The Right of Fixed-term Workers to Expect Renewal of their Employment Contract

I. Introduction

The problem of non-regular workers in Korea occurred due to the overuse of irregular workers through managerial dismissal and worker dispatch laws, in efforts to cope with the IMF financial crisis in 1997. In order to limit the use of non-regular workers and encourage their use as full-time workers whenever possible, the Act on the Protection, etc. of Fixed-term and Part-time Workers (hereinafter referred to as the "Fixed-term Workers Act") was enacted. For the protection of irregular workers, the Fixed-term Workers Act, enacted in 2007, stipulates that fixed-term workers can be used for a maximum of two years, and after two years, the fixed-term worker is regarded as a non-fixed term worker (Article 4 of the Act). This regulation was introduced to limit the use of fixed-term workers and to eliminate employment insecurity by promoting the renewal of their fixed-term employment in cases where fixed-term workers had worked for more than two years.

Article 4 of the Fixed-term Workers Act stipulates that fixed-term workers can be used for two years, with some exceptions. Nevertheless, the right to expect renewal is assured in cases where the fixed-term contract can be renewed, with a renewal condition; the worker expects to have his/her fixed-term contract renewed. In addition, the exemption clauses of fixed-term employment are exceptional for repeated employment contracts for professional workers and elderly workers, which add to the confusion in the worksite, making it necessary to establish the contents and specific criteria for this. In this regard, I would like to specifically examine the laws, precedents, and reasons for the right to expect renewal.

II. Restriction on the Term of the Fixed-term Workers Act (Article 4) and the Right to Expect Renewal

1. Contents of Article 4 of the Fixed-term Workers Act

Article 4 of the Fixed-term Workers Act limits the period of use for fixed-term workers to two years.[1] The reason this limitation is as follows: (1) In Article 16 of the previous version of

[1] The Fixed-term Workers Act: Article 4 (Employment of Fixed-term Employees)
(1) An employer may employ a fixed-term employee for a period not exceeding two years (in cases where a fixed-term labor contract is repeatedly renewed, the total consecutive employment period shall not exceed two years.): Provided that an employer may employ a fixed-term employee for more than two years in any of the following cases:
1. Where the period required for completion of a project or particular task is defined;
2. Where a fixed-term employee is needed to fill a vacancy arising from a worker's temporary suspension from duty or dispatch;
3. Where the period required for a worker to complete his/her education or vocational training is defined;
4. Where a fixed-term labor contract is made with an aged person as defined in Article 2 Subparagraph 1 of the Aged Employment Promotion Act;
5. Cases prescribed by Presidential Decree, where the job requires professional knowledge and skills or is offered as part of the government's welfare or unemployment measures;

the Labor Standards Act, the upper limit is set as one year, but there is no restriction on the total period of use through repeated renewal of the labor contract. This enabled employers to take advantage of repeating an employment contract for less than one year as a means of avoiding the restriction against dismissal according to Article 23 of the LSA. This has increased the number of workers in fixed-term contracts; and (2) it is a principle that employment is terminated automatically upon termination of the contract. However, if an employment contract is renewed several times, it may be interpreted as being an employment contract without a fixed term. In that case, as the habitual practice of the contract, the intention of the parties, the expectation of renewal, the nature of the work, and other various factors need to be considered, it has been pointed out that the workers are not likely to win a dismissal case, and that such dismissal cases are inconsistent, which led to the enactment of the Fixed-term Workers Act.[2] Since the adoption of the Fixed-term Workers Act, even if an employment contract is repeated a number of times, there is no such dispute because the term can only be a limit of two years. However, in instances of a fixed-term labor contract where there are conditions for renewal even if there is no provision for renewal, if there is a trust in the relationship for the renewal of the fixed-term contract, the right to expect renewal is still valid even after introduction of the Act.

2. The right to expect contract renewal

The right to expect renewal is not specified in the Fixed-term Workers Act, but has been consistently recognized in court rulings, and has the same role as the subsidiary clause of Article 4 of the Fixed-term Workers Act. The right to expect renewal means that if a contract is signed for fixed-term employment, but a contract renewal is reasonably expected, if the employer refuses to renew the contract with no rational justification, there is no effect as unfair dismissal. In this case, any employment after the contract expires shall be regarded as a renewal of the old labor contract.[3]

The Supreme Court concluded, "In the case of a term of employment contract, the employment contract between the parties shall be terminated without waiting for a separate action such as dismissal of the employee when the period expires. However, (1) except in a case where the original period is renewed over a long period of time and the fixed period is only a form;[4] (2) in cases where there is a provision stipulated in the employment contract and the rules of employment that the fixed-term contract will be renewed if certain requirements are met despite the expiration of the period; or (3) if there is a trust relationship between the parties that the employment contract will be renewed if certain requirements are met, even if there is no such specific provision; the refusal to renew the employment contract can be considered dismissal rather than termination of the contract due to expiration of

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6. Other cases prescribed by Presidential Decree, where there are reasonable grounds equivalent to those described in subparagraphs 1 through 5.

(2) If an employer employs a fixed-term employee for more than two years, even though grounds under the proviso to paragraph (1) do not exist or cease to exist, the fixed-term employee shall be considered as a worker who has made a non-fixed term labor contract.

[2] Labor Law Practice Study,「Labor Standards Act Translation Ⅱ」ParkYoungsa, 2010, pp. 17-18.

[3] Kiljoon Noh, 「A study of the fixed-term employment contract 」, Graduate School of Ajou University (Doctoral thesis), 2018, p. 37.

[4] Supreme Court ruling on Feb. 24, 2006, 2005doo 5673.

contract period."[5] Since the enactment of the Fixed-term Workers Act, the total contract period is limited to two years in principle, and the above issue (1) was solved to some degree. However, since issues (2) and (3) arise from the expectation of conditional renewal and the right to expect renewal, disputes have often arisen between workers and employers.

III. Rational Justification for Refusing Renewal after Recognition of the Right to Expect Renewal

1. Reasons to Refuse Renewal

The court ruling[6] provides the criteria: "If a reasonable expectation that an employment contract will be renewed is granted to a worker, it is ineffective for the employer to unfairly refuse to renew the employment contract without reason. If there is reasonable justification to not renew the contract, even if the employee has a reasonable expectation of the renewal, such reasons can be evaluated by considering the following: ①The employer's purpose and the characteristics of the business, workplace conditions, the employee's position and job responsibilities;② The process of signing an employment contract; ③ Whether or not the requirements and procedures for renewal of the employment contract are set up and its operational status; and ④ Whether the employee bears responsibility or not. The reason for refusal and the procedure should be judged based on socially-accepted standards, on the basis of being objective, reasonable and fair, and the burden of proof for such matters shall be borne by the employer."

Even if legitimate expectation of renewal of a fixed-term worker's employment contract is recognized, it is sufficient for the employer to refuse to renew the contract if there is a rational justification which is deemed to be equivalent to the socially-accepted standard, which is a relaxed standard rather than a legitimate reason.[7] This is because it would suggest rational justification for replacing the renewal expectation, or suggest that the expectation of renewal has changed.

2. Related labor cases

(1) Cases where there is no reason to refuse to renew the contract

(i) Worker A made an employment contract for two years from Oct 26, 2010 to Oct 25, 2012. According to the employment contract, the contract could be renewed one month before the expiry date. One month before the expiration of the contract, the company informed worker A that the labor relationship would be terminated on October 25, the expiry date of the employment contract. The company informed worker A that the personnel evaluation results were "not good", which was the reason for termination of the contract. However, at that time, the company's personnel evaluation criteria were vague, and objectivity was low.[8]

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[5] Supreme Court ruling on April 14, 2011, 2007doo1729; Supreme Court ruling on Nov. 10, 2016, 2014doo 45765.

[6] Supreme Court ruling Oct. 12, 2017.10.12, 2015doo44493.

[7] Seoul Appeal Court ruling Sep. 30, 2010, 2009noo36233.

[8] Supreme Court ruling on Nov. 10, 2016, 2014doo45765: As there was no objectivity in the personnel evaluation,

(ii) The company is a foundation that operates social work support projects for unemployed people. Worker A joined the company on Oct 26, 2010, and worked as a team leader who supported the establishment of social enterprise. The enterprise informed a worker on September 24, 2012 that the employment contract would expire on October 25, 2012. One month before the expiration of the contract, the company considered whether or not it would switch to full-time employment through personnel evaluation.[9]

(iii) Seoul Metropolitan Government Facility Management Corporation had concluded contracts for the transportation of persons with disabilities by setting a contract period of one year with the driver, and then did not renew the contract. It is stated that the Call Taxi for the Handicapped by the City of Seoul is to renew the contract period on a yearly basis and that the purpose for this is to be able to replace unsatisfactory people. This service for the disabled cannot be regarded as a temporary business and has term extension regulations for the contract with the drivers. Considering the aforementioned, it is considered that the drivers who belong to this facility management corporation are granted the right to expect that their fixed-term contract will be renewed.[10]

(2) In the case of exceptional occupations, the right to expect renewal is recognized

(i) In the case of the plaintiff (an in-house lawyer), the labor contract cannot be regarded as having no fixed term, as the plaintiff worked four times over five years while renewing the labor contract. The plaintiff had reason to expect renewal as he/she had been responsible for necessary tasks as the lawyer for the company and has been renewing the contract with an expectation of doing so as long as he/she wishes to continue to work.[11]

(ii) The defendant, Gimcheon City, had commissioned the plaintiffs (the symphony orchestra) as non-permanent members since December 1, 2004, and entered into two-year contracts. However, the City suddenly did not renew with the plaintiffs after the expiration period in January 2011. Gimcheon City had decided to select new members through a new screening process before the final contract expired, and in November 2011, it announced the recruitment of the Gimcheon City arts group. The City asked the plaintiffs to join the new screening test. The candidates' current address of Daegu or Gyeongbuk as of the announcement date was added as a qualification requirement for common examination. Because of this, plaintiffs who lived in Seoul, Milyang, and Busan at that time failed to meet the qualification requirements and do the Gimcheon City refused to renew it.[12]

(iii) Company S entered into an employment contract with the plaintiffs for one year in October 2011, after which they worked as a golf course management team with no updated contracts until February 2014. Company S's retirement age was 55, and the plaintiffs had

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the case was admitted as an unfair dismissal.

[9] Seoul Appeal Court ruling Nov. 6, 2014, 2013noo53679: At the end of the term contract period, the company evaluated whether to convert to full-time employment through personnel evaluation. The worker had an expectation of renewal, and the company was not fair in its personnel evaluation.

[10] Supreme Court ruling on April 14, 2011, 2007doo1729: It is a regular business which re-contracts on a yearly basis. The company refused to renew the contract through personnel evaluation. There was no fairness and objectivity in the personnel evaluation.

[11] Seoul District Court ruling on April 19, 2012: 2011gahap 21933. Professional jobs belonging to the exception to the limit of 2 years of the term of Article 4 of the Fixed-term Workers Act are applied to the right to expect renewal.

