Requisites and Restrictions of Business Dismissal* Trends in Recent Decisions

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Abstract

In recent years, management dismissals have become a social problem because of strong enforcement of competition principles, acceleration of enterprise structural reforms and execution of mass dismissals in so-called globalization era. When one considers the social character of management dismissal, it is clear that the laws that regulate management dismissals exert an enormous influence on job securities for employees as well as improvement of enterprise management.

The object of this article is to examine the trends as revealed in recent judicial decisions, finding logic in them and laying foundations for just application of the laws. The author argues that after the amendments of the statutes, the Court at once seized four requisites for effective management dismissal, in essence clinging to old precedents which require "the dismissal to be admitted as completely and objectively reasonable and socially rational when considered as a whole". He further underscores that a dismissal lacking even one requisite is to be considered illegal dismissal that is deficient in "objective reasonableness and social rationality". Lastly, the author argues that the meaning of the prior conference with labor representative should be interpreted not as "a simple process of collecting opinions" just like the Courts do, but as "laborers' understanding or comprehension" through sincere exchange of opinions.

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I. Introduction

Business dismissal[1] usually occurs when a business enterprise alters or adjusts its structure in response to changes in the economy, industrial structure or technology and has as its goal the reduction of surplus labor or change in the personnel composition. As such, it is distinct from the general dismissal which is normally brought on by some defect in the employee or his performance. Therefore, since business dismissal is not caused by internal reasons of labor relationship conflicts between the employees and the employers but by external reasons of economic and structural change, business dismissal is unique in that the burden of its unfair results must be shared by employees, employers and the nation, i.e. third party. Hence, the concept of limits on business dismissal is inevitably tied with employment security that can come from the improvement and prosperity of the business enterprise.

Business dismissals have been regulated by judicial precedents until amendments were made to the Labor Standard Act in 1998 which provided compulsory regulations for the dismissals. In recent years, business dismissals have become a social problem because of strong enforcement of competition principles, acceleration of enterprise structural reforms and execution of mass dismissals in so-called globalization era. When one considers the social character of business dismissal, it is clear that the laws that regulate business dismissals exert an enormous influence on job securities for employees as well as improvement of enterprise business.

The object of this article is to examine the trends as revealed in recent judicial decisions, finding logic in them and laying foundations for just application of the laws. The subject of this article is the judicial decisions rendered during the four years from 1998 when the amendments to the Labor Standard Act were made to 2001; however because the Supreme Court cases are so rare, trial decisions by a lower court and decisions by the Central Labor Relations Committee which are considered significant are also included. The method of inquiry used is summarizing the judicial decisions by the legal issues that focused on requisites of business dismissal and evaluating the decisions briefly.

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1) The court uses the expression “personnel reductions,” the Labor Standard Act uses the expression “dismissal for managerial reasons. In this article, I’ll shorten that legalized expression of “dismissal for managerial reasons” to “management dismissal”.

II. The Position of Business Dismissal in the Dismissal Legislation

Before reflecting on the legislation regarding dismissal, a brief inquiry into the position of business dismissal in the legislative scheme is needed for understanding business dismissal.

In general,major reasons for the termination of labor contracts include resignation based on the intention or will of laborers, termination unrelated to the intention of employers and employees and termination that is by unilateral will of employers against the will of employees. There are no special regulations for resigning on one's own initiative or termination of labor relations such as by retirement under the age limit. However, dismissal must meet the requisites of clause 1 of article 30 of the Labor Standard Act.

Clause 1 of article 30 of the Labor Standard Act provides that "Employers should not without a reasonable cause dismiss employees, cause them to retire temporarily, suspend, change their occupations, reduce wages or punish" and also provides general regulations on dismissal. The question to ask, then, is, what is dismissal with a "reasonable cause"? The answer in any given case is provided by the Court in its decision rendered on the facts of each indivdidual case. As "reasonable cause," the Court consistently requires some cause for which the employee is responsible and which makes it impossible to continue the labor contract as socially acceptable, or unavoidable necessities of the business.[2] If an employer dismisses an employee without a reasonable cause, the dismissal is without effect. In such a case, the employer must state and prove that a reasonable cause exists.[3]

A dismissal committed for reasons attributable to the employee and for which he is to blame such that discontinuation of the labor contract is socially acceptable is called a disciplinary dismissal. The fairness of disciplinary dismissal depends on what is socially acceptable as "fair", so the Court judges objectively. Accordingly, disciplinary dismissal is deemed to be naturally fair not only when there are conditions applicable to the disciplinary dismissal under regulation of collective agreement or the rules of employment, but when there are reasonable causes in light of the facts of the case.[4]

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2) the Supreme Court 1991.3.27. 90Daka25420 ; 1992. 5. 22 91Nu5884 and many.

