

Business Transfers & Employment Relations

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I. Introduction

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

II. Legal Principles of Business Transfer

1. Basic principles

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

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

(3) Whether a business transfer has occurred or not shall be determined by whether the transferred business can perform the same profitable business as before through the transferred property as a systematic organization while also managing the previous level

¹ Supreme Court ruling of March 29, 2002, 2000doo8455 (Unfair dismissal); July 27, 2001, 99doo2680

² Supreme Court ruling of June 9, 2005, 2002da70822

of business without starting anew.³

2. Exceptions

(1) Conditional business transfers

If a business is transferred, labor relations between the transferor (original employer) and the employees are transferred inclusively to the transferee (new employer) in principle, unless there are special conditions imposed in the transfer agreement. If one of the conditions between the parties involved in the transfer is to exclude some employees, those excluded employees will not be transferred. Such a condition shall be justifiable under Article 23 (1) of the Labor Standards Act, because it is equivalent to actual dismissal. However, it is not justifiable to dismiss an employee on account of a business transfer.⁴

(2) Contract for sale and purchase of property: When POSCO (the transferee) purchased a particular business section operated by Sami Special Steel Company (the transferor), the transferee took over only the assets of the plant but not claims and liabilities. The transferee took on most of the employees from the transferor, but employed them individually after dismantling the previous personnel organizations upon transfer and hiring them again under a probationary period, after which it placed them in new positions according to the transferee's new business schedule. This was not a business transfer, but rather a transfer of an asset.⁵

III. Business Transfers & Employment Relations

1. Principles

(1) When making a contract to purchase some parts of a business of another company, in cases where the buying company agrees to take over the rights and duties of the employees working at that business section inclusively, their employment is transferred to the buying company in principle. However, the employment relations transferred at this time refer to the employment conditions the buying company agreed to as of the signing date of the contract, but does not include an employee who was dismissed from that business section prior to the contract-signing date and who was in the middle of a legal dispute regarding claims of unfair dismissal.⁶

(2) In the event of a business transfer, an employee's employment relations are transferred to the transferee company and considered to be continuous. Just because the

³ Supreme Court ruling of November 25, 1997, 97da35085

⁴ Supreme Court ruling of June 28, 1994, 93da33173

⁵ Supreme Court ruling of July 27, 2001, 99doo2680: Sami Special Steel; Lim Jongyul, "Labor Law", Parkyoung Sa, 14th edition, page 522.

⁶ Supreme Court ruling of May 25, 1993, 91da41750; July 14, 1997, 91da40276

transferred employee received severance pay at the time of business transfer, does not mean that the employee was terminated by the previous company (the transferor), beginning new employment with the company that purchased the business. Provided, that if the employee submitted a resignation letter voluntarily and then received severance pay, it can be regarded that the employee agreed to the termination of employment. In contrast, in cases where an employee had to resign and be re-hired by the company according to its unilateral decision and in accordance with its business policy, even though the employee receives severance pay, the employment has not been terminated.⁷

2. Exceptions

(1) Employment relations transferred in a business transfer refer to those with the employees working at the particular section being transferred as of the signing date of the contract, but do not apply to employees who were dismissed from that business section prior to the contract signing date, even if they were in the middle of a legal dispute over claims of unfair dismissal. However, if it is clear that the transferee company knew that the orders of the transferor company to the transferring employees were not valid (as the employees rejected them), and accepted the business transfer clearly knowing this fact, the employment relations of those employees would be transferred to the transferee company as is.⁸

(2) In the event of a business transfer, employment relations with the employees concerned are transferred inclusively in principle, but if opposing the transfer to the transferee company, the employees can choose to stay with the transferor company or resign from both the transferee and the transferor companies. The employee may also choose, upon his/her own volition, to resign from the transferor company and thereby terminate continuous employment, and then seek a new job with the transferor company. At this time, the employee's intention to oppose the business transfer should be expressed to the transferor company or the transferee company within a reasonable time from the date that the employee came to be aware of the business transfer.⁹

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

1. The rules of employment

(1) If employment relations were transferred inclusively, the employee can expect to have the same working conditions with the transferee company as he/she had with the previous company (transferor). In cases where the employer intends to change the rules of

⁷ Supreme Court ruling of November 13, 2001, 2000da18608: Severance pay

⁸ Supreme Court ruling of May 31, 1996, 95da33238

⁹ Supreme Court ruling of May 10, 2012, 2011da45217: Severance pay

employment unilaterally or require the transferred employees to agree to comparatively disadvantageous rules of employment with the transferee company (the new employer), the employer shall obtain the consent of the majority of employees to whom the transferor company's rules of employment apply, by means of a collective decision-making process. Without this type of agreement, the employees concerned shall not be subject to the transferee company's rules of employment, but shall remain subject to the previous rules of employment as they are.¹⁰

(2) In cases where employment relations are transferred inclusively due to business transfer or company merger, the transferor employer's contract working conditions shall be transferred. If the severance pay regulations from the transferor company are superior to the severance pay regulations of the transferee company, the inferior transferee severance pay regulations shall not apply after the transfer unless the transferee company obtains the transferred employees' consent through the collective decision-making process stipulated in Article 94 (1) of the Labor Standards Act. After the employment relations are transferred inclusively, if the transferee company's severance pay system is inferior to that of the transferor company, the transferor company's severance pay system shall be continuously applied to the employees from the transferor company. As a result, two different severance pay systems would be operated in one company. In this exceptional case, two different severance pay systems can be legitimately established and applied.¹¹

2. Relation to the collective agreement

(1) Even though employment relations were transferred inclusively in the business transfer, if the company newly agrees with the labor union through a collective agreement that the previous working conditions would change, or be adjusted or unified with the transferee company's working conditions, this new collective agreement shall be applicable.¹²

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

¹⁰ Supreme Court ruling of January 28, 2010, 2009da32362

¹¹ Supreme Court ruling of December 26, 1995, 95da41659: Severance pay

¹² Supreme Court ruling of October 10, 2001, 2001da24051: Wage

employees (including the merged companies' employees) agree on union shop membership or conclude a collective agreement on the issue with the employees from the merged company.¹³

V. Conclusion

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

¹³ Supreme Court ruling of May 14, 2004, 2002da23185