

Reasons for Disqualification of a Labor Union

I. Introduction

Workers are free to establish and join a labor union according to their basic rights guaranteed by the Constitution. However, the Trade Union and Labor Relations Adjustment Act (hereinafter referred to as the "Trade Union Act") stipulates that a "union" that allows the employer or persons acting on behalf of the employer to become members, that association shall be disqualified from being declared a labor union. The restriction that a labor union shall not allow membership for the employer also extends to representatives of the employer's interests. The Trade Union Act restricts the scope of union membership in this way to i) protect the independence of the union by preventing someone directly representing the employer from joining it and controlling or intervening in its operations and ii) maintain the balance of bargaining power between labor and management by preventing the leakage of employer-related confidential information to the union.¹ For this reason, if a worker who is prohibited from joining a labor union joins such a union, that union becomes disqualified as it can no longer serve to protect labor rights under the Trade Union Act.

Recently, more than 100 office workers in a public corporation formed a labor union and received a Certificate of Union Establishment from the Ministry of Employment and Labor (MOEL). However, the employer claimed that some of the union members included workers who are prohibited from joining a labor union under the Trade Union Act, and filed a complaint with the MOEL so as to disqualify the Office Workers' Labor Union. Herein, I would like to examine whether these workers are prohibited from joining a labor union according to the Trade Union Act.

II. Criteria for Determining for Disqualification

1. Requirements for establishing a labor union

Article 2, Paragraph 4 of the Trade Union Act regulates, "The term "labor union" means an organization or associated organization of workers which is formed in a voluntary and collective manner upon the workers' initiative for the purpose of maintaining and improving working conditions, or improving the economic and social status of workers", which is the "substantive requirement". Article 10, paragraph 1 of the same Act stipulates that a Report on Establishment shall be submitted to the MOEL, which is the "formal requirement". The Trade Union Act explains that in order for such a labor union to be legitimate, it must meet

¹ MOEL Guidelines: Nojo 01254-665, Jun. 28, 1996.

both substantive and formal requirements.

The substantive requirement is designed to assess whether a union has identity, independence, purpose and collective nature,² in which case it is not regarded as a labor union under the Trade Union Act if an employer or other persons who always act in their employer's interests are allowed to join the organization; in cases where most of the expenditures are provided for by the employer; where those who are not workers are allowed to join the organization, etc. The union's identity, independence, purpose and collective nature must be protected.

The formal requirement is for the labor union to report its establishment to and receive a Confirmation of Registration letter from the MOEL. A person who intends to establish a labor union shall prepare a report with the union constitution attached, which describe the union's democratic and independent operations (Article 10 (1) of the Act). The MOEL shall return any report filed by a labor union to which any item in Article 12(3) apply (related to disqualification). The purpose of requiring such a report regarding the establishment of a labor union is to ensure it can survive as an independent, democratic organization through effective maintenance and management of the administrative organization.³

2. Labor unions that remain unregistered due to their disqualification from establishment

Once the MOEL has received a Report on Establishment, it shall issue a Confirmation of Registration letter within three days⁴, except when i) supplementation is required or ii) when it is necessary to reject the report on establishment. Since unions are established under a registration system rather than a permit system, once a Confirmation of Registration letter is issued, the union shall be considered to have been established as of the date of receipt of the Report on Establishment by the MOEL.

i) Supplementation is required if some problem is detected in the Report on Establishment. If a report does not have the union constitution attached or if the union constitution was not enacted by direct, secret and anonymous ballot, an order for supplementation shall be issued, to be fulfilled within 20 days.

ii) On the other hand, if the reasons for disqualification are related to the establishment of the union, the MOEL may reject the Report on Establishment. If it sends an order for correction, then correction shall be made by the applying union within 30 days. If it fails to

² Jongyul Lim, 「Labor Law」 17th ed., Parkyoungsa, 2019, p. 60.

³ Supreme Court ruling on Oct. 14, 1997, 96 nu 9829.

⁴ Article 19, Paragraph 1 of the Act on the Handling of Civil Complaints: "If the period for processing a complaint is set to 5 days or less, it shall be calculated in hours from the time of receipt of the complaint, but holidays and Saturdays shall not be counted. In this case, one day shall consist of eight working hours."

do so within that period, it shall be regarded as an unregistered union.⁵

Notwithstanding the principles of free registration for labor unions, the MOEL shall issue a Confirmation of Registration only to unions that meet certain requirements. Labor unions that are not established in accordance with the Trade Union Act cannot be protected by that Act because they are unregistered. There are three types of unregistered unions: ① No attempt at registration was made, ② The union's Report on Establishment was rejected, or ③ A previously-registered union was disqualified.