[12] Supreme Court ruling on October 12, 2017: 2015doo44493. In the case of exemption from Article 4 of the Fixed-term Workers Act, the right to expect renewal is applied.

already reached this age before or during the term of the contract. Company S signed an employment contract with the plaintiffs in March 2014 which set the work period for one additional year, and notified the plaintiffs in January 2015 that their contract period would expire in February. In the case of the plaintiffs, it can be said that the retirement age did not convert them into unqualified workers. It could be expected that the labor contract would be renewed, and that there was no reason to refuse the renewal, and so it belongs to unfair dismissal.[13]

(3) Cases where the right to expect renewal cannot be established

(i) The employee had been working as a full-time professional commissioner in the Civil Rights Commission with a contract period ending December 31, 2008, and had been working as a professional adviser from January 1, 2009 to December 31, 2009. He had to resign because of contract expiration. There was no right to expect renewal because the Commission announced that this job was not a position which would be converted into non-fixed employment, in accordance with 'regulations on irregular workers in public institutions.'[14]

(ii) Hyundai Motors Company employed a fixed-term worker and renewed the employment contract 14 times over short periods of 2 weeks to a maximum of 6 months. After 2 years, it notified the worker of the expiry of the contract, which was not renewed on January 31, 2015. There were no precedent cases in which other irregular workers in the company were changed to full-time workers, and so there was no right to expect renewal because, while the position was constantly needed, it was regarded as a temporary task to fill the vacancies of regular workers.[15]

V. Conclusion

If there is a statement in a labor contract that provides conditions for the renewal of a fixed-term contract, etc., or if there is a relationship of trust that it will be renewed, and in the case of regular continuous work, the expectation of renewal is recognized even though a fixed-term employment contract was made. In the case of professional workers who are exempted from the maximum employment contract period, and workers who have not retired after the retirement age, there can be an expectation of renewal. Therefore, it is necessary to utilize regular employees whenever possible for permanent jobs. Employers will have to hire fixed-term workers for temporary work only, or for work not expected to be subject to renewal of a fixed-term contract.

[13] Supreme Court ruling on Feb. 3, 2017: 2016doo50563.
[14] Seoul Appeal Court ruling on August 18, 2011: 2011noo9821.
[15] Seoul Administrative Court ruling on October 20, 2016: 2015goohap71068.

Legal Effect of a Retention Bonus (Signing Bonus)

I. Introduction

A company can use several methods to retain highly-skilled workers for a long time, with two representative examples. One is through a non-compete clause[16] in the employment contract or rules of employment, whereby the employer prevents capable workers from transferring to competitive companies, and the other is through a signing bonus,[17] where the employer tries to restrict the transfer of workers through financial means. A non-compete clause is hard to validate as it restricts the freedom of a worker's occupation. The Supreme Court has argued that "even if there is a non-compete agreement between the employer and the employee, if such an arrangement excessively restricts the constitutionally-guaranteed freedom of occupation, or the right to work or free competition, an action contrary to good social order, such as good customs as set forth in Article 103 of the Civil Law, should belong to invalidity."[18] For this reason, many companies prefer signing bonuses, which have a direct effect on the reduction of turnover by good manpower.

I recently received an inquiry from a company about the effectiveness of a retention bonus clause[19]. For this company, 30% of the annual salary is set as bonus, with 50% paid with the 1st year's salary in January, and the remaining 50% paid in January of the following year. In return, the worker must work for three years. The employer wants to include the following clause: "If the employee resigns prior to the agreed three years, the retention bonus shall be returned." The company asked for a legal review of the validity of this. In this case, I concluded that for the retention bonus to be set for three years would be no problem, considering related matters such as the nature of the related wage, the prohibition of forced labor, the Prohibition of Predetermination of Nonobservance, etc.

In this article, I would like to deal with this issue in more depth, reviewing (ii) the characteristics of a special bonus and violation of the Labor Standards Act; (iii) the legal effect of a signing bonus; and (iv) the criteria for a signing bonus.

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[16] A non-compete clause means that the employee promises not to transfer to a competitor company, and if the employee subsequently violates the clause, the company violated may claim compensation from the employee.

[17] A signing bonus is a special bonus, in that a company pays a lump sum to an employee when signing an employment contract, in an effort to recruit talented people.

[18] Supreme Court ruling on March 11, 2010: case number 2009da82244.

19 If an employee fails to work for the mandatory tenure, the employee will return some or all of the amount paid in advance, which is called. a signing bonus or a retention bonus.

II. The Characteristics of a Special Bonus and Determining Whether it Violates the Labor Standards Act

1. The Characteristics of a Special Bonus

The term "wages" as defined in Article 2 of the Labor Standards Act refers to “wages, salaries and any other money and valuable goods an employer pays to a worker for his/her work, regardless of how such payments are termed." Regarding the wage status of bonuses, such bonus can be regarded as wage if payment conditions and payment timing are set in a collective agreement or employment rules, etc. and if the payment of such bonus is customary for all employees. If the above conditions are satisfied, such special bonus can be recognized as having the characteristics of wages. Concerning the legal characteristics of a "Retention Bonus", the Ministry of Employment and Labor judged that this bonus could not be considered as wages under the Labor Standards Act if payment was not stipulated in a collective agreement or rules of employment, etc., and if the employer temporarily or voluntarily paid it on condition of securing longer employment.[20] Therefore, it is not included in the average wage for the calculation of severance pay.

2. Determining Whether a Special Bonus Violates the Labor Standards Act

“Prohibition of forced labor” as stipulated in Article 7 of the Labor Standards Act means that “No employer shall force a worker to work against his own free will through the use of violence, intimidation, confinement or any other means which unlawfully restricts mental or physical freedom.” It is forced labor to cause workers to carry out unwanted work. However, it is not forced labor for an employer to direct, supervise or legally sanction workers to fulfill their obligation to provide work under an employment contract.[21] The penal provisions of Article 7 (prohibition of forced labor) impose a penalty of imprisonment of not more than 5 years or a fine of not more than KRW 30 million, while the penalty for violation of Article 20 (Prohibition of Predetermination of Nonobservance) is a fine of less than KRW 10 million. Therefore, in the application of the signing bonus case, Article 20 of the LSA Act, which includes the voluntary intentions of the employees, is more appropriate than Article 7, which governs only direct physical and mental restraint, such as assault, intimidation and confinement.[22]

The prohibition of predetermination of nonobservance prescribed in Article 20 of the Labor Standards Act stipulates that "No employer shall enter into a contract by which a penalty or

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[20] Labor Ministry guideline on April 27, 2010: Labor Standards-883

[21] Lim Jong-yul, 「Labor Law」, 14th edition, Parkyoungsa, Feb. 2016, page 378.

[22] Kwon Oh-Sung, "A Study on the Effectiveness of Signing Bonus Return Agreements", 「Sungshin Law」, Sungshin Women's University Law Research Institute, February 2013, page 136.

indemnity for possible damages incurred from breach of a labor contract is predetermined." This is to prevent an employee from being forced to continue to work against his/her will by previously agreeing to pay a certain amount of money without determining the type and degree of the actual damage to the employer because of non-fulfillment of the employee's employment contract.[23] In order to guarantee performance in a contractual relationship, the Civil Act may apply penalties or damages for default in advance at the conclusion of a contract (Article 398 of the Civil Code 'Liquidated Damages'). However, while a penalty for non-fulfillment of work is a means of securing long-term employment of good manpower for the employer, it does prohibit employees from resigning, because of the burden of penalty payment.[24] As concerns provisions for the prohibition of 'Liquidated Damages', labor contracts in the form of penalties for existing wages are not allowed, but reimbursement of training costs and bonuses with reasonable and valid content is permitted, because it does not unduly limit **freedom of resignation.**[25]

III. Legal Effectiveness of a Signing Bonus

1. Situations where the return commitment of the signing bonus is valid

(1) Suwon regional court ruling on May 13, 2013: 2002gahap12355: An employee agreed that he would receive KRW 150 million as a retention bonus for 3 years' compulsory stay, which he would repay if he left the company prematurely. After 7 months of service, he moved to a competitor company. The court ruled, "The retention bonus does not belong to the wage and can be excluded from application of Article 20 of the LSA (Prohibition of Predetermination of Nonobservance), but the company paid the bonus for the purpose of retaining the employee for 3 years. Therefore, the employee should repay the retention bonus."
(2) Seoul regional court ruling April 29, 2013: 2013kahap231: An employee received a signing bonus of KRW 50 million, which he agreed to repay if he left the company before two years after receiving this money. He then left the company after 7 months. The court ruled, "This signing bonus to retain the employee for a certain period of service cannot be translated as forced labor, and it also does not violate Article 20 of the LSA (Prohibition of Predetermination of Nonobservance)."
(3) Changwon District court ruling on November 17, 2007: 2007na9102: According to a mutual agreement between a company and an employee, the company was to pay a special bonus to the employee in accordance with the length of service, ranging from 12 months to 41 months

[23] Supreme Court ruling on April 28, 2004: 2001da53875.
[24] Lim Jong-yul, 「Labor Law」, 14th edition, Parkyoungsa, Feb. 2016, page 388.
[25] Supreme Court ruling on October 23, 2008: 2006da37274.

of the normal wage, in return for which the employee would stay for two years from the date on which the employee was paid. The agreement stipulated that in the event that the employee resigned from the company, the special bonus would be returned to the company for a period not exceeding two years. The employee who received the compensation from the company submitted a resignation letter and resigned on the day after the receipt of the compensation. In this case, returning compensation based on two years of obligatory work does not restrict the freedom of choice of the workplace or freedom of retirement. The court agreed with the company's rule that the special bonus should be returned.

2. Instances where the return commitment of the signing bonus is invalid

(1) Supreme Court ruling on Oct. 23, 2008: 2006da37274: When an employee joined the company, he signed a retention bonus agreement whereby he would receive KRW 500 million and serve the company for 10 years. If he resigned before 10 years, he would repay a penalty of KRW 1 billion. In this case, the court ruled that this retention agreement violated Article 20 of the LSA (Prohibition of Predetermination of Nonobservance) and became null and void.
(2) Inchon regional court ruling on April 29, 2013: 2013gahap3994: An employee promised to stay in the company for at least 5 years, and received KRW 50 million as a retention bonus. In the agreement, the employee agreed to repay 3 times the value of the retention bonus received if he did not fulfill the agreement. After 5 months of service, the employee resigned. The company claimed KRW 150 million, three times the amount of the retention bonus. In this case, the court rejected the employer's claim.

3. The Supreme Court ruling on Signing Bonuses[26]

(1) Case details: A company that manufactures robot doctors (ROBODOC) hired an experienced engineer in the field of fuel cells at S company on January 13, 2009 for a period of four years. The company made a recruitment agreement to pay KRW 100 million as a signing bonus separate from the salary. The recruitment agreement contained a stipulation that the company guaranteed employment for seven years, and the employee would work for the company for seven years. The employee resigned on April 12, 2010 for personal reasons. The company sued for return of the signing bonus, but the district court dismissed the plaintiff's (company's) claim (Dongbu District Court, 2010kahap13266). The company appealed, and the Seoul High Court partially accepted the claim that the employee should pay a prorated amount of the signing bonus, stating that the signing bonus was: 1) a special incentive to join the company, 2) a full down payment for 7 years of pre-emption, and 3) a special bonus to expect

[26] Supreme Court ruling on June 11, 2015: 2012da55518.

7 years' service (Seoul High court 2011na22827).

(2) Decision of the Supreme Court: The Supreme Court dismissed the plaintiff's claim, saying, "As the company concluded labor contracts as a way of hiring experienced professional personnel, the so-called "signing bonus", the following points should be taken into consideration: ① Whether or not they have the characteristics of compensation for job turnover or the conclusion of a labor contract; ② Whether to pay for the prohibition of resignation during the compulsory working period; ③ Whether or not there is a written statement concerning returning the bonus upon retirement or turnover in the middle of the period." Based on the aforementioned premises, the signing bonus was judged to have the characteristics of a reward because there was no description of a specific method of payment or any return obligation. In other words, the signing bonus for this case is an instance in which the nature of the reward for employment is judged to be stronger than the nature of the mandatory working period of seven years.

IV. Conclusion (Criteria for a Signing Bonus)

The judging criteria for a signing bonus must adhere to the following principles:

(i) If there is a disagreement over the interpretation of the contract between the parties: ① The contents of the document, ② The motivation and the manner in which the agreement was made, ③ The purpose of achieving by agreement, and ④ The true intention of the parties should reasonably be interpreted according to logic and empirical rules.[27]

(ii) It is effective for the employer to stipulate a return of the employee's bonus, which is provided separately from the employee's wage, for the special purpose of preventing the employee from transferring to another company. In principle, these return arrangements are required to ① balance the amount of the signing bonus award and the duration of the contract of employment, and the degree of the former restriction; ② not infringe on the essential condition of the employee's freedom of changing occupation; ③ the bonus should not have the characteristics of a wage, and ④ there should be no reason related to the employer for the employee's transfer to another company.[28]

In other words, it must be made clear that the signing bonus is awarded on the condition that the bonus is to be paid for a period of mandatory service; the duration of such obligatory service should be as short as possible and; the returning amount should be the same or less than the amount that the employee received for the mandatory service period. In addition, a contract for returning the bonus award is valid only if the employee voluntarily resigns.

