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Korean labor case: Dismissal of Offline Employees due to Transferring of Business to the Internet

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I. Introduction

Since the beginning of 2020, the coronavirus pandemic has swept the world, causing enterprises to move their business online. As a result, offline work has reduced, requiring that company workforces restructure. I would like to introduce here a related case of dismissal. A multinational company, hereinafter referred to as "Company A", provides maintenance and technical support for ERP programs for companies, such as Oracle and SAP operations. Company A established an office in the Republic of Korea in April 2017 and continued to expand, hiring 6 employees to carry out their business operations. However, the number of offline employees continued to decrease as work shifted online during the coronavirus pandemic. Company A finally dismissed the two remaining employees in February 2022.

After Company A let all their employees go, it only had an address in a shared office in Korea, but there were no employees at the address. Accounting processes such as tax invoices were entrusted to the accounting office, and sales were entrusted to an outsourced company. Company A is working online at its headquarters only on ERP program maintenance and technical support, which is its main business. This case has several issues that set it apart from normal dismissal. First, there are questions around whether an employee is eligible to seek remedy for unfair dismissal because there are no employees left in the Korean office while Company A carries out its business operations online. Second, Article 11 of the Labor Standards Act allows only employees at workplaces with 5 or more employees to seek legal remedy. However, Company A had a Korean branch with only two employees. Third, Company A abolished all offline work and conducts all its business online. Is this a justifiable reason to terminate all employees? I will review herein the arguments of the parties on the above three issues and look at how this case was resolved.

II. Case Summary and Claims of the Parties

1. Summary

Company A notified the two remaining employees in Korea in mid-January 2022 that they had no choice but to withdraw from the business because of continued losses. At the end of January 2022, the company informed the two employees that it would pay severance pay, one month's performance bonus and 30 days' pay in lieu of advance notice of dismissal, and requested that they sign a letter of resignation. As both employees refused to sign, the company paid only severance pay and one month dismissal allowance on February 15 before dismissing them both.

On March 10, 2022, the labor attorney in charge of this case filed a remedy application for unfair dismissal and submitted it to the Labor Commission.[1] The Labor Commission sent documents related to the application to the address of Company A's Korean office. However, the documents from the Labor Commission were returned because there were no employees at Company A's Korean office address. The Labor Commission, after the official document related to the labor case was sent back twice, requested that this labor attorney correct the address, and informed him that the case would be dismissed if there was no one to receive the documents. Accordingly, the labor attorney sent out the document requesting public notification of the remedy claim document, and also provided the e-mails of the head office CEO, Asia director, and HR director at the head office. Accordingly, an official in charge in the Labor Commission sent an official notice of the case to the above three persons. Fortunately, the head office of Company A appointed a lawyer from a law firm in Korea as an agent and submitted a rebuttal document on April 1, 2022.

2. Claims of the parties

(1) Company A's claim

In response to remedy claim from the two employees for unfair dismissal, the company argued that the dismissal was justified for three reasons. First, the applicants were the finance director and sales director, who had exercised their independent authority as the head of finance and sales. The court had ruled in this regard, "For the former director who has been in charge of training and management for his employees as an unregistered managing director, if work is not provided in a subordinate relationship with the company for the purpose of

[1] Seoul Labor Commission, Unfair Dismissal Case Number: Seoul2022buhae, 000Korea

wages in terms of working hours and work details, such director is not considered an employee under the Labor Standards Act." [2]

Second, it argued that Company A's Korean office was an independent company established in accordance with Korean commercial law, and had fewer than 5 full-time employees, so it was not subject to a remedy claim for unfair dismissal under the Labor Standards Act. The court had ruled in this regard, "If the domestic branch of a multinational corporation (i) has an address in Korea as a corporation independent of the foreign head office, (ii) prepares financial statements separately from the head office, (iii) pays corporate tax, VAT tax, and income tax for their employees, the Labor Standards Act does not apply to this branch regarding a remedy claim for unfair dismissal as it is independent from the relationship with the head office and has fewer than 5 employees." [3]

Third, termination of the employment contracts in this case corresponded to a normal dismissal on the premise that the employer's entire business was abolished, so it was a fair dismissal. It was argued that the employer fired all Korean employees because the Korean branch was going to be abolished soon. Related precedents also showed, "Dismissal of employees in the process of liquidating the company for the purpose of discontinuing the business is not considered dismissal. It is because this closing of business falls under the freedom of business management, and so this dismissal is regarded as having a justifiable reason." [4]

Therefore, it was argued that the employer's dismissal of the employees was justified because each of these three criteria applied.