If a labor union becomes unregistered, it does not have the following benefits: (1) Immunity from civil and criminal liability (Articles 3 and 4), ② Legal status (Article 6), ③ The right to apply for adjustment in labor disputes, or to apply to the Labor Relations Commission for remedy against unfair labor practices (Articles 7 (1) and 82), ④ The right to use a labor union name (Article 7), ⑤ Tax-exempt status (Article 8), ⑥ Authority to engage in collective bargaining and conclude collective agreements (Article 29) ⑦ The right to participate in the procedure for determining a bargaining representative union (Article 29-2), ⑧ The right to engage in collective action during disputes, which is normally afforded to labor unions (Article 37), ⑨ The right to designate workers for essential maintenance services (Article 42-6), ⑩ The right to be excluded from participating in a special mediation committee (Article 72), and ⑪ The right to apply for redress of unfair labor practices (Article 81).

III. Reviews of the Related Cases

The MOEL office will order corrective action if there is a reason to disqualify from registration an existing union or a union that has submitted a Report on Establishment. If the corrective action is not taken, then a Certificate of Registration will not be issued to the reporting union, or registration will be canceled for an already existing union. There are two main reasons for disqualification. First, the union allowed membership for an employer or those working directly for the employer's interests. Second, the labor union's constitution contains content that is undemocratic or violates its independence or the Trade Union Act.

1. In cases where a member is the employer or someone working directly for the employer's interest

Relevant MOEL guidelines explain that those who act on behalf of the employer in matters relating to workers under Article 2 (2) of the Trade Union Act are (i) those who are engaged

⁵ Trade Union Act: Article 12(2), (3)-1 ho; Enforcement Decree to the Trade Union Act: Article 9(2)

in determination of working conditions such as personnel, salary, welfare, labor management, etc.; ii) those who have been given a certain authority and responsibility by the employer over matters such as ordering, supervision, etc.; iii) and those in charge of management of personnel and labor such as recruitment, dismissal, and job transfer; (iv) Those in charge of determining wages, working hours, breaks and other working conditions and confidentiality of labor relations; and (v) those with authority or direct involvement in internal and external regulations and other policy decisions. This includes employees and directors in charge of human resources and labor, and employees and managers in charge of management planning. In addition, those who act on behalf of the employer's interests in Article 2 (4) of the Trade Union Act refer to those acting on behalf of the employer with respect to the workers of the business, such as the employer's assistants, employees in supervisory positions, and employees and directors in charge of accounting in the company, directors' drivers, and security personnel engaged in surveillance, patrols and other policing duties.⁶

However, authority and responsibility for determining working conditions such as personnel, salary, welfare, and labor, or for ordering or supervising work should be considered in terms of specific facts such as the degree of involvement in the job and in workers' affairs, rather than only the formal title or status. This should be also judged in consideration of whether this authority has been granted by the employer or the manager in charge of the business and the degree of involvement in matters related to workers. Other details to be reviewed comprehensively are whether the persons in question have access to the employer's confidential information related to plans and policies.⁷

2. Cancellation of a labor union's registration due to its constitution violating the Act on the Establishment, Operation, Etc. of Trade Unions for Teachers (hereinafter, the "Teacher's Union Act"): Korea Teachers' Labor Union (KTU)

The KTU is a representative case of disqualification because its constitution violated the Trade Union Act.

(1) Background to the KTU's disqualification⁸

The KTU was founded in May 1989, and is a nationwide unit labor union that covers elementary and secondary school teachers, consisting of about 50,000 members in 2015. The KTU has been contributing to true education by working against bribery, prohibiting corporal punishment, eradicating private school corruptions, but has also been criticized for

⁶ MOEL Guidelines: nojo 01254-665, Jun. 28, 1996.

⁷ MOEL Guidelines: nojo 01254-383, May 24, 1999; nojo 01254-665, Jun. 28, 1966

⁸ Internet Encyclopedia: Wikipedia / Wooden Wiki, "Search: National Teachers' Union of Korea," accessed on August 18, 2019.

opposing the teacher evaluation system and for teaching political ideology.