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[27] Supreme Court ruling on May 27, 2005: 2004da60065; Supreme Court ruling on September 20, 2009: 2006da158166.

[28] Seoul District Court ruling on January 25, 2005: 2004kadan128716.

Working Conditions of Part-time Workers

I. Introduction

In 2014, IKEA, a Swedish furniture company, entered Korea and recruited most of its field workers as part-timers working four hours a day, which shocked our society. This company was able to maintain better productivity than was normal in Korea while using part-time workers. It is very rare for Korean companies to use part-time workers as regular workers, mainly because they are employed as Alba, temporary or part-time low-wage workers in small businesses within the service sector. The proportion of part-time workers in Korea was only 10.8% in 2014, while it was 37.2% in the Netherlands, 27% in Japan, 24.9% in Britain, and 22.1% in Germany in the same period.[29] There are no differences in Korean labor laws compared to foreign labor laws regarding part-time workers: The working hours of part-time workers are shorter than those of regular workers, while their working conditions are similar to that of full-time workers.[30]

In fact, if working conditions for part-time workers are properly maintained, sharing of work with full-time workers is also possible, which is expected to result in greater productivity while creating more employment. In particular, it makes it possible to attract female workers and elderly people whose career quite often has been cut short in the labor market. In regards to the protection of short-term workers, I would like to specifically examine (i) the concept of the part-time worker, (ii) statutory working conditions, and (iii) the prohibition of discriminatory treatment.

II. Concept of the Part-time Worker

The term “part-time worker” in Article 2 of the Labor Standards Act (LSA) means an employee whose contractual working hours per week are shorter than those of a full-time worker engaged in the same kind of job in the same workplace. For example, since a full-time worker works 40 hours per week, a worker who has worked 8 hours for 4 days in a week (32 hours per week) is considered a part-time worker.

The concept of part-time worker includes (i) one-week basis, (ii) contractual working hours, and (iii) the working hours of regular workers.

(i) The one-week basis shall be the working hours of the week if the working hours are constant every week, but the average of 4 weeks shall be calculated for the weekly contractual working hours when weekly working hours are not constant (Article 18 of the LSA).

(ii) The number of contractual working hours per day for part-time workers is the number of hours divided by the number of days for a full-time worker for that period.[31] In other words, the calculation may vary depending on the total number of days worked by a full-time worker over a four-week period. Contractual working hours is defined as the working hours determined between the worker and the employer within the range of legal working hours, so

[29] Labor Ministry and Korea Labor Foundation, 「Introduction and Operational Guide of Time Selection System」, 2013.

[30] Hyungbae Kim, 「Labor Law」, 24th edition, Parkyoungsa, 2015, page 1287.

[31] The LSA Enforcement Rule, Article 9 [Attachment No.2]

the contractual working hours should be equal to or less than the legal working hours (Article 2 of the LSA).[32]
The calculation method for the contractual working hours per day is as follows: ① 6 hours per day from Monday to Friday and a 5-day working per week: [(30 hours x 4 weeks)/(5 days x 4 weeks) = 6 hours]. Or ②, if a regular worker works 6 days a week: [(30 hours x 4 weeks)/(6 days x 4 weeks) = 5 hours].

(iii) The standard for full-time workers is defined as "full-time workers engaged in the same kind of job in the same workplace" in Article 2 of the "Act on the Protection etc. of the Fixed-Term and Part-Time Workers" (FPA). The court explained that whether or not the work of the employee selected as a comparable worker corresponds to the work of the same or similar type as the work of a part-time worker is not based on the work content as specified in the rules of employment or the employment contract, but on the basis of the work actually performed by full-time workers. However, even if the tasks they perform are not completely in agreement with one another and there are some variances in the scope, responsibilities and authority of the tasks, they are considered to engage in similar tasks unless there is a substantive difference in the content of the main task."[33]

III. Legal Working Conditions of Part-time Workers

Working conditions for part-time workers shall be determined on the basis of the relative ratio of their working hours in comparison to those of full-time workers engaged in the same kind of job in the same workplace (Article 18 of the LSA).

That is, even part-time workers are subject to all the provisions of the Labor Standards Act, but for statutory holidays and leaves, the principle of proportional working hours of ordinary workers is applied.[34]

1. Employment contracts and Rules of Employment

(i) Employment contract: The employment contract of part-time workers must be issued in writing. In case of violation, a penalty of KRW 5 million is imposed (Articles 17 and 24 of the FPA). The items that must be included in the labor contract include: 1) Matters concerning the contract period; 2) Matters concerning working hours and rest hours; 3) Matters concerning components, calculation and payment methods of wages; 4) Matters concerning holidays and leave; 5) Matters concerning the place of work and required work; 6) Work days and working hours of each work day. The reason for requiring the employer to make labor contracts in writing is to prevent disputes for violation of the Labor Standards Act in advance.

(ii) Rules of Employment (ROE): The employer may create Rules of Employment that apply to part-time workers separately from those that apply to full-time workers. If an employer wants to make or change the rules of employment, the employer shall seek seek consultation of the

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[32] The LSA: Article 50 – 40 hours per week and 8 hours per day; Article 69 (Working hours for minors) 7 hours per day and 40 hours per week; Article 46 of the Occupational Safety and Health Act (Harmful and dangerous work) 6 hours per day and 34 hours per week.

[33] Supreme Court ruling on October 25, 2012: 2011do7045.

[34] For details, related information is in the Labor Standards Act and Article 9 of the LSA Implementation Rule attached, table number 2, the FPA, the Minimum Wage Act, etc.

majority of the part-time workers to whom the ROE will apply. However, if the ROE are to be modified in a manner that is unfavorable to the part-time workers, the employer must obtain the consent of the majority of the part-time workers (Article 94 of the LSA). The purpose for this is to prevent the employer from unilaterally lowering the working conditions of part-time workers.[35]

2. Wages

(i) The wage calculation unit for a part-time worker is based on the hourly wage. If hourly wage is calculated as daily ordinary wage, the number of hours worked per day is multiplied by the hourly wage. (ii) The wage shall be paid in full to the worker directly in Korean currency, and shall be paid at least once per month on a fixed date (Article 43 of the LSA). (iii) For part-time workers, the average wage of 30 days or more for one year of continuous work shall be paid as severance pay. In this case, if the average wage is less than the ordinary wage, the ordinary wage must be paid as severance pay (Article 2 of the LSA). Also, in establishing a severance pay system for part-time workers, there should be no difference from that of the severance pay system for full-time workers. (iv) Even if there is no comparable full-time worker, the minimum wage under the Minimum Wage Act must be paid.

3. Working hours

(i) The contractual working hours of part-time workers are strictly protected. The employer must obtain the consent of the part-time worker in cases of having the part-time worker work beyond the contractual working hours, and in instances such as this the Act (FPA) also stipulates that the part-time worker shall not work more than 12 additional hours from the contractual working time of one week. The employer shall pay part-time workers at least 50/100 of the ordinary wage for overtime work exceeding the contractual working hours within the legal working hours (8 hours per day, 40 hours per week). Under the Labor Standards Act, an additional wage of 50% or more of ordinary wage is paid only for overtime work exceeding legal working hours, but for part-time workers, payment of additional wages is prescribed even if the contractual working hours are exceeded within the legal working hours (Article 6 of the FPA). (ii) Part-time workers are also paid an additional 50% for holiday work as specified in the rules of employment, and 100% for holiday work exceeding 8 hours (Article 56 of the LSA). (iii) If a part-time worker performs night work between 10 pm and 6 am on the following day, the employer shall pay wages with an additional allowance equivalent to 50/100 (Article 56 of the LSA).

4. Holidays and annual paid leave

Holidays and annual paid leave for part-time workers are applied equally in accordance with the principle of proportional working hours for full-time workers.
(i) Holidays: An average of one paid holiday per week worked shall be guaranteed, for which the contractual working hours of one day must be paid. When calculating wages according to hourly wage, the employer shall pay an additional weekly holiday allowance. However, in the

[35] Supreme Court ruling on May 28, 1990: 90da19647.

case of a part-time worker who has been employed for weekend or holiday work, the weekly holiday should be given as a paid holiday on a non-weekend day.
① Calculating 6 hours per day from Monday to Friday, 5 days' work per week for full-time workers and payment of KRW 10,000 per hour: [(30 hours x 4 weeks)/(5 days x 4 weeks) = 6 hours], results in [6 hours x KRW 10,000 = KRW 60,000]. ② However, if full-time workers are working for 6 days a week: [(30 hours x 4 weeks)/(6 days x 4 weeks) = 5 hours], the result is [5 hours x KRW 10,000 = KRW 50,000].

(ii) Annual paid leave: The employer shall grant part-time workers a number of days of annual paid leave equal to that of full-time workers. Annual paid leave is calculated in hours, with less than one hour counting as one hour. Also, in case of monthly paid leave for those working less than one year, the contractual working hours of one day per each month should be given as monthly paid leave. The criteria for granting annual paid leave for part-time workers are as follows:

$$\text{Number of annual leave days for full-time workers} \times \frac{\text{Number of hours worked for part-time workers}}{\text{Number of hours worked for full-time workers}} \times 8\,\text{hours}$$

If a part-time worker works 20 hours a week, this works out to [15 days x (20 hours/40 hours) x 8 hours = 60 hours]. In other words, each four hours is guaranteed as an annual paid leave day.
(iii) Maternity Leave: The employer shall give 90 days of pre-and post-natal maternity leave for pregnant part-time female workers, with the first 60 days of maternity leave being paid. ① The maternity leave allowance is the amount calculated as the hourly wage of a part-time worker multiplied by the contractual working hours of one day and multiplied by 60 days. ② The remaining 30 days can be paid as maternity leave benefits as stipulated by the Employment Insurance Act (Article 74 of the LSA). Assuming that a part-time worker is paid KRW 10,000 per hour, and the contractual working hours is 5 hours per day. ① The maternity leave allowance is KRW 10,000 x 5 hours x 60 days = KRW 3,000,000. ② The maternity leave benefit is KRW 10,000 x 5 hours x 30 days = KRW 1,500,000.

IV. Prohibition of Discriminatory Treatment and the Exception of Applications

1. Prohibition of discriminatory treatment

An employer shall not give discriminatory treatment to any part-time employee on the grounds of his/her employment status compared to full-time workers engaged in the same or similar kinds of work in the business or workplace concerned. It is necessary to pay various allowances etc. in accordance with the Rules of Employment and employment contracts, and not discriminate against ordinary workers. The subjects of discriminatory treatment are ① Wages[36]; ② Regular bonuses, holiday bonuses, etc. and bonuses paid regularly; ③ Incentives according to business performance; ④ Other matters concerning working conditions and

[36] Article 2 of the LSA: The term "wages" in this Act means wages, salaries and any other money and valuable goods an employer pays to a worker for his/her work, regardless of how such payments are termed.

benefits, etc. (Article 2 of the FPA) If a part-time employee has received discriminatory treatment, he/she may file a request for correction with the Labor Relations Commission; this shall not apply if six months have passed since such discriminatory treatment occurred (or since such treatment ended in cases of continuous discriminatory treatment). The procedures for this are the same as those for remedy application of an unfair dismissal case (Articles 8, 10 to 15 of the FPA). The employer shall not discriminate against the part-time worker for the reason that he has applied for correction of discrimination (Article 16 of the FPA). If the employer fails to perform the correctional order of the Labor Relations Commission without just cause, he shall be subject to a fine of up to KRW 100 million (Article 24 of the FPA)

2. Exceptions of applications for part-time workers

With respect to workers whose contractual working hours is an average of less than 15 hours per week over a four-week period (or the employment period, if they have been employed for less than four weeks), ① weekly holiday allowance (Article 55), ② annual paid leave (Article 60), ③ monthly paid leave (Article 60), and ④ severance pay (Article 34) shall not apply. In addition, social security insurances such as employment insurance, national pension and national health insurance except for industrial accident compensation insurance are excluded.

