissed (refused to grant regular employment) probationary employees (tour bus drivers) on the reason that they fought with other colleagues after drinking and caused a violent incident. However, the violent incident occurred outside the workplace and after work. After this incident, both parties involved in the incident reconciled amicably. Accordingly, the employer's refusal to grant regular employment to the probationary employees was an abuse of the right of personnel and was considered an unfair dismissal.

The company confirmed a position, salary table and announced the personnel order for a newly hired employee. However, if the company did not describe a probationary period in the labor contract, he/she shall be admitted as a regular employee. (Nov. 2, 1998, NLRC 98 Buhae 427)

When hiring a new employee on January 26, 1998, the employer confirmed a position and salary table (4^{th} level – 2 ho), and then assigned him to the department (general affairs team) in the personnel order, which means he was hired as a regular employee. Then, the employer dismissed him on account of the lack of job ability, but in consideration of his first experience at work after graduation, this dismissal is so serious that it is unfair dismissal that abused the employer's personnel right.

Dismissal by means of poor personnel evaluation result

I. Summary

In October 2006, the employee was employed as an accounts manager by Company T and, due to a poor personnel evaluation result, she was dismissed in September 2008. She received a less than satisfactory level on the teamwork portion and communication skills implemented in early 2008. Due to this poor result, the employee was put into the subject to the "Performance Improvement Plan (PIP)" in April 2008. As the employee could not accept the inferior parts of the personnel evaluation, she rejected the repeated requests from the department head to submit the PIP. Therefore, the company initiated a "Corrective Action Plan" (CAP) concerning the employee in May 2008, where the department head evaluated whether her teamwork and communication skills improved during the following three months. The company did not find any improvement in her attitude and determined there would be no possibility for any progress. As a result, the company made a disciplinary dismissal for her on September 18, 2008. The employee filed a relief application for unfair dismissal, claiming that the dismissal by means of short-term poor personnel evaluation result would be too severe a punishment in terms of common societal standards and is therefore not justifiable.

II. Company T's Claim

1. Reason for dismissal

The employee received a less than satisfactory level in her 2007 personnel evaluation especially in regards to her teamwork and communication skills. Since the department head recognized that the employee could not get along with her team members and even caused disputes with them due to her uncontrollable hot-temper, the department head reminded the employee several times that the teamwork would be major evaluation criteria in here 2007 personnel evaluation. When the department head asked her four times to submit the performance Improvement Plan (PIP) for the inferior parts of her 2007 evaluation result, she did not submit the PIP, making excuses repeatedly. The company gave her a final chance through the Correction Action Plan (CAP), but her resistance toward improving her performance worsened the situation.

2. Justification of the dismissal

The employee had frequently showed excessive anger at work. She reacted sensitively to criticism, she spoke ill of other coworkers and the company, all of which deteriorated the workplace atmosphere. The employee also showed unacceptable behavior and an immature attitude at work toward her superior and fellow coworkers, which affected her work negatively. In addition, the company provided enough opportunities for her to improve her attitude through verbal and written warnings, the PIP, and the CIP in the disciplinary process, but she ignored these efforts and showed no change in her attitude. Accordingly, the company decided to dismiss the employee according to the related provision of the Rules of Employment, judging that the company could no longer expect any improvement from her.

III. Employee's Claim

1. Problem in reasons for dismissal

During the last two years since joining the company, the employee had not been absent without permission or had never seriously violated the company's rules, and, in 2007, she worked more hours, including overtime, holiday and night work, than any other coworker on her finance team. The reason for the employee's dismissal was because of her lack of teamwork and poor communication skill in her accounting department. The employee was dismissed in the personnel evaluation not because of her vocational ability, but because of her teamwork and communication issues evaluated by the department head's subjective judgment. That is to say, the reasons for dismissal were due to the poor teamwork and communication problem during her personnel evaluation, and as the employee could not improve those portions at the Corrective Action Plan (CAP), she was dismissed. Here, the main issues to be considered are: 1) whether dismissal of an employee because of a poor personnel evaluation is possible? 2) whether it is justifiable to dismiss an employee because of poor teamwork and a lack of communication skill in a personnel evaluation?

(1) Whether dismissal of an employee because of a poor personnel evaluation is possible?

In order that a dismissal because of a poor personnel evaluation can be justified, the personnel evaluation shall be equitable, and the employee's performance result shall be inferior in an objective view to a level where the company could not maintain its employment with the employee in terms of common social norms.

(2) Whether it is justifiable to dismiss an employee because of poor teamwork and a lack of communication skill in a personnel evaluation?

The employee had handled her duties in accounting, tax, and customs clearance issues very professionally as a first-line, person-in-charge and had been well recognized by persons-in-charge from other relevant departments. Concerning the poor teamwork and communication problem, the department head had to manage his/her subordinate employees and make every effort to promote overall cooperation at work with amicable communication among department members, but the department head attributed the employee's problems as an individual fault and regarded the problems as reasons for dismissal. These problems could be too severe to cut off the employment with the employee in terms of common social norms.

