

Case Study: Dismissal of a Korean Branch Manager (Recommended Resignation)

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I. Introduction

As more foreign-invested companies have come into the Korean market, dismissals of Korean branch managers have occurred more frequently. Generally, in cases where the branch manager represents a virtually-independent workplace in Korea, he or she can be regarded as a commissioned employer rather than an employee under an employment contract, and therefore not subject to employee protections under the Labor Standards Act. However, during the beginning stages of investment, there is a high possibility that branch managers of foreign companies may be considered employees in practice, since foreign companies generally start up Korean sales offices or liaison offices at the beginning. Later, the status of “employer” may be accepted for the branch manager as these offices gradually expand their business and become independent in corporate operation, management of personnel, and accounting.

In cases where the branch manager is an employee to whom the Labor Standards Act applies, the employer can only dismiss them for ‘justifiable reason’. In cases where he or she feels the dismissal has been unfair, the branch manager may seek legal remedy from the Labor Relations Commission in accordance with the remedy application process, which may include reinstatement, retroactive pay during the period of dismissal, or monetary compensation. Of course, if the branch manager is considered to have employer status, termination of commissioned relations is easier, in accordance with the details of the commission agreement signed by the foreign company head office and the branch manager. However, as the branch manager’s legal status is not always clear, a pragmatic approach which seeks peaceful resolution involving mutual compromise will help to avoid legal risk. One such approach is for a company to recommend resignation.

In this article, I will deal with the characteristics of branch managers in terms of both employee and employer, and then through an actual labor case, I will explore the use of company-recommended resignation as a way of resolving potentially difficult cases.

II. Determination of a Branch Manager’s Employment Status

1. A branch manager’s status according to the Labor Standards Act

The term “employee” in the Labor Standards Act means “a person who offers work to a business or workplace to earn wages, regardless of the kind of job he/she is engaged in.” Factors necessary to be considered an employee include ‘regardless of the kind of job’, ‘in a business or workplace’, and ‘a person who offers work...to earn wages.’ In the

definition of “employee”, wages is the central concept¹, with the secondary factor being whether there is a subordinate relationship with an employer. This means that “employee” refers to a person who provides work in a subordinate relationship to earn wages.²

As a Supreme Court ruling³ has stipulated, “Whether it is appropriate to regard a director as an employee defined by the Labor Standards Act has nothing to do with the manner in which the contract is made but whether the director was paid to provide a service that requires him to be subordinate to another. Regardless of whether he/she is holding the position or title of a company director or auditor, in the real sense or just in name, as long as he/she receives remuneration as compensation for providing a specific labor service under the direction and supervision of the employer or he/she receives remuneration as compensation for taking charge of a specific labor service under the direction and supervision of persons such as the representative director in addition to the duties assigned to him/her by the company, such a director can be regarded as an employee as defined by the Labor Standards Act.” This judicial ruling determines that whether a branch manager is an employer or not depends on whether or not he/she has independent operational authority.

In addition, the Supreme Court ruling suggests that the following items shall be considered substantially and collectively when determining whether a person is an employee or not:

- 1) Whether the Rules of Employment or service regulations apply to the person in question, and whether that person has been supervised or directed during his/her work performance specifically and individually by the employer;
- 2) Whether his/her working hours and workplaces are designated and restricted by the employer;
- 3) Who owns the equipment, raw materials, or working tools; and
- 4) Whether payment is remuneration for work, whether the basic wage or fixed wage is determined in advance and whether income tax is deducted for withholding.

2. Criteria for judgment on a branch manager’s status

Judicial rulings related to employee characteristics under the Labor Standards Act offer the following three guidelines:

- (1) Employee status shall be decided by whether that person offers work to the employer as a subordinate of the employer in a business or workplace to earn wages in actual practice, regardless of the type of contract;
- (2) Employee status shall be decided by actual practice regardless of whether the contract is

¹ Lee Byungtae, 『Labor Law』, 9th edition, Chungang Economy Co. 55th page

² Lim Jongryul, 『Labor Law』, 11th edition, Parkyoung Co. 29th page 제 11 판

³ Supreme Court ruling on December 7, 2006. 2004da29736.

an employment contract, a commissioned contract or service agreement under Civil Law. That is, employee status shall be determined by the substantial relations implemented in actual practice, not as stated in a formal contract format; and

(3) Employee status under the Labor Standards Act shall be decided by whether that person ‘provides labor service’ in a subordinate relationship. The subordinate relations shall be determined by considering several standard factors collectively.

III. Dismissal of a Branch Manager: A Case Study

1. Summary

A French law firm requested legal advice regarding the dismissal of a Korean branch manager at the Korean branch of a French company in early December 2014. The labor lawyer from this particular French law firm had received the necessary information regarding legal determination of the branch manager’s status, preparation of dismissal proceedings, details on legal risks, as well as practical methods on implementation of the dismissal, and was double-checking them by phone. Several days later, the vice-president of the Asia head office located in Tokyo, Japan, visited and made substantial inquiries about legal relations, the company’s responsibilities according to the employment contract, the dismissal process, required documents for dismissal, and advice on successfully terminating the employment relationship face to face. After making preparations based on this legal information, the vice-president met the branch manager on December 17 and terminated the employment relationship peacefully through a recommended resignation rather than outright dismissal.