If the employer sets the contractual working hours of one week to 14 hours, and concludes the employment contract by adding an additional 2 hours of fixed overtime work every day (for 5 days), the Ministry of Labor has decided that the total working hours, including fixed extended working hours, are defined as working hours actually taken, as long as there is no reason to believe otherwise. In such case, part-time workers are subject to severance pay. However, it is possible to exclude from fixed working hours if it is not fixed overtime work but extension work due to an agreement with the company at that time.[37]

V. Conclusion

The reason part-time workers have been subjected to relatively poor working conditions is that it is difficult to find the same kind of workers working in the same workplace, to be able to compare for discriminatory treatment. To protect against discriminatory treatment of part-time workers, it is necessary to expand the scope of full-time workers for comparison.[38] In addition, in the case of workplaces with fewer than 5 employees, legal correction for discriminatory treatment is not possible, as these workers are excluded from the protection of the labor laws, which is a blind spot in the labor law because it does not apply to overtime, night work or holiday work. Therefore, for the active use of part-time workers, it is necessary to gradually expand the scope of full-time workers to be compared and to apply the Labor Standards Act to workplaces with fewer than 5 workers, to reduce discriminatory treatment.

[37] Labor Ministry Guidelines: Working Standards-5085, December 1, 2009..

[38] Park, Kyui-chun, "Legal Issues on Part-time Workers", 「Labor Review」, February 2008, Korea Labor Institute, page 25.

Ordinary Dismissal & Personnel Management

I. Introduction

Recently I received two questions regarding ordinary dismissal from two different companies for whom I have provided regular consultation. The first question was from a company engaged in unloading imported vehicles from a car carrying ship at a car dock. Around 8:20 pm on July 4th, 2015, while driving vehicles out of a ship and on to a parking lot, a car accident occurred in which the driver hit a structural support on the ship while turning a corner. The driver should have easily seen the supports as he had driven vehicles on such ships many times. This particular driver had had a visual impairment when he was hired on January 1st, 2009, but it was not serious enough at the time to disqualify him from employment. Since that time, he had had ten accidents including this most recent one, so the company asked him to go for an eye examination at a hospital designated by the company, and turn in the results. If the employee's eye exam is poor enough that he would have been disqualified from being hired, can the company dismiss him so as to prevent further accidents and safeguard other employees?

The second question was from a company whose sales manager went missing after embezzling 400 million won in funds received by the company in return for products delivered to customer companies. This sales manager had large personal debts, and used the company money to pay them. So the company pressed charges against the employee after a search and investigation by the police. On July 15, 2015, the company requested this labor attorney for advice on how to handle this employee in terms of his embezzlement and long term absence.

Both companies in these cases should dismiss the relevant employees: one due to his disqualification from employment, the other for embezzlement and long-term absence for personal problems. Generally, companies describe procedures for disciplinary dismissal in their Rules of Employment, but hardly make mention of procedures for ordinary dismissal. Herein, I would like to explain the criteria for the concept of ordinary dismissal, types, and justification in related labor cases.

II. The Concept & Types of Ordinary Dismissal

1. The concept of ordinary dismissal

"Ordinary dismissal" refers to termination of the employment contract due to the non-performance of the employee's obligation to provide labor service in accordance with the employment contract. Therefore, ordinary dismissal requires a reason attributable to the employee that the employee cannot provide work.[39] "A reason attributable to the employee" means that the employee falls into the remarkable condition where the employee becomes mentally or physically disqualified from providing the work which is the employee's main obligation according to the employment contract, and as a result, the employee cannot carry

[39] Hyungbae Jun, "A study on the Justification of Ordinary Dismissal per Type", Seoul Labor Relations Commission, 2011, page 1.

out his assigned work sufficiently in the workplace.[40] That is, "the term 'employment contract' in the Labor Standards Act means a contract which is entered into in order for a worker to offer work and for an employer to pay wages for that work (Article 2 of the Labor Standards Act)." As the reason the employee cannot provide work according to the employment contract is attributable to the employee, the employer can terminate the employment contract on the grounds of the employee's severe violation of the employment contract. This is referred to as ordinary dismissal.

2. Types of ordinary dismissal

In most cases, ordinary dismissal is a result of reasons attributable to the employee, but court rulings also place termination of an employment contract due to company bankruptcy or voluntary closure in the category of ordinary dismissal.

(1) Dismissal due to reasons attributable to the employee

1) In cases where the employee is not qualified for work, or lacks the necessary vocational skills

① In cases where the employee is unable to obtain a qualification certificate essential for work, or failed an examination required for appropriate work performance, or he is lacking the necessary professional knowledge or skills, this may be grounds for ordinary dismissal.[41]

② If the employee's work performance has been evaluated as very poor, the employer cannot dismiss the employee for that reason only. However, in cases where the employee's work ability has been evaluated remarkably deficient in objective reviews, a dismissal may be determined as attributable to the employee.[42]

③ In cases where the employee has a severe handicap after completing medical treatment for an occupational injury, if the employee cannot carry out or completes his previous assignments very poorly, the employer may be justified in dismissing the employee.[43]

2) In cases where the employee is sick with an illness that makes it unreasonably difficult to provide work.

① In cases where a driver has become blind, or in cases where a cook has contracted an incurable infectious disease, dismissal is regarded as attributable to the employee.[44]

② In cases where the employee was injured due to actions unrelated to work, and cannot work as normal for a considerable time even after taking leave of absence twice, dismissal may be justifiable.[45]

3) In cases where potential exists for a company's secrets to be leaked

In cases where an employee is in a position to know a company's business secrets and has a close relationship, through marriage, with a competitor's management, or the employee has a close relative or friendly relationship with a competitor company's directors, dismissal may be acceptable to prevent the leakage of business secrets.[46]

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[40] Jongryul Lim, 「Labor Law」, 13th edition, 2015, Parkyoung sa, page 353.
[41] Supreme Court ruling on July 25, 1989, 88daka25595.
[42] Seoul Civil Court ruling on April, 1990, 89gahap33263.
[43] Supreme Court ruling on November 12, 1996, 95nu15728.
[44] Supreme Court ruling on December 6, 1996, 95da45934.
[45] Administrative Court ruling on March 3, 2006, 2005goohap14158.
[46] Constitution Court decision on March 31, 2005, 2003hunba12; Hyungbae Kim & Jisoon Park, the above book, page 217.

(2) Dismissal due to reasons attributable to the employer

① In cases where a bankruptcy administrator dismisses all employees after the declaration of bankruptcy, this dismissal is not managerial dismissal, but ordinary dismissal, and so the company does not need to follow the requirements in the Labor Standards Act as to the process for dismissal for managerial reasons. [47]

② In cases where the employer has made every effort to resolve financial problems, and has concluded that closing the business is the most reasonable method, and closed the business and dismissed the employees, these dismissals are justifiable.[48]

③ In cases where the employer has dismissed an employee because the work that was supposed to be carried out is no longer needed, this dismissal is not for managerial reasons, but is ordinary dismissal. [49]

④ In cases where an employee was hired to work at a specific workplace, and the company's license to use the specific workplace has expired, dismissal of that employee may be justifiable. [50]

III. Reasons Necessary for Ordinary Dismissal

1. Ease of dismissal

In cases where the employee neglects his primary duty in the employment contract to provide work, or carries out his assigned duties insufficiently, the employer can notify the employee of termination of his employment contract. This ordinary dismissal serves to increase the number of reasons for terminating the employment contract and make flexibility in manpower management possible.

There are three types of dismissal: ordinary dismissal, disciplinary dismissal, and managerial dismissal. Here, disciplinary dismissal and managerial dismissal have strict requirements and procedures that must be followed for the dismissal to be determined justifiable.

Disciplinary dismissal requires the employer to follow the disciplinary procedures stipulated in the Collective Agreement or the Rules of Employment. If the employer does not do so, the dismissal becomes unfair even though the reason was serious enough to justify dismissal. In one case, the courts ruled, "The Collective Agreement, the Rules of Employment, and its related rules regulated that the employer should hold a disciplinary committee that includes a Labor Union representative, and provide the employee concerned the opportunity to attend the disciplinary action meeting where he/she may explain his opinions and submit any defending documents. However, if the employer dismissed the employee concerned in violation of the disciplinary procedures, this dismissal is unfair and invalid regardless of any

[47] Supreme Court ruling on February 27, 2004, 2003doo902.
[48] Administrative Court ruling on April 18, 2006, 2005gookhap34015.
[49] Supreme Court ruling on October 29, 1996, 96da22198.
[50] Administrative Court ruling on July 19, 2005, 2004goohap39723.

justifiable reason for dismissal.[51]

Managerial dismissal requires very strict conditions and the employer to comply with procedures according to dismissals for managerial reasons in Article 24 of the Labor Standards Act to be determined justifiable in accordance with Article 23 (1) of the same Act. These conditions and procedures for managerial dismissal are: 1) there must be an urgent necessity in relation to the business; 2) the employer shall make every effort to avoid dismissal; 3) the employer shall follow reasonable and fair criteria for the selection of those persons subject to dismissal; and 4) the employer shall inform and consult in good faith with the labor union (where there is no such organized labor union, the employee representative) regarding the methods for avoiding dismissals and the criteria for dismissal at least 50 days before the intended date of dismissal. The above four conditions and procedures should be observed in order for managerial dismissals to be determined justifiable.

2. No need for procedures of dismissal

Ordinary dismissal does not become unfair if procedures required for disciplinary and managerial dismissals are not followed. In this review, ordinary dismissal plays a role in reducing the restrictions on dismissal, and is used when there are reasons attributable to the employee, unlike disciplinary and managerial dismissals. Related examples include:

① Ordinary dismissal does not require that disciplinary procedures be followed, such as holding a disciplinary committee meeting and providing opportunity for the employee to explain his opinions.[52]

② An employee claimed that dismissal was unfair because the company did not follow the procedure to hold a personnel committee meeting and did not request submission of a doctor's medical certificate, as stipulated in the Collective Agreement. However, there were no rules stipulated in the company's Collective Agreement and the Rules of Employment that the company had to hold a personnel committee meeting for dismissals besides disciplinary dismissal. The company did not need to hold a personnel committee meeting to confirm there was a reason to dismiss the employee, so this dismissal is not simply illegal because the company did not follow the procedures for dismissal. [53]

IV. Conditions for Justification of Ordinary Dismissal

1. Good faith principle

Where a reason for ordinary dismissal has not become serious enough to terminate the employment, dismissing the employee without sufficient consideration of the employee's situation according to the principle of good faith and sincerity will be determined unjustifiable and an abuse of the managerial rights by the employer. For example, in cases where the employer intends to dismiss an employee due to a physical disability, if the employee can be rehabilitated or otherwise recover from that disability in a relatively short time, it would be

[51] Supreme Court ruling on July 9, 1991, 90da8087.
[52] Supreme Court ruling on September 24, 1991, 91da13533.
[53] Supreme Court ruling on December 6, 1996, 95da45934.

necessary to keep the employee for a certain period of time by way of assigning him to lighter work.