2. Problem in application of disciplinary punishment

The employee had carried out her duties sincerely without ever missing deadlines during the last two years of employment. The reason for dismissal was due to low grade in her personnel evaluation. The poor performance result was not due to vocational ability, but due to the employee's lack of teamwork and communication skill. It could be estimated that the employee's lack of teamwork and communication skill might be solved by the department head's leadership and special team-building activities between department members. However, without these efforts, the department head took advantage of the poor personnel evaluation result to dismiss the employee. Even though the department head judged that the employee had severe faults, which are subject to disciplinary action, dismissal was too severe of a disciplinary measure and was therefore an abuse of the employer's personnel right.

IV. Related judicial rulings

The company dismissed the employee because she received four consecutive low grades on her personnel evaluation, which is an abuse of the employer's personnel right. (Jan 27, 2006, Seoul District Court 2005 Kuhap 23879)

As the company's personnel evaluation system was used not by an absolute grading method, but by a relative grading method, the employee's vocational ability could not be evaluated objectively just because he/she received the lowest grade in the personnel evaluation. In the personnel grading process, the department head and the directors concerned admitted that the employee had technical vocational ability and professional knowledge, but the employee's problems in human relations had caused frequent disputes in the workplace. In reviewing all circumstances, the company dismissed the employee only because of her four consecutive low grades on the personnel evaluation, which could not be regarded objectively as a justifiable dismissal. Accordingly, this dismissal due to this personnel grading is an abuse of the employer's personnel right.

When the company dismissed the employee who received the lowest grades in two consecutive personnel ratings according to the Personnel Evaluation Regulation, it is not an abuse of the employer's disciplinary right. (Dec 28, 2004, Seoul District Court, 2003 Guhap 39306)

The employee received the lowest personnel grade 'C' in two consecutive personnel ratings in the second half of the year 2001 and in the second half of the year 2002. In the past, the employee had also received disciplinary punishments several times due to poor personnel ratings. In reviewing such circumstances, when the company dismissed the employee who received the lowest grades in the two consecutive personnel ratings, it is not an abuse of the employer's disciplinary right.

It is justifiable to dismiss the employee who has been given continuously low grades in her personnel review. (Jan 24, 2003, Seoul District Court No 4, 2002 Guhap 16306)

The employee's job was to handle assistant personnel affair, which was rather simple and regular work. Even though the employee had conducted the same work for many years, the employee repeated similar kinds of mistakes. Therefore, every year at the personnel evaluation, the employee received directions that required the improvement of work skill and related knowledge, but the employee did not make any progress. In fact, the employee's ability got worse. In reviewing all the circumstances, even though the employee suffered from the disadvantage resulting from the dismissal, this employer's dismissal could be neither too harsh nor the abuse of the disciplinary right.

V. Conclusion

The company dismissed the employee after just one year's personnel evaluation, and furthermore, the personnel evaluation was not made on vocational ability, but on a subjective judgment on her team work and communication problems. After considering all the circumstances, the company expected an unfavorable result by the labor commission and therefore suggested a compromise. The employee accepted a settlement of the case. The conditions of the settlement were that the company would pay seven months of additional salary and give a positive answer for any reference checks from potential employers.

Dismissal Due to Low Sales Performance

I. Introduction

In every company there are employees who perform very well, and those who perform poorly. Companies pay incentives to good workers, while they apply disciplinary measures to poor employees to ensure better performance in the future. In some instances companies may dismiss poorly-performing employees, and in such cases, the labor laws have strict standards designed to protect employees. Generally, disciplinary dismissal requires justifications in 1) reason for dismissal, 2) the severity of disciplinary actions, and 3) disciplinary procedures in order to be justifiable dismissal. Justification for dismissing under-performing employees should be determined by considering not only the criteria required for normal disciplinary dismissal, but also occupational characteristics related to poor sales performance by the particular employee. In order to dismiss employees with poor sales records, a company needs to maintain a detailed checklist to verify that it has provided sufficient opportunities for improvement to these employees and that the poor sales have been ongoing for a long period of time (refer to Table 1).

I would like to look at a sample checklist of what would be necessary for justifiable dismissal of low performers, and then, based upon the criteria described in the checklist, I will review a case of dismissal due to poor sales performance in which I was recently involved as a labor attorney.