(2) Employees' Claims

In response to the employer's claim of justifiable dismissal, the employees responded with actual content. First, the employer asserts that the applicants were not employees because their positions were as directors. However, the applicants were directors only in rank, and in reality did not have the relevant authority. The applicants' employment contract included a probation period, and designated the direct superior at the head office, place of work, and working hours. Their wages consisted of fixed salary and bonuses based on work performance. In recent expenditures, they had to receive approval from their

[2] Supreme Court ruling on June 24, 2005, 2005du2667.
[3] Seoul Central District Court ruling on Nov. 23, 2018, 2017gahap559829.
[4] Supreme Court ruling on Nov. 13, 2001, 2001da2797.

managers for KRW 300,000 for funeral flowers, KRW 50,000 for cell phone fees, and other basic fees. In addition, they were not registered as directors in the company's register, and they performed their duties while reporting their business operations and receiving instructions from their designated superiors.

Second, Company A claimed that it was a workplace with fewer than 5 employees. Since its establishment in April 2017, the Korean branch had employed 5 people in 2019, 6 in 2020, and 4 in 2021, but this had been reduced to 2 employees at the time of dismissal in 2022. The two employees at the Korean branch worked under the instructions of their superiors, and since there were no subordinates in the workplace, they never issued any work orders. The finance and sales managers (applicants) performed their work under the supervision of their superiors. Accordingly, the applicants did not have the authority to independently manage the business in Korea, such as director rights to execute business and finances and exercise the right to manage personnel.

Third, the company had argued that termination of the employment contracts was legitimate because the employer was withdrawing from the business. However, the company continued to sign ERP technical support service contracts with new customers. In January 2022, they signed a new long-term technical maintenance service contract with four companies and received an advance payment. This proves that, while the company will not work offline in the future, it will continue to provide technical support services online.

III. Judgment on the Main Issues in this Case

1. Determining whether the Korean finance director and sales director were employees

In general, employee status is not recognized for registered directors, and is recognized only when they are under considerable direct command and supervision. In the case of unregistered directors, in principle, their employee status is recognized, and is denied only when independent decision-making or business execution rights are quite obvious.[5] Although the titles of “finance director” and “sales director” were used in this case, they were actually ordinary employees without any authority in their employment contract. They

[5] Ahn, Tae-Sik, “Criteria for Judging Employee Status of Corporate Registered Directors,” 「Law and Policy Research」, No. 22, Korean Association for Policy Studies, June 2014, p. 624.

were not listed as directors in the company's Corporate Register, and they did not have any independent authority in practice. In fact, even in business, they reported directly to their direct managers in charge of Asia and received work instructions from them.

2. Whether it is possible to apply for remedy for unfair dismissal even if Company A is a workplace with fewer than 5 employees

In accordance with Article 11 of the Labor Standards Act, a remedy application for unfair dismissal can only be filed by an employee who works at a workplace with five or more employees. However, if the workplace of a foreign company with fewer than 5 employees does not have independence in Korea and acts as a branch of the head office, it is counted together with employees of the head office in calculating the number of employees, so its employees are protected from unfair dismissal.[6] The issue here is to be judged based on whether the Korean branch has independence. In this case, in Korea, an independent corporation was registered according to commercial law and independent settlement of accounts was made, but in reality, it was operated under the business instructions of the head office, and the head office managed all accounting.

3. If employees are dismissed on the premise that the business is abolished, are they justifiable dismissals?

According to Article 23 of the Labor Standards Act, if it is impossible to continue a business, dismissals are regarded as justified. A related precedent also states, “If an employer who has dismissed employees practically closes the workplace and there is no workplace for employees to return to, the employment contract relationship that is premised on the existence of the company is effectively terminated.”[7] Company A asserted that termination of the employment contracts in this case amounted to legitimate dismissals because the business was abolished. However, based on the actual facts, the employer in this case continues to conduct business online, so the business never closed.

[6] Ministry of Employment and Labor Guidelines, Labor Improvement Policy Division – 438, Jan. 28, 2014.
[7] Supreme Court ruling on Dec. 24, 1991, 91nu2762.

IV. Conclusion

As the facts in this case were clearly confirmed, the employer proposed a settlement of an additional six months' wages to the employees since Company A's chances of winning were quite low. In response, the employees demanded 12 months' wages, mentioning the difficulties in the job market. The employer and employees reached agreement for 8 months' wages as compensation. On June 10, 2022, the two parties drafted a settlement agreement at the Labor Commission and settled this case.

This case can be considered meaningful and can be used as reference for dismissal of employees when a business moves online. Although a brick and mortar business can be transitioned online at the discretion of the company, the employer should be aware that the employment relationship with the employees remains valid regardless of the termination of its offline business.