2. Observance of legal procedures

Ordinary dismissal should be prepared for with legal procedures. As ordinary dismissal is a unilateral action by the employer to terminate the employment contract, the employer must follow the procedural requirements in the Labor Standards Act. If an employer intends to dismiss an employee, the employer shall notify the employee of the reason(s) for dismissal and the date of such dismissal in writing (Article 27 of the LSA). The employer shall give notice to the employee at least thirty days before the planned dismissal. If notice is not given thirty days before the planned dismissal, ordinary wages of at least thirty days shall be paid to the employee in lieu of the notice (Article 26 of the LSA). A written notification of dismissal is related to the justification for dismissal, but such advance notice of dismissal can be substituted with money.

According to judicial rulings, ordinary dismissal does not require the observation of procedural regulations for other forms of dismissal. If the employer does not have regulations in the Collective Agreement or Rules of Employment requiring a personnel committee meeting to be held for dismissals except disciplinary dismissal, dismissals without following the disciplinary dismissal procedures is also not illegal.[54] As the dismissal is an ordinary dismissal, the employer does not have to consider the procedures that involve holding a disciplinary committee meeting or provide the opportunity for the employee to explain his opinion. [55]

V. Conclusion

The two questions in this article's Introduction section are related to ordinary dismissal. Regarding the first question, in cases where an employee is unable to sufficiently fulfill his work duties due to a physical disability, the employer can dismiss him for reasons attributable to the employee. In the second question, the employee embezzled company money and had been absent from work for a long period of time, actions which are subject to both disciplinary dismissal and ordinary dismissal. This company's Rules of Employment regulate that, when intending to dismiss an employee, the employer must hold a disciplinary committee meeting and provide opportunity for the employee to explain his side. Since the employee had been absent for a long period of time, it was impossible to follow the procedures for disciplinary dismissal. Therefore, the absence would be justification for ordinary dismissal. Accordingly, in terms of personnel management, the employer can make the most of ordinary dismissal by using the legal principle of ordinary dismissal, such as ease of dismissal and no need of dismissal procedures.

[54] Supreme Court ruling on December 6, 1996, 95da43934.
[55] Supreme Court ruling on September 24, 1991, 91da13533.

Compromise as a Means of Settling Labor Disputes

I. Introduction

Of the total labor cases brought to the Labor Relations Commission (hereinafter referred to as "the Labor Commission"), the percentage of cases resolved through compromise has gradually increased: 25% in 2010, 32% in 2011, 34% in 2012 and 34 % in 2013.[56] This reflects the Labor Commission's view that compromise is one of the most important methods to resolving labor disputes, a view it has held since the provision 'Compromise' was introduced into the Labor Commission Act in April 2007.[57] Labor Commission judgments result in one party winning all the benefits, while the other loses all, which may result in an appeal that extends the labor dispute beyond what was expected.

Compromise plays a role in preventing resolution of labor cases from such delays, and aims for amicable conclusion between the company and employee concerned. Despite this important role, the compromise system is regarded as a method of "anything goes" to solve disputes in actual practice. Accordingly, it is necessary to understand the use of compromise through actual labor cases resolved reasonably in such a way, and seek how to make more frequent use of it.

II. The Legal Status of Compromise and its Use

1. The legal status of compromise

The Civil Law stipulates (in Articles 731 and 732) that a compromise shall become effective when the parties have agreed to terminate a dispute between them by mutual concessions. A contract of a compromise shall have the effect that the rights conceded by one of the parties are thereby extinguished and the other party will, in turn, acquire the pertinent rights by virtue of the compromise. Judicial rulings have agreed that when reaching a compromise, the previous agreement is extinguished by virtue of the newly established effects of the compromise, and the compromise becomes legally binding regardless of any contradicting content in the previous agreement.[58]

According to Article 16-3 of the Labor Commission Act, a Labor Commission may recommend

[56] Ministry of Employment & Labor, "White Paper on Labor and Employment, 2014"
[57] Lee, Sungil/Cho, Sungkwan, "A Study on the Improvement of Operations of the Labor Relations Commission", 「Thesis Papers on Labor Laws」 No. 27, Comparative Labor Law Society, 2013.
[58] Supreme Court ruling on Sep 22 1992: 92da25335

conciliation or present a proposal for such at the request of the parties concerned or by virtue of its authority before a judgment, order or decision is rendered pursuant to Article 84 of the Labor Union & Labor Relations Adjustment Act or Article 28 of the Labor Standards Act. The conciliation statement shall have the same effect as a compromise imposed by the courts in accordance with the Civil Procedure Act.

2. Use of compromise

(1) Designing the compromise

The compromise process in an unfair dismissal case brought to the Labor Commission begins with the necessary time to consider the compromise, when a judge in the judgment hearing has suggested a compromise and one of the parties has accepted it. In general, the party requesting a compromise in the course of an unfair dismissal case is regarded as having a weaker claim, and so a compromise is seldom requested before the judgment hearing starts.

If the employer feels likely to lose the case, a compromise is quite acceptable. This is the case also if the employer feels he has the potential to win the case, if the cost of settlement is much lower, as the compromise will prevent the employee from appealing. From the employee's viewpoint, a compromise is desirable if he/she does not wish to continue working for the employer, has gotten a new job, or feels he/she cannot win the case.

(2) Settlement money

Settlement money is normally calculated based upon the employee's wage. In cases where the employee has a favorable position in the dismissal case, he/she requests monetary compensation up to one year's wages, considering the wages that should have been received during the dismissed period and the ability to earn more upon reinstatement at the workplace. However, if the employee has an unfavorable position in the dismissal case, he/she usually accepts a compromise with the settlement money covering only the period of dismissal. Accordingly, after the Labor Commission has investigated the facts related to the justification of dismissal in the judgment hearing, it will suggest a compromise including a cash settlement.

Should a considerable gap exist between what each party feels is acceptable, the Labor Commission will endeavor to narrow the gap through mediation to encourage settlement. Nevertheless, if there is no compromise reached, the Labor Commission tends to avoid a quick judgment and instead opts to give both parties time to consider ways to reach a compromise.

(3) Compromise form

In actual practice, compromises require filling out a 'Settlement Agreement' form similar to the one below.

Seoul Labor Relations Commission – Letter of Compromise

Case number: Seoul2014buhae2689 000 Korea, Application for Remedy for Unfair Dismissal
Employee: 000
Company: 000 Korea

Conditions for Settlement

1. *The employee and the company in this case agree that employment is terminated as of September 15, 2014.*
2. *By Wednesday, November 26, 2014, the company will transfer 00.0 million won (in actual payment) to the employee's bank account as settlement money that includes severance pay.*
3. *When the above conditions are fulfilled, both parties in this case will not take further civil, criminal or other administrative actions regarding the termination of this employment.*

We, the undersigned, agree on the above conditions regarding this labor case of application for remedy for unfair dismissal, and hereby confirm that this conciliation statement shall have the same effect as a compromise imposed by the courts in accordance with the Civil Procedure Act in accordance with Article 16-3 (5) of the Labor Relations Commission Act.

November 19, 2014.

Employee's labor attorney: O O O (Signature)

Employer's labor attorney: O O O (Signature)

Seoul Labor Relations Commission – Commissioner, 0000 (Signature)

3. Difference between a compromise and monetary compensation

Monetary compensation is a system where the company shall provide the employee with monetary compensation if the employee does not desire reinstatement upon such a verdict in an unfair dismissal case (Article 30 of the Labor Standards Act). Any requirement for monetary compensation shall begin when an employee receives notification of the judgment hearing date, with the calculation period for compensation calculated from dismissal date to judgment date (Articles 64 and 65 of the Labor Relations Regulation). Accordingly, monetary compensation can be claimed for wages missed during the period after dismissal, and as this amount cannot include compensation for emotional damage, the compensation is relatively low and limited.[59] On the other hand, since a compromise is not related to the level of monetary compensation, the greater the possibility for unfair dismissal to be determined, the

[59] Cho, Sunghye, "Critical Review on the Monetary Compensation System for Unfair Dismissal", 「Labor Strategy Studies」, 2009, volume 9, page 154.

higher the compensation request will be, while the lower the possibility for unfair dismissal to be determined, the lower the compensation request will be: for example, one month's wage, equivalent to the one month compensation requirement for a failure to give advance notice of dismissal.

III. Labor Cases Resolved through Compromise

1. A case brought against "Company A"

"Company A", a Taiwanese semiconductor company with five Korean employees at its Korean branch is selling semiconductor components to Korean electronics companies. For the past few years, this company has been in deficit, and determined that the branch manager's poor sales skills were to blame. The company dismissed the branch manager without notice, and paid him the required one month compensation in August 2014. The branch manager then applied to the Labor Commission for remedy for unfair dismissal.

The Labor Commission held a judgment hearing on November 19, 2014 where the branch manager claimed that the poor sales performance that the company claimed was partly due to the high prices of the company's semiconductors, his legal status was not as an employer since he only worked as a sales manager, and the Korean branch was a sales office and not an autonomous organization. These claims greatly weakened the company's chances to win the case.

The Labor Commission estimated that as the branch manager had lost the company's confidence, he would be unable to work effectively upon reinstatement, and suggested a compromise be reached, which both parties accepted. In the judgment hearing, the employee demanded 12 months' wages as a condition for settlement, while the company responded with an offer for 3 months' wages in consideration of the already-paid compensation for no advance notice of dismissal, and the labor attorney's service fees. The Labor Commission judge then proposed compensation equal to 8 months' wages to both parties, but the company rejected it. The Labor Commission then explained that the parties would have one week to consider methods for settlement, and that a judgment would be made if the two parties were unable to reach agreement by that time.

When the company's labor attorney explained to the company that the Labor Commission was more in favor of the employee's claims and additional costs would result if they appealed a verdict of unfair dismissal, the company agreed to increase the settlement to 5 months' wages. The company's labor attorney then persuaded the employee's labor attorney (whose client had already accepted the judge's proposal for 8 months' wages) that the employee's severance pay would be reduced by two months considering that there had been fewer than 5 employees for some years previously. The employee then reduced his claim by an additional two months and accepted 6 months' wages as a settlement. In the end, the company's labor attorney successfully persuaded the company for this small difference, and also accepted the employee's compromise. Ultimately, 5 1/2 months' wages in compensation was accepted by both parties.

2. A case brought against “Company B”

“Company B” is a Korean branch office of a multinational company with head offices in Switzerland. The employee was assigned to the Korean branch office as a senior director on December 1, 2012, signing a two year contract. He had adjusted to Company B very well and worked faithfully, but suddenly received a letter of dismissal from Company B on August 30, 2013. The reason given for dismissal was suspicion that the employee had been involved in unfair price transactions with a customer while working at the head office in 2012. However, Company B did not investigate the incident thoroughly, and simply dismissed the employee immediately pursuant to a request from the head office. The judgment hearing at the Labor Commission was held for this case on December 17, 2013.

As the company had dismissed the employee pursuant to a request from the head office without observing the disciplinary process stipulated in the Rules of Employment, it was very clear that unfair dismissal would be the verdict. The Labor Commission Chairman suggested the parties settle the case, to which both parties agreed.

However, settlement was difficult due to significant difference of opinion on adequate compensation. The employee was unwilling to return to work, while the company could not win the case. When he considered that there were only 11 months left in his contract and he was unsure about continuing to work at the head office after completing the contract, the employee decided to accept 9 months’ average wage as compensation. The company agreed, and the settlement was finalized as 9 months’ average wage.

VI. Conclusion

The compromise system in the Labor Commission is advantageous to a verdict in terms of preventing one party from losing entirely, maintaining an amicable relationship afterwards, and terminating a dispute. However, each party’s objective circumstances and subjective emotions can determine whether a compromise is acceptable or not, making it an at-times difficult solution to labor disputes. In order to reduce uncertainties regarding compromise, it is necessary to improve the monetary compensation system so that it grants additional compensation for an employee’s number of service years plus compensation for the period after dismissal. Combining compromise with this improved monetary compensation system will greatly increase its use.