<Table 1> Checklist: Meeting Requirements for Justifiable Dismissal of Poor Performers[26]

1. Are the criteria for determining poor performers objective and reasonable?	1) Objective criteria should be applied. 2) Poor performance should be sustained for a reasonable time. 3) Sales are not expected to show much improvement.
2. Is the evaluation of poor performers objective and impartial?	1) Objective and impartial evaluation must be used. 2) Multiple evaluators should be used to assess the sales performance. 3) Absolute evaluation is preferable to relative evaluation.
3. Does the company endeavor to motivate poor performers to improve?	1) Sufficient advance warning must be given to the low performer. 2) A Performance Improvement Program (PIP) should be in operation. 3) Continuous improvement coaching and mentoring shall be provided.

[26] Koo Keunseo,「Justification for Dismissal of Poor Performers」『Labor Law Theory and Practice Association』Nov. 2011; Bang, Sangin,「Legal Issues Surrounding Poor Performers」,『Monthly Labor Law』Feb. 2010; Cho, Sanguk,「Management of Poor Performers」,『Monthly Labor Law』Dec. 2012; Kim, Sunghee,「Dismissal of Poor Performers」,『Gangwon Law Studies』Feb. 2012

	4) Occupational support for poor performers shall be available.
4. Are there any guidelines regarding the dismissal of poor performers in the collective bargaining or rules of employment?	1) Rules for handling poor performers should exist. 2) Sufficient explanation regarding the dismissal of poor performers should be provided. 3) Systematic procedures such as evaluation of sales performance, notification of evaluation results, and work expectations should be implemented.
5. Is the poor performance serious enough to deserve termination of employment according to social norms?	1) The poor performance must be serious enough to be accepted as such according to social norms. 2) The company must consider many factors, such as the company's business situation, the employee's working conditions, and past practices of disciplinary action.

II. A Case of Dismissal due to Poor Sales Performance

1. Summary

A company based in Germany (hereinafter referred to as "the Company"), which employs 30 local people in its Korean office, provides a standard authentication service for industrial machinery, electronics, automobiles, etc. The Company was introduced to a manager (hereinafter referred to as "the Employee") of a competitor company through a recruiting agency, and this Employee submitted a written target sales plan in which he promised a yearly sales increase of 5 billion won, beginning with an increase of 2 billion won in sales in the first year. The Company, trusting the Employee's submitted proposal, hired him as an executive director with an annual salary of 100 million won. The Company expected him to play a vital role in increasing sales, and assigned him to the head position of a new project, but his sales results were remarkably low, at only 2 percent of target for the first 6-month period. As a result, the Company abolished the new project team, and re-assigned him to the Sales team. Even as part of the Sales team his sales were very low, as a result of which the Company dismissed him. The Employee then applied for remedy to the Labor Relations Commission, claiming that he was dismissed unfairly.

2. Claims of Each Party

(1) Employee's Claim

The Employee joined the Company on January 11, 2013, where he worked as a managing director in charge of the new project team. The Employee was transferred to the Sales team on July 2, 2013, and was then dismissed unfairly on December 2, 2013.

1) The Company exercised its managerial (personnel) right in a one-sided manner without stipulated rules for disciplinary action or procedures in the rules of employment.
2) When notifying him of his dismissal, the Company did not define any specific reason for dismissal, and so violated Article 27 of the Labor Standards Act.
3) While dismissing the Employee due to his low sales results, there were no evaluation criteria, and the Company even ignored some sales achievements. As a result, this dismissal is an abuse of managerial rights. In addition, the Employee, along with other employees, had submitted a letter detailing the Company president's unethical behaviors to the German headquarters, which was the real reason for the dismissal. Therefore, this dismissal is unfair.

(2) Employer's Claim

The Company decided to pay this Employee an annual salary of 100 million won and assigned him to the new project team after trusting in his target sales plan, which described how the Employee would increase sales by 200 million won by the first quarter of 2013, and then increase sales by 2 billion won by December 2013. However, in reality, his sales only reached 36 million won (2 percent of the target) by June 30, 2013. After the abolition of the new project team, he was assigned to the Sales team in order to provide him with another opportunity. The Employee then proposed a new target, which was to bring in 400 million won by December 2013, but his actual sales were 3.6 million won in August 2013 and 700,000 won in September 2013. As his sales performance was significantly lower than what he promised in his target sales plan, the Company was justified in dismissing the Employee. The dismissal procedure was justified when the Company provided written notification of dismissal, stipulating the effective date of and reason for dismissal.

3. Actual Events

(1) The Employee submitted a business plan in which he stated that, based on his 17 years of experience with a competitor company, if the Company hired him, he would increase sales by 5 billion won every year through organization of the project team, to which plan he attached verification of his performance in his previous company. Trusting this target sales plan, the Company hired him in the position of managing director in charge of the new project team.

(2) At the 'Kick-off meeting' on January 18, 2013, the Employee announced his target sales plan in which he would hire 7 engineers by February 2013 and increase sales by 200 million won in the first quarter, increasing to sales of 2 billion won by December 2013.