On June 27, 1999, when the KTU was legalized, it established an additional clause (Article 5) in its Constitution to be able to allow 9 laid-off teachers to join, but this registration report did not include this article when reporting to the MOEL. In other words, in 1999, when the KTU reported its registration form, the provision that allowed it to retain dismissed teachers as members was hidden.

In 2010, the MOEL received a complaint from a conservative NGO that the KTU was keeping the 9 dismissed teachers as members. As a result, it was discovered that the union's constitution violated the Trade Union Act⁹ and the Teachers' Union Act.¹⁰ So, in May 2010, the MOEL issued an order to the KTU to correct its constitution. The reason given was that dismissed teachers cannot become union members in accordance with Article 2 of the Teachers' Union Act and Article 2 (4) of the Trade Union Act, and any union with non-employee members is subject to disqualification. In accordance with Article 9 (2) of the Enforcement Decree to the Trade Union Act, the union was disqualified for failing to follow the correction order from the MOEL.

(2) The KTU challenges the judgement as unconstitutional¹¹

The KTU challenged the constitutionality of the judgment with the following arguments:

(1) The Trade Union Act and Teachers Union Act violate the constitutional right to organize, as they do not allow dismissed workers to join a labor union; (2) Rules not entrusted under legislation enacted by the National Assembly is a violation of legal principle: Article 9 (2) of the Enforcement Decree to the Trade Union Act (which the MOEL used to disqualify the KTU), was enacted by the MOEL, and cannot be implemented without the actual Article stipulated in the Trade Union Act, passed in the National Assembly by lawmakers.

(3) Decision of the Constitutional Court¹²

The Constitutional Court dismissed the KTU's constitutional challenge on May 28, 2015.

⁹ Trade Union Act – Article 2 (4ho) Disqualification item (4) D. Where those who are not workers are allowed to join the organization, Provided that a dismissed person shall not be regarded as a person who is not a worker, until a review decision is made by the National Labor Relations Commission when he/she has made an application to the Labor Relations Commission for remedy against unfair labor practices.

¹⁰ Teachers Union Act: Article 2. The term “teacher” in this Act refers to a person prescribed in Article 19 (1) of the Elementary and Secondary Education Act: Provided that any dismissed persons who have requested remedy for unfair labor practices to the Labor Relations Commission under Article 82 (1) of the Trade Union and Labor Relations Adjustment Act shall be regarded as teachers until a review decision is made by the National Labor Relations Commission under Article 2 of the Labor Relations Commission Act.

¹¹ Seoul High Court ruling on Sep. 19, 2014: 2014ah413.

¹² Constitutional Court decision on May 28, 2015, 2014 hunma 671, 2014 hunma 21.

“Even if some of the non-teachers are members of the teacher union, it is up to the discretion of the MOEL to decide whether to qualify or disqualify the labor union. In addition, the discretionary judgment of the MOEL on the disqualification of the KTU as it includes some persons who are no longer teachers is based on the number of unqualified members who are active in the union activities, the effect of such members on the KTU activities, and the union activities of such unqualified members. This decision to disqualify the KTU is within the legal discretion of the MOEL.”

In addition, the Constitutional Court stated, “Adoption of the principle of reporting in relation to the establishment of a labor union allows the relevant union to survive as an independent, democratic organization through efficient maintenance and management of the organizational structure of a labor union. It is the purpose of labor policy considerations to protect, foster, and thoroughly guide and supervise.”¹³ In particular, since the teachers’ union is made up of unit labor unions under one nationwide organization, allowing non-teachers into membership is a reason for disqualification of its establishment under Article 2 (4) of the Trade Union Act.

IV. Conclusion

If an employer places control over a union by becoming a member himself or having someone directly representing his interests become a member, this amounts to a violation of the union's identity and independence. On the other hand, when a large number of workers directly representing the employer's interest join the union, the company essentially falls under the control of the labor union, as confidentiality of the company's business will be impossible to maintain. This upsets the balance of power between labor and management. Therefore, to maintain this balance, the administrative office needs to be involved in the reasons for disqualification of a labor union from establishment.

In the same way, it should be judged as a disqualified labor union as the Office Workers Union in this case includes the employer's managers and the representatives representing the employer's interests. Accordingly, the administrative office shall check the actual status of the union in accordance with Article 9 (2) of the Enforcement Decree to the Trade Union Act, and order corrections within 30 days if reason exists to disqualify the union.

¹³ Constitutional Court decision on July 31, 2008, 2004 hunba 9.