Criteria for Determining Whether Forced Resignation is Agreed Resignation or Dismissal

I. Introduction

There are two ways to terminate employment: one is voluntary resignation and the other is dismissal, which is a unilateral decision by the employer. Resignations do not cause labor disputes as the employee chooses to resign, whereas dismissals require a justifiable reason in accordance with Article 23 of the Labor Standards Act since they terminate the employment relationship without mutual consent.

Forced resignations are in the grey area between resignation and dismissal, and refer to cases where the employee does not wish to quit but must submit a letter of resignation at the employer's insistence, whereupon the employer terminates the employment relationship. In this case, it would seem that there would be no labor dispute about whether this was a dismissal or not because the employer simply terminated the employment by accepting the letter of resignation submitted. In relation to this, the Civil Law (Article 17: Declaration of Untrue Intention) stipulates, "A declaration of intent shall be valid, even if the declarant has made it with the knowledge that such declaration is different from his intent: Such declaration of intent shall be void if the other party was aware, or should have been aware, of the real intent of the declarant." Judicial rulings have shown that if an employer receives letters of resignation from all employees but dismisses them selectively, such terminations are considered dismissals, whereas if employers pay certain employees a voluntary early retirement bonus and, in return for that, receive a letter of resignation before engaging in managerial dismissals due to urgent business reasons, these are considered mutually agreed resignations.

There are no substantial or stipulated criteria for determining if forced resignations are agreed resignations or de facto dismissals, resulting in frequent labor disputes. I would like to look at related cases and review the legal criteria for such determinations.

II. Cases Determined to be Dismissals

In cases where an employee was unilaterally forced by the employer to submit a resignation letter to the company, the resignation can be invalidated because it was not the employee's actual intent to resign. Judicial rulings have shown that when an employer forced an employee to submit a letter of resignation and terminated the employment based upon the received letter of resignation, this was considered de facto dismissal as the decision to terminate employment was a unilateral employer decision. In addition to this, dismissal without justifiable reason is equal to unfair dismissal.[60] Following are some cases where resignation was considered de facto dismissal.

[60] Supreme Court ruling on July 12, 1991, 90da1155

1. Employee unable to enter the country if a resignation letter was not submitted

An employee who was working overseas had to enter the country to undergo medical treatment for an illness, but the company insisted that he submit a letter of resignation if he wished to enter the country, and so he did so, although that was not his original intent. In this case, the employee's letter of resignation was not considered a valid reason for termination of employment.[61]

2. All employees submitted letters of resignation, after which the company terminated employment with all of them

A company's quality team was strongly criticized by the quality management director for quality problems. The quality team held a meeting where they decided that the entire team would submit letters of resignation to the board members to show their desperate determination to improve their work. The letters of resignation were not meant to express an actual intention to resign, but to apologize for the quality problems collectively, and express their intention to not repeat those mistakes. However, the company accepted their letters of resignation and terminated employment with everyone on the quality team. Included were low-ranking employees who had to submit the letters of resignation in solidarity with the other members of the quality team (including the quality management director and the team leader). This termination was judged as unfair dismissal.[62]

3. All employees submitted letters of resignation, but the company only terminated selected employees.

A company received an order from the supervisory office to terminate a certain number of employees, and in implementing this order, the company forced all employees to submit letters of resignation. The applicant for remedy of unfair dismissal had to submit a letter of resignation along with his other coworkers, against his will. The company then terminated employment for six employees. This case was considered a dismissal because employment was, in reality, terminated by unilateral decision of the employer. [63]

4. Personnel at the managerial level or higher were forced to submit letters of resignation, which the company accepted

A company president ordered all senior managers to submit letters of resignation so that they could get recognition from the chairman of the board. All managers had to submit their resignations against their will, which the company accepted, and terminated employment with all of them. These terminations were ruled to be unilateral dismissals by the company president.[64]

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61 Supreme Court ruling on Sep 1, 1992, 92da26260
62 Seoul Administrative Court ruling on Nov 25, 2008, 2008guhap27674
63 Supreme Court ruling on Feb 9, 1993, 91da44452
64 Supreme Court ruling on Apr 29, 1994, 93nu16185

5. A company terminated employment with all employees after receiving their letters of resignation, and hired them again

All employees had to submit letters of resignation according to company business policy. The company accepted these resignations and terminated employment relations. They were then rehired. Since there was no gap in time between their resignations and rehiring, it was determined that the employees had not truly intended to resign when they submitted their letters of resignation, and that the employer was aware that the employees resigned only on the condition of reemployment. Therefore, the company's terminations based upon the letters of resignation were not valid. [65]

6. An employee was transferred only after submitting a letter of resignation, in accordance with company policy

In cases where an employee transfers from the parent company to its subsidiary, or from the subsidiary to the parent company, whether continuous employment exists or not depends on whether he actually intended to resign or is simply following company requirements that he resign before such a transfer. If the employee submitted a letter of resignation to the parent company or the subsidiary with the real intention of terminating the employment relationship, received severance pay and later was hired by the parent company or its subsidiary again, it can be regarded that his employment with the previous entity has been terminated. However, if the employee had to resign and be rehired by the company according to the parent company's unilateral policy, and so submitted a letter of resignation (without really intending to terminate the employment relationship), even should the employee receive severance pay, the employment shall not be considered terminated as the employee had no intention to do so in actuality. [66]

7. Employees with poor performance results forced to quit by the employer

Korea Rural Community Corporation was required to downsize its workforce in accordance with a government management innovation plan. The Corporation selected some employees to terminate without rational or fair criteria, and forced them to submit letters of resignation. These forced resignations were considered to be dismissals since they were done by unilateral decision of the employer.[67]

III. Cases Determined to be Agreed Resignations

The criteria for determining agreed resignation refer to conditions where the employee submits a letter of resignation without really desiring to resign, but resignation is admittedly in his or her best interest. This may be considered agreed resignation. The following legal principle can be used as criteria for judgment.

Even though an employer forces an employee to submit a letter of resignation against his

[65] Supreme Court ruling on May 10, 1988, 87daka2578
[66] Supreme Court ruling on 1997.03.28, 95다51397
[67] Supreme Court ruling on Jun 14, 2002, 2001du11076

will, then accepts the resignation and terminates employment, this may not be dismissal, but an agreed resignation. The employee outwardly expressed his intention to resign as fitting the situation, even though that was not his real intention. Therefore, even though he did not want to resign, if he judged that expressing his intention to do so was the best thing he could do under the circumstances, it can be understood that his real intention was to express regret, not actually resign.[68]

1. Voluntary resignation in relation to dismissal for managerial reasons

Even though the employees of a certain company did not wish to resign, they submitted letters of resignation as they seemed the best plan of action when collectively considering the economic situation, the company's redundancy plans, and the company's early retirement bonus, and the interests of both sides. The employment relationship between the employees and the company was terminated on the basis of agreed resignation after the employees submitted letters of resignation as recommended by the company. [69]

2. An employee submitted a letter of resignation on the basis of forced resignation rather than resigning for disciplinary reasons

Even though an employee at another company did not wish to resign at the time he submitted a letter of resignation, he chose his best option, which was to avoid disciplinary dismissal and resign, as a way of gaining severance pay and future employment rather than seek judgment on the validity of disciplinary dismissal under those circumstances. The letter of resignation was considered to be valid as his resignation corresponded to his expression of his true intention.[70]

V. Conclusion

Whether an employee submits a letter of resignation without real intent is dependent upon whether his true intentions were understood and accepted. If they weren't, then the employer shall take responsibility for unfair dismissal, whereas when an employee's letter of resignation is determined as true intent, no issue related to unfair dismissal will occur as it is then regarded as an agreed resignation or honorary resignation.

Judicial rulings provide us with the following criteria: If an employer terminates the employment relationship with an employee who submits a letter of resignation under pressure from the employer, or who is forced to do so, this is a termination of the employment contract by unilateral employer decision, and will be considered a dismissal. However, even should an employee not truly wish to resign but does so as his best choice under the given situation, it will not be considered a dismissal.[71]

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[68] Supreme Court ruling on Apr 25, 2003, 2002da11458
[69] Supreme Court ruling on Apr 22, 2002, 2002da65066
[70] Supreme Court ruling on Apr 25, 2000, 99da34475
[71] Supreme Court ruling on Jul 30, 1996, 95누7765; Apr 25, 2003, 2002da11458

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)

Dismissal of a Probationary Employee without Written Notice of Dismissal

I. Introduction (Summary and Major Points in Dispute)

In March 2014, I received an inquiry regarding a case of dismissal from Company X (hereinafter referred to as "the Company") which is involved in the furniture wholesale business. The Company hired Employee Y (herein referred to as "the Employee") as a translator and assigned her translation duties, but the Employee was unable to carry out her duties well, so the Company terminated the employment contract within the probationary employment period of three months. The Company did not issue a written dismissal notice during the final meeting with the Employee, but simply obtained her signature on the evaluation sheet for probationary employees. Two months after her termination, the Employee filed an application for remedy for unfair dismissal. Considering that the Employee had passed a tough interview process and had worked hard during the probationary period, the Employee claimed that the Company's unilateral termination of her employment was unfair. For its part, the Company claimed that it had to terminate the employment contract after evaluating the Employee's performance during the probationary period as the Employee's translation skills were remarkably lower than expected or desired.

Major points of dispute in this dismissal of a probationary employee were: 1), whether the fact that the Company failed to issue a written dismissal notice was acceptable, and 2), whether the Employee's signature on her evaluation sheet can be regarded as agreement with termination of employment. In cases where an employee's signature on an evaluation sheet has not been regarded as agreement with termination of employment, termination has been considered unfair dismissal in violation of required dismissal procedures. The Labor Commission concluded on May 9, 2014 that this case would be regarded as if the employee had accepted termination indirectly, even though her signed evaluation sheet could not be seen as agreeing to termination, given that it was admissible that the employee's translation skills were insufficient for her position as a professional translator, and that the Employee did not refuse to sign the probationary employee evaluation sheet.

Here, I would like to review the claims of each party, the Labor Commission's judgment, and then the case itself.

II. Claims of both Parties regarding the Dismissal of a Probationary Employee

1. The Employee's Claim:

The Employee applied for an open position through an employment agency, had three separate job interviews and also took a three-hour translating test before being awarded the job in early October, and was assigned to a translator on the translation team on October 16, 2013. The Employee had worked very hard with no instances of lateness or absenteeism since she started with the Company. The Employee had official language qualification scores of 104

(TOEFL) and 980 (TOEIC) as well as a Masters degree from one of the top ranking US Universities, and had performed part-time work as a translator for three different broadcasting companies.

The Employee had never made any agreement with the Company concerning termination of employment. The Company notified the Employee of the termination of employment during the probationary period, but this dismissal during the probationary period should require an objective and rational reason to qualify as justifiable dismissal. Without such qualification, this action by the Company must be considered as unfair dismissal. The Company's dismissal is not justifiable due to the missing legal requirements such as a reason for dismissal, the severity of disciplinary punishment, and the dismissal process itself.

2. The Employer's Claim:

The Company rescinded the offer of employment during the probationary period due to the Employee's remarkably insufficient translation ability and relatively low-quality translations. As these results could be deemed reason for termination of employment in terms of not meeting reasonable standards, this could not be considered abuse of the employer's right to revoke an offer of employment. On the other hand, as this employee herself confirmed when she signed the probation evaluation sheet, this verified that both parties mutually agreed on the termination of employment.

When the Employee began her probationary period on October 16, 2013, she was assigned to translation duties, which involved the translation of English-language documents into Korean. Her translations did not meet the expected basic quality, and her translation efforts took twice the time of her colleagues. As her work contained so many translation errors, liberal translations with different meanings drastically from the original material, in addition to spelling mistakes, the translation team manager had to frequently re-translate her finished work. On December 4, 2013, the translation team manager implemented an intermediate evaluation on the Employee's performance for four items: 1) job knowledge; 2) work-performance quality; 3) cooperation with colleagues; and 4) communication skills. Except for cooperation with colleagues, she received the lowest evaluation result category ('requires considerable improvement') for all areas. The Employee signed her agreement with this evaluation.