(3) The Employee's new project team obtained only 2 percent (36 million won) of the targeted amount by the end of June 2013.

(4) In combination with 8 other employees, the Employee submitted a Letter of Request to the German headquarters, detailing the Korean branch's negative working environment and irregularities within the Company.

(5) The new project team which the Employee was in charge of was abolished, after which the Employee was assigned to the Sales team on September 1, 2013. Again, compared to his new sales projections, the Employee's sales performance was remarkably low.

(6) On October 2, 2013, the Company provided notification of dismissal to the Employee with a letter advising him of his dismissal, which would become effective on December 1, 2013, and which stipulated that the two-month period from October 2 to December 1 would be his period of advance notice for dismissal and that he was not required to come to work. The Employee was then dismissed as scheduled on December 2, 2013.

4. Judgment Criteria[27]

(1) Justification for Disciplinary Action

The Company dismissed the Employee because of his extremely poor sales performance, not because of any misconduct on his part, and therefore the point under consideration is whether this dismissal because of poor sales can be construed as reason for dismissal. The Company hired the Employee after trusting in the target sales plan that the Employee had submitted, but the Employee achieved only 2 percent of the target amount in sales, and although the Company provided sufficient time and opportunity for improvement, the Employee's sales results remained extremely low. Considering that the Company hired the Employee based on his business plan, which he was so profoundly unable to fulfil, this is the reason for the disciplinary action.

(2) Justification for the Severity of Disciplinary Action

The Supreme Court ruled regarding the severity of disciplinary action, "Dismissal can be accepted as justifiable when the cause attributable to the employee is too severe to allow for the continuance of employment according to social norms. Determination of whether or not the employment can be sustained according to social norms shall take into consideration the employer's business goals and characteristics, workplace conditions, the employee's position and job description, motivation for and details of misconduct, disorders caused by his/her misconduct, their influence on the company, and the company's past decisions in similar situations." (Supreme Court ruling on October 12, 2007, 2005du10149)

Considering the Employee's position and salary level and comparing the sales results he achieved, which were drastically lower than was expected at the time of hiring, and much lower than is generally accepted for someone in his position and salary range, relations were broken due to causes attributable to the Employee, which made it hard to maintain the employment relationship.

[27] 000 Korea's appeal case for unfair dismissal: April 28, 2014, Joongang 2014buhae167)

(3) Justification for Disciplinary Procedures

In cases where the procedures for disciplinary action are not stipulated in the rules of employment, the Supreme Court has ruled: “The rules of employment are composed of rules regarding service regulations and working conditions like wages regardless of what they are called. If the individual employment contract contains rules regarding the aforementioned working conditions, this can also become the rules of employment. In cases where such individual employment contract corresponding to the rules of employment does not contain any procedural rules regarding the holding of a disciplinary action committee or offering an opportunity for the employee concerned to account for him or herself, disciplinary action is not invalid even if the employer skipped such procedures.” (Supreme Court ruling on November 27, 1998, 97nu14132)

The Company did not have rules of employment regarding disciplinary action, but in a situation where the employment contract stipulates: “the termination of this employment contract may be conducted by either party informing the other in writing at least two months in advance”, without reference to a rule regarding disciplinary action committees, etc., it is hard to see the disciplinary action as invalid even if the Company conducted the dismissal without following such procedure.

III. Conclusion

(1) This is a typical case where an employee’s extremely low performance can be cause for dismissal even though the employee was not guilty of any misconduct. In a situation where the employee proposed an exaggerated sales target and the employer hired him based on that proposal, if the employee is not able to achieve the proposed sales target, he can be subject to disciplinary action. Generally, this kind of situation is ideally resolved by adjusting the employee’s annual salary or assigning him to a different position, thereby providing him with another opportunity. However, the failure in the aforementioned case was so extreme that the Company could not accept an employment relationship any longer due to the Employee’s remarkably dismal performance in contrast to his annual salary, authority, position and pre-employment claims.

(2) When an employer intends to dismiss an employee, there should be justifiable reason as stipulated by Article 23 (1) of the Labor Standards Act. In particular, in cases where the employer intends to dismiss the employee due to his/her poor performance, the employer must pay careful consideration to satisfying the conditions required for justifiable dismissal. With this in mind, the checklist in section 2 of this article (“Meeting the Requirements for Justifiable Dismissal of Poor Performers”) is designed to meet these requirements for dismissing poor performers, and contains five items which should be applied when considering dismissal due to poor performance: 1) Objective selection of appropriate employees; 2) Procedure for impartial evaluation; 3) Provision of opportunity to improve poor performance; 4) Related Company employment regulations; and 5) The degree of poor performance. Accordingly, this checklist not only provides criteria to minimize the occurrence of unfair dismissal, but also suggests good reference points which an employer can consider essential for introduction into the personnel system regarding the termination of poor performers.