2. Basic information on the branch manager

- 1) Number of employees for whom responsible: 100 (30 at the Seoul head office, 70 at the Busan plant)
- 2) Position and type of contract: President, employment contract signed in Korea
- 3) Nationality: Australian⁴
- 4) Contract signing date: April 2, 2012 (Service period: 2 years and 8 months)

⁴ Korean national law applies to labor disputes occurring in Korea in accordance with the ‘territorial principle’. Even though both employer and employee have foreign nationality, Korean labor laws are preferentially applied. The following shows the relevant content and basic reference for governing law.

The Conflict of Laws: Article 28 (Employment Contracts) 1) For employment contracts, regardless of the governing law that both parties agreed, it is not possible to ignore the employee protections endowed by compulsory rules of the resident country related to the governing law stipulated by Paragraph 2.

2) If neither party chose the governing law, the employment contract usually follows the law of the country where the employee provides labor service ordinarily. If the employee does not provide labor service in a particular country, the governing law shall be the law of the country where the business office exists that hired the employee.

- 5) Basic annual salary: 300 million won plus 20% performance bonus
- 6) Status: Registered representative director with limited authority to operate company business at the Korean branch, and manage personnel and accounting
- 7) Articles related to termination in the employment contract: 60 days' average wage for each service year in terms of severance pay; termination possible with 30 days advance notice in the event poor business performance is determined.

IV. Legal Review & Evaluation of the Case, and Use of Recommended Resignation

1. Legal review

In dealing with this case, I provided a legal review of the branch manager's status to the labor lawyer of French law firm "A" from early December 2014. The process of dismissal in this case was well-implemented and followed the termination procedures suitable to the branch manager's status and according to relevant documentation. Following are the questions asked by law firm "A" and the responses given by this labor attorney.

Q: What is the best way to breach the employment contract?

A: In reviewing the employment contract and judging the branch manager as having "employer" status, it is possible to dismiss him or terminate the employment contract by recommending resignation in accordance with the contract details where the branch manager can be dismissed due to poor business performance results.

Q: In the event of failure of negotiations for recommended resignation, is there possibility for legal dispute?

A: If the branch manager rejects the recommended resignation and plans to take legal action and claim employee status, the company can terminate his employment with 30 days' notice according to Article 6.2 "Termination of the Employment Agreement". As the branch manager has "employer" status, he cannot apply for remedy. Current labor law protects employees only. However, if the branch manager's status is judged as an employee, the company may encounter serious problems in this dismissal case.

Q: What are the required documents for the recommended resignation procedure?

A: The company shall prepare two documents: (1) the Settlement Agreement for Voluntary Resignation, and (2) a Dismissal Notice. The company shall notify the branch manager of its intention to terminate the employment contract due to poor sales results in a final discussion with the branch manager, and recommend that he resign. If the branch manager refuses to resign, the company should deliver to the branch manager the strong message that the company can dismiss him immediately and only pay the dismissal allowance in lieu of 30 days' notice.

Q: What can be expected as the worst-case scenario if the branch manager refuses to resign?

A: The branch manager is not protected by the Labor Standards Act, and there should be no problem even if he refuses to resign. In civil law, there is a law regarding the responsibility for non-implementation of a contract, but termination due to the branch manager's poor sales results can be enough for the company to terminate this commissioned relationship justifiably. As termination of the contract can be accepted as justifiable, there would be no possibility for the branch manager to begin proceedings for a civil suit.

However, if the branch manager is judged to be an employee, he could apply for remedy for unfair dismissal with the Labor Relations Commission, or litigate in civil court to nullify the dismissal. The company should be prepared to counter these things, as they can cause significant difficulties for the company in Korea, and cost a lot of money.

Q: How much will handling a recommended resignation cost?

A: Even though the branch manager's performance was insufficient, he has contributed to the company so far and has maintained a relationship in good faith with other employees of the branch office. Therefore, an amicable termination of the employment contract would be desirable, which of course can be done through a recommended resignation. The basic cost for that would be 4 months' wages as severance pay for the two years' service, as well as a termination bonus equivalent to (X) months' wages. This termination bonus should consider previous precedents, the company's ability to pay, the branch manager's service years and his expectations, etc.

2. Evaluation

Although foreign company branch managers work as the head of the Korean branch offices in a capacity seemingly identical to employers, they actually work according to instructions from company headquarters and are therefore more like employees to whom Korean labor law applies. If a company intends to dismiss such branch managers, there should be justifiable reasons for dismissal. If the reason cannot be sufficiently explained, a termination settlement would be desirable which includes a termination bonus upon agreement to resign. The above case involving dismissal of a branch manager can serve as a good example where the company involved sought advice from a professional legal advisory service as to the legal risks and then was able to make sufficient preparations to amicably terminate labor relations.

3. Use of the recommended resignation system

Recommended resignations can be the most desirable way to avoid labor disputes between employers and individual employees because employment relations are terminated after mutual agreement. As labor laws in Korea do not allow employers to dismiss employees without justifiable reason, companies use many methods to encourage employees to agree to resign. In cases of employee redundancy, if the relevant employee refuses to agree to resign, it can be quite difficult to resolve the situation in a satisfactory way for both parties.

As recommended resignations with monetary compensation are used only by companies seeking to resolve particular situations, employees who are suddenly pressured to resign generally feel that the compensation offered is not equal to the potentially long-term uncertainty and urgency of getting another job. This has usually led to long labor disputes. Accordingly, in order to prepare for cases where an employer shall terminate employment unilaterally without any of the justifiable reasons required by the Labor Standards Act, companies can prevent labor disputes in the near future by introducing a mutually-agreed monetary compensation package in the Rules of Employment or the individual employment contract.