On January 9, 2014, the translation team manager had a meeting with this employee, explained the evaluation results of the employee's probationary period, and then informed her of termination of her employment. The evaluation sheet of the probationary employee, on its front side, refers to 4 fields: job knowledge, work-performance quality, cooperation with colleagues, and communication skills, while the reverse side stipulates: "① The Company hires the employee; ② The Company extends the probationary period; and ③ The Company terminates employment." The translation team manager explained the results of the probationary evaluation that revealed an insufficiency for each rated item, and then, on the reverse side of the evaluation sheet, the manager checked the section "the Company terminates employment" and asked her to sign there for confirmation, after which she signed the evaluation sheet. In the meantime, the personnel team manager joined the meeting, and the Employee said: "My aptitude suggests that I prefer a marketing job to a translation job". The personnel team manager suggested that the Employee could apply for an open position

related to marketing, and later gave a business card to the Employee. As the interview process continued during the final evaluation meeting, the Employee confirmed the items regarding termination of her employment with the Company and then signed the probationary evaluation sheet. In this situation, where the employee herself even mentioned that she would be more qualified for marketing than for translation work, her termination was mutually agreed upon.

III. The Labor Commission's Judgment[72]

The major points of dispute in this case are firstly, whether or not there was a dismissal; and secondly, if there was a dismissal, whether or not such dismissal was justifiable. The Labor Commission, after considering both parties' claims, reviewing various submitted verification documents, and direct interrogations during the judgment hearing regarding these points of dispute, judged this case as follows:

The Supreme Court ruled, "the dismissal of an employee during a probationary period, or the refusal to enter into an employment contract after the expiration of a probationary period, are interpreted more generously than general dismissal, as concerns the employer's right to be able to cancel further employment, because the probationary system was designed to give the employer time to evaluate whether or not a new employee has the competence required for a given job." [73]

In this case, the Employee did not agree on the termination of employment, and even during the probationary period, the employer's termination of the Employee without objective and justifiable reason shall qualify as an unfair dismissal. However:

1) The Employee was very not good at translations and frequently made mistakes.

2) Approximately one month after the joining the Company, the Employee complained to the personnel team about the inefficient working system and unfair work assignments, which had caused disagreements between the Employee and her direct superior, the translation team manager. After this incident, the Company decided to terminate the employment with this employee prior to completion of the three-month probationary period, due to the Employee's work deficiencies and poor communication skills with the translation team manager.

3) The evaluation sheet which the Employee confirmed and signed in the section of termination of her employment with the Company on January 9, 2014 could not be enough to verify mutually agreed-upon termination. However, the fact that she signed the evaluation could be understood as accepting dismissal, since she had signed an interim evaluation the month before (on December 4, 2013) which also highlighted her poor performance.

4) After receiving the lowest scores available in the probation evaluation performed on January 9, 2014, the Employee signed the evaluation sheet stipulating the termination of employment without dispute.

5) During the process of evaluating the probationary results and delivering notification of termination, the Employee stated that she could do better in marketing than in translation. In

[72] Labor Commission's Decision on May 9, 2014. Seoul 2014buhae703

[73] Supreme Court ruling on July 22, 2003, 2003da5955; SC ruling on February 24, 2006, 2002da62432

consideration of the documents submitted and interrogations conducted, the Employee was deemed to have suggested that the Company's original evaluation of her translation skills were not adequate for the job.

6) Even though the Employee did not want to accept it, she knew that there was a probationary period stipulated in the employment contract and the rules of employment, and so the termination of the probationary contract was not unilateral.

Considering all the items mentioned above, in terms of the purpose of setting the probationary period, the termination of employment between the Company and the Employee was implemented based on the negative results of her poor work performance.

IV. Major Points of Dispute in the Labor Commission's Decision

The major points of dispute in this dismissal during the probationary period are two: the first is whether it could be no problem when the Company did not provide written notification; and the second is whether the Employee's signing of the probation evaluation sheet can be regarded as agreed-upon termination. I would like to look into each.

1. In cases where the company does not give written notification of dismissal to the probationary employee, is the dismissal valid or not?

Article 23 (1) of the Labor Standards Act stipulates that the employer shall not dismiss a worker without justifiable reason. Article 27 of the LSA stipulates that when intending to dismiss a worker, the employer shall notify the worker in writing of the reason for dismissal and the date of such dismissal. These rules were designed to make the employer become more circumspect, and ensure whether dismissal in fact exists, and if so, the reason for the dismissal as well as the date it becomes effective, so the worker can easily make appropriate preparations if he or she seeks a remedy claim.[74]

In cases where the probationary employee was dismissed, even though there was a justifiable reason to dismiss the probationary employee due to poor evaluation results of his/her occupational aptitude or job eligibility, if the company did not notify the probationary employee in writing of the reason for the dismissal and the date of such dismissal, such dismissal is regarded as an unfair dismissal due to no implementation of procedural justification.[75] Accordingly, this particular dismissal case was implemented without the Company's written notification of dismissal, and so unless the case was considered an agreed-upon termination, as the Company claimed, this dismissal during the probationary period could only become invalid because the Company did not follow the procedural requirement of written notification.

[74] Lim Jongyul, Labor Law (12th edition), Parkyoung publishing co. pages 538-539
[75] National Labor Commission's decision on October 17, 2011, 2011buhae676

2. Whether the Employee's signing of the probation evaluation sheet can be regarded as agreed-upon termination of employment?

The term, 'agreed-upon termination' is not defined in the labor laws, but refers to mutual agreement: the employee expresses his or her intention to resign, and then the employer accepts it, thus terminating the employment relationship.[76]

First of all, the Labor Commission ensures that an employee's signing of a probation evaluation sheet does not automatically become an agreed-upon termination of employment. However, in this case, the Employee signed the evaluation sheet knowing that it stipulated that the result of the evaluation was to terminate the employment. The Employee admitted in the evaluation meeting that she was not qualified for a translation job, but as there were no open positions for marketing that she wanted to apply for, she applied for the translation position instead. Also, when the Employee joined the Company, she signed the employment contract based upon a probationary period. In the middle of the probationary period, the Employee received the intermediate probation evaluation, and after the final evaluation at the end of the probationary period, she was informed of the termination of the employment contract. Considering all the aforementioned items, although the Employee did not agree with the termination of employment directly, she could be regarded as agreeing with the termination of employment indirectly. Accordingly, it is evident that the Labor Commission's decision was fair.

V. Conclusion

It is common for the Company to notify of dismissal after probation evaluations without written notification, but this can be deemed an illegal dismissal in violation of the employer's duty to provide a written dismissal letter as stipulated by Article 27 of the Labor Standards Act. This particular dismissal during the probationary period was made without such written dismissal notification. Fortunately in this case, the Company made sure that the probationary employee understood the employer's reason for dismissal during the evaluation meeting and obtained the Employee's signature on the evaluation sheet. Because of this signature, the Labor Commission decided that the Company's termination of the probationary employee's employment was not a dismissal, but the agreed-upon termination of employment based on the previously-mentioned conditional employment contract concerning probation. If this case had been designated as an illegal dismissal, the Company would be at risk for huge financial and operational damages. Accordingly, it is recommended that when dismissing even a probationary employee, a company should observe the required procedures such as a written notification of dismissal along with justifiable reasons as per the Labor Standards Act.

[76] Lim Jongyul, Labor Law (12th edition), page 541

Foreign Pastor's Dismissal Case

I. Summary

A foreign pastor (hereinafter refer to as "the employee") started to work for an international school (hereinafter refer to as "the employer") under contract as a pastor, but was dismissed 6 days after his employment began. The employee applied to the Labor Relations Commission on April 27, 2009 for remedy, alleging that his dismissal on March 6, 2009 was unfair.

The job description in the employment contract was "Position: Pastor of Church, English Worship. Duties shall include, but are not limited to: preaching, teaching and the provision of overall pastoral leadership." However, when the employee first arrived at the school, the employer assigned 12 hours of Bible/English classes per week to the employee, contrary to the employment contract. The employee refused to teach these classes because, according to his contract, his major duties were to preach and fulfill other pastoral obligations, not teach regular classes. The employer then demanded that the employee sign a written pledge stating that the employee would comply with the Rules of Employment as a teacher, but the employee refused because he was hired primarily as a pastor, not a teacher, so a written pledge for teachers was not appropriate to his position as a pastor.

The employer dismissed the employee because he refused to teach the Bible/English classes, and also refused to sign the written pledge. The central argument in this dismissal case was whether the assigned Bible/English classes were mandatory according to the employment contract or not. The Labor Commission's decision would be based on whether the employee's rejection of the Bible classes was appropriate or not.

II. The school's claim

1. As stipulated in the employment contract, the employee's job was not limited to any particular duty. The employee's view that, as a pastor, he could not perform other duties except his pastoral duties, is contrary to his employment contract. The "teaching" that the employee rejected was clearly within the employee's job boundaries in the employment contract. Even though the details were not specifically included, the employee should agree to the employer's work instructions because of the phrase, "but not limited to..." in the employment contract. In particular, those filling the pastoral position at the Christian School should not only preach to the students, but also provide English Bible classes so that he can share biblical knowledge, fundamental work for a pastor.

2. Signing of the written pledge was requested to ensure a reliable relationship between the employing school and the employee. This is a general document required by most companies at the beginning of employment. Despite this, the employee refused to sign the pledge,

alleging that the school demanded, in a threatening manner, that the document be signed. Article 10 of the company's Rules of Employment (regarding cancellation of employment) stipulates that the employer can cancel employment for those who do not submit the written pledge. The employee refused the employer's justifiable demand to submit the necessary document, so the employer took the necessary next step, cancellation of employment, and stated that there was no threatening.

III. The employee's claim

1. When the employee enrolled his daughter at an international school, he came to know the employer. At the employer's suggestion, the employee started working part-time for the employer in February 2008, teaching a Bible class on Friday afternoons and preaching English sermons. Later, the employer suggested that the employee work as a full-time pastor at the English church of the school after he finished his contract as a full-time lecturer at a Christian university in Cheonan at the end of February 2009. The employer and the employee negotiated over the employment contract for several months, and although the university had offered to renew his contract with a salary increase, the employee signed a three-year employment contract with the international school, for a monthly salary of 2.7 million won.

2. As already discussed, the employee, who has a Doctor of Ministry degree, entered into an employment contract as a full-time pastor, at the suggestion of the employer. If the employee had known that he would not be a full-time pastor, but a full-time instructor engaged in regular Bible/English classes, he would never have entered into this employment contract with the employer. After hiring the employee, the employer changed the position from being a pastor to a full-time regular instructor, contrary to the contents of the employment contract. When the employee rejected this change, the employer dismissed him immediately, within one week after being hired, without any attempt to understand or persuade him to change his mind.

IV. Related Judicial Rulings

1. In cases where there is disagreement between the parties in interpreting the contract, logic and experience need to be used when considering the related sections, the motives behind the contract with the disputed article, the purpose desired by the contract, both parties' real intentions, etc. If the real intentions of either party cannot be interpreted from their expressed intentions, the expected results from externally expressed behaviors (the contents of a written contract) shall be used to indicate real intentions. So, internal opinions of either party are not accurate indicators of real intent. (Supreme Court Ruling Jun 24, 1007, 97da5428)

2. In cases where, according to an employer's Rules of Employment, newly-hired employees have a probationary period, whether or not this applies to a specific employee shall be stipulated in the employment contract. If there is no provision in the employment contract that a new employee will have a probationary period, he/she shall be regarded as a regular employee, rather than a probationary employee. (Supreme Court Nov 12, 1999, 99da30473)

V. Conclusion (Judgment of the Labor Relations Commission)

The major issue in this dispute was to decide whether termination of the employment contract was justifiable, after interpreting the purpose of the employment contract concerned. We came to the conclusion that follows, after considering the claims of both parties, the stated contents of evidence documents submitted, investigations made by the labor commission, facts revealed by answers to our questions, etc.

1. Concerning the purpose of the employment contract

The employment contract signed by the employer and the employee concerned stipulates, "Position: Pastor of Church, English Worship. Duties shall include, but are not limited to: preaching, teaching and the provision of overall pastoral leadership." The duties stipulated by the employment contract seem limited to those of a pastor of the English church located in the international school, a position which involves preaching and teaching the Gospel. The employer stated that the employee's position and duties were not only limited to being a pastor, but also included instructor's duties since the contract included "teaching" as one of the duties, and used the phrase "not limited to". However, if this employee was hired to teach, which requires assignment of the employee to the class and grading students, the company should have used the same type of employment contract as it used for its current instructors, not a different contract stipulating different working conditions and service requirements. Furthermore, the school principal sent an e-mail to the employee on February 20, 2009, stating that the employee would be assigned 12 hours of Bible classes per week if the teacher who was supposed to teach the relevant class did not show up at school, an event which might cause serious problems for the school. If the employee's duties were not limited to those of a pastor, but also included teaching duties as an instructor, as the employer felt, there would have been no reason for the principal to send this email to the employee. In reviewing the overall purpose stipulated in the employment contract made between the two parties, it is obvious that the employer hired the employee as a pastor to conduct English prayers, to preach, teach, and implement overall pastoral duties.

2. Concerning justification of terminating the employment contract

The employer hired the employee not as a probationary employee, but as a regular employee. If the employer wanted to terminate the employment contract, he should prove the existence of one of the justifiable reasons in Article 23 of the Labor Standards Act, as is required for regular employees. This means that in order to justify the dismissal, the employee must have caused problems serious enough to make maintaining the employment relationship extremely difficult. The employer stated his reason for dismissing the employee was that the employee refused to teach the classes simply because there was no such requirement stipulated in the employment contract, something which the employer disagreed with. The employee's reasons for refusing to teach the classes were justifiable, as we reviewed in the above paragraphs. The employer also added that another reason for dismissing the employee was his refusal to submit a 'written pledge,' an essential document normally submitted at the time of employment. However, informing the employee of the cancellation of the contract on March 5, 2009, just 4 days after his employment on March 1, was deemed too harsh, especially when the employee did not receive any written notice that submission of this 'written pledge' was required, and just received a verbal order at a meeting on the first day. A dismissal based on the reasons given by the employer, as mentioned above, cannot be accepted as justifiable. Therefore, as there was no evidence or document to view the employee's dismissal as objective and reasonable, this dismissal is unfair.

3. Conclusion

That the employer dismissed the employee on March 6, 2009 was judged as unfair dismissal. Therefore, it was decided that the employer shall reinstate the employee to the previous position within 30 days from the date that the letter of judgment was delivered, and the employer shall pay the employee the amount that the employee should have received if he had been working normally since his dismissal.

A Question of Dismissal or Voluntary Resignation, and an Order for Financial Compensation[77]

I. Summary

This dismissal case concerns a TESOL (Teachers of English to Speakers of other Languages) Institute (hereinafter referred to as "the Employer") and an American native-speaking English teacher (hereinafter referred to as "the Employee") they hired. The TESOL Institute made two employment contracts: one was a three-week temporary contract prior to her receiving an E-2 visa, and the other was a one year contract. She completed the three-week contract, but after evaluating her teaching, the Employer concluded the Employee was not a suitable TESOL teacher, and dismissed her before the one-year employment contract began. However, the Employer claimed that he did not dismiss the Employee, but she resigned after mutual agreement. As the Employer did not implement the procedures required for dismissal in terminating the employment, if she was dismissed, this was definitely unfair dismissal. Accordingly, the major question in this case was whether the Employee was dismissed or she agreed to resign.

The details of this case are as follows:

1) The Employer, which specializes in TESOL, has a head office in Seoul and operates a branch in Busan. As one teacher at the Busan branch resigned suddenly, the Employer decided to invite the Employee to work as a temporary teacher before getting her an E-2 visa (which requires a regular employment contract) so the Employer could fill the vacant position.

2) On August 6, 2009, the Employee signed two employment contracts with the Employer: one a temporary employment contract and the other a one year employment contract (Sep 5, 2009 to Sep 4, 2010).

3) The Employee was assigned to the Busan branch after six days' training in TESOL at the head office in Seoul.

4) The Employee completed her three week temporary employment contract on August 28, and the Employer told her to come to the Seoul office before she entered into the E-2 visa issuance procedures.

5) On September 2, 2009, the Employer met the Employee and told her that she was better-suited as an English conversation teacher rather than a TESOL teacher and asked a recruiter to find a position for her. The Employee made a phone call and asked for help from a lawyer whom she knew through a friend. The lawyer called the Employer and persuaded him to let her stay in Employee housing for one more month. After this call, the Employer and the Employee signed an agreement as to salary for the temporary contract period, and permission for her to stay an additional month in Employee housing.

6) On November 24, 2009, the Employee applied to the Labor Commission for remedy for unfair dismissal, but the Labor Commission held a hearing and rejected the application on

[77] Mr. Jung was the legal attorney for this case at the National Labor Relations Commission from Feb 2010 to Apr 2010. (NLRC 2010 Buhae 122)

January 18, 2010, judging that the agreement for wage settlement and permission to stay an additional month in Employee housing was effectively agreement that she had resigned.

7) On February 10, 2010, the Employee appealed the Labor Commission's decision. Additionally, she included in her appeal a request for financial compensation rather than reinstatement as she had already signed a new employment contract with a high school and had begun working on November 9, 2009.

8) On April 22, 2010, the National Labor Relations Commission held a judgment hearing and overruled the Labor Commission's decision, judging that the agreement between the Employer and the Employee was only on settlement of wages and should not be interpreted as a voluntary resignation.

II. Reasons for the Decision of the Seoul Labor Commission

The Seoul Labor Commission rejected the Employee's application for remedy for unfair dismissal for the following reasons:

"On September 2, 2009, the Employer called a meeting with the Employee, informing her that TESOL teaching was not suitable for her and that she would be able to find a position as an English conversation teacher through a recruiter. In response, 1) the Employee asked for help from a lawyer that she came to know through a friend, so that she could continue to stay in Employee housing. 2) After a telephone conversation with the lawyer, the Employer signed an agreement that contained an adjustment of salary accrued during her temporary work in Busan and two days' expenses at a hotel, as well as permission to stay one more month in Employee housing. The Employee signed as well. 3) After this, the Employer paid the adjusted salary to the Employee and allowed the Employee to stay in Employee housing another month. During this period, she neither came to work nor complained about termination of her employment contract. 4) The Employee had already gotten a job at another workplace before filing the application for remedy. In consideration of all these facts, it seems that both parties agreed to terminate the employment contract before the contract started, and so we find it hard to agree that the Employer dismissed the Employee."

III. Appeal to the National Labor Relations Commission

The Employee appealed to the National Labor Relations Commission, stating that she had been dismissed unilaterally and had never agreed to resign. The Employee claimed the following, stating that the Labor Commission's decision was unfair because it had been made without enough investigation of the facts.

1) When informed of her dismissal by the Employer on September 2, 2009, the Employee had not received any payment for her temporary employment, and was also suddenly without any housing. Under such unexpected conditions, the Employee called a lawyer, whom she came to know through a friend, to ask for some help. At this request, the lawyer felt so bad about the Employee's situation that, although there was no legal relation between them, he

called the Employer. The lawyer was not playing any role as a legal representative for the Employee, but simply asked the Employer to allow the Employee to stay in Employee housing for one more month, free of charge.

2) The agreement that the Employee signed at the place where she had been notified of her dismissal on September 2, 2009, does not contain any information about the Employee's status, but only about a salary adjustment for actual work done. The Employer paid her salary and allowed the Employee to stay one more month in Employee housing since she was a foreigner and would be homeless without such permission. However, this cannot be regarded as evidence of an agreement to resign.

3) The reasons why the Employee did not challenge the dismissal when she was informed of it was due to her ignorance of remedy procedures according to labor law and having no money to hire a legal representative. The Employee came to understand the procedures for remedy for unfair dismissal through consultation at the Seoul Global Center, and right after she had some money for legal fees, she filed for remedy.

4) The Employee came to Korea to earn money by working as a native English teacher. It is not true that she could not apply for remedy because she had gotten a new job at another school. The reasons why the Employee got a new job were to pay for basic living expenses and save money for legal retainer to file an application for remedy for unfair dismissal.

IV. Judgment of Review Case and Order for Financial Compensation

1. Decision of the National Labor Relations Commission (April 22, 2010)

The NLR Commission confirmed that the agreement the Employer made at the time he dismissed the Employee was only an agreement to pay her salary, and not an agreement by the Employee to resign. Accordingly, the Commission ruled that this was an unfair dismissal as the Employer did not comply with necessary procedures for dismissal (i.e., written notification). As the Employee requested financial compensation instead of reinstatement, financial compensation was determined as the following:

2. Order for Financial Compensation

- Basic data
  1) Date of dismissal: Sep 2, 2009;
  2) Starting date of regular employment: Sep 5, 2009;
  3) Reemployment: Nov 9, 2009;
  4) Decision on the review case: Apr 22, 2010;
  5) Salary: 2,500,000 won;
  6) Salary at new workplace: 2,300,000;
  7) Daily average wage: 96,000 won = 1,440,000 won / 15 days (actual amount paid divided by number of days for that pay period)

- **Financial Compensation [1)+2)]: 17,509,040 won**
  1) Period of Unemployment (Sep 5 ~ Nov 8): 5,328,940 won, equivalent to salary (5,000,000 won for two months: Sep 5 ~ Nov 4) + 328,940 [4 days (Nov 5 ~ Nov 8) x 2,500,000 / 30.4 days)
  2) Period of Reemployment (Nov 9, 2009 ~ Apr 22, 2010): 'The equivalent to salary' minus 'intermediate income' exceeding suspension allowance: 12,180,100 won
  - The equivalent to salary: 13,651,310 = 12,500,000 (2,500,000 x 5 months) + 1,151,310 (2,500,000 / 30.4 days x 14 days)
  - Intermediate income: 12,559,210 = 11,500,000 (2,300,000 x 5 months) + 1,059,210 (2,500,000 / 30.4 days x 14 days)
  - Intermediate income exceeding suspension allowance: 1,471,210 = 96,000 (daily average wage) x 165 days (2009.11.9 ~ 2010.4.22) x 70%

3. Relevant Regulation for Financial Compensation (For reference: Judgment Work Guides: NLRC)

A. Applicant: Only an employee or his/her legal agent can apply for financial compensation.

B. Application Period: An employee who intends to apply for financial compensation must apply between the date of application for remedy and the date on which notification for judgment hearing is received.

C. Application Requirements: An employee wishing financial compensation instead of reinstatement shall submit an "application for financial compensation" to the Labor Relations Commission. In this application, the employee shall stipulate the amount of desired compensation, and method and details of calculation. Reference data, such as the employment contract, pay slip(s), etc., shall also be attached.

D. Calculation of Compensation

(1) The compensation period shall be from the date of dismissal to the date of judgment on the case, and the amount shall include equivalent salary. "Equivalent salary" means the amount that the employee would have likely received if he/she had been able to work normally during the time between dismissal and judgment on the case.

(2) Compensation shall be the amount of money the employee would likely have received if he/she had been able to work normally between the period of during the date of dismissal and the date of the Commission's judgment, including expenses etc., caused by dismissal. The judgment committee shall determine the amount by considering collectively the degree of the unfair dismissal, the degree of employee fault, the employee's intermediate income accrued from the date of dismissal to the date of judgment, and the type of employment contract.

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[78]

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.
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.

[78] 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

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[79]

(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)

[79] 000 Korea's appeal case for unfair dismissal: April 28, 2014, Joongang 2014buhae167)

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.

(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.