3) the Supreme Court 1992.8.14. 91Da29811

4) the Supreme Court 1992.5.12. 91Da27518 ; 1991.10.11. 91Da20173 ; 1990.12.7. 90Daka23912 ; 1990.11.23. 90Daka21589 ; 1990.4.27. 89Daka5451 ; 1987.4.14. 86Daka1875 ; 1989.9.26. 89Daka5475 and many.

On the other hand, a dismissal committed when there are "unavoidable necessities of business" is called business dismissal. But even a business dismissal must be supported by reasonable causes to be considered fair. However, a business dismissal, unlike a disciplinary dismissal, must meet a higher level of requisites in judicial proceedings because it is caused by business situation and not by responsibility of an employee. This judicial requirement has been legislated into article 31 of the Labor Standard Act now in force. In other words, a business dismissal is a dismissal without responsibility of an employer or an employee, and, as such, falls into the category of general dismissal in that the termination of labor relations is by unilateral will of employers. Consequently, a business dismissal is regulated by the basic principles of general dismissal, but it needs to be further regulated by more stringent rules than general dismissal due to the peculiarities of lack of responsibility of the parties involved.

III. Requisites of Business Dismissal

Article 31 of the Labor Standard Act states four requirements that a business dismissal must meet in order to maintain objectivity and be socially acceptable. These requirements are interpreted by judicial decisions as follows: To justify personnel reductions by business dismissal, all circumstances must be considered as to whether there were urgent business necessities; whether the employers made reasonable efforts to avoid the dismissal; whether the employers made a selection of the subjects for dismissal according to reasonable and fair standards and; whether the employers gave notice to a labor union or representatives of laborers 60 days before the dismissal and discussed the matter sincerely and in good faith.[5)]

Business dismissal is laying off some selected employees under certain conditions based on the necessity of maintaining and supporting the business enterprise. On the other hand, when a company ceases to exist, the company is free to let go of all of its employees during its liquidation process[6)] Further, the Court seems to be of the view that execution of business dismissal when necessary is employers' fundamental right in business and cannot be restricted by the demands of a labor union that the right not

5) the Supreme Court 2000.9.8. 99Da42308

6) the Supreme Court 2001.11.13. 2001Da27975

be exercised or become subject to collective bargaining. Any direct action to achieve such restriction cannot be allowed.[7]

Detailed examination of the judicial interpretation of the four requirements for business dismissal is set hereinbelow.

A. Urgent Business Necessities

The critical issue in deciding what qualifies as "urgent business necessities" is determining the meaning of "urgent" Interpreted in a narrow sense, business dismissal is restricted to unique cases such as company bankruptcy. On the other hand, interpreted in a broad sense, business dismissal can extend to include cases involving other milder forms of company protection. Furthermore, the difficult problem is how actually to assess the "urgency" that is claimed by the company since documents that are indicative of the condition of the company and relevant to the decision of urgency are entirely in the possession of the company. For this reason, it is very difficult for laborers and labor unions to obtain informations on business property and accounts to analyse them. The Court's answers to these questions are examined.

1. General Standards

(a) Objective Reasonableness for Reduction of the Personnel

"Urgent business necessities" is not limited to economic reasons such as avoidance of bankruptcy. Business necessities can also arise from a variety of technical reasons such as modification of production to improve productivity and the need to increase the company's competitiveness in the market. For this reason, urgent business necessities should be widely accepted if there is objective reasonableness for reduction of the personnel.[8]

7) the Supreme Court 2001.4.24. 99Da4893

8) Supreme Court 1999.5.11. 99Du1809, the District Court of Seoul 2000.11.8. 2000Nu5601

(b) Consideration of the Business Circumstances of the Entire Company

As stated earlier, urgent business necessities is not necessarily limited to the purpose of avoiding bankruptcy. But it should be determined only after the business conditions of the entire company have been considered, rather than the financial health of only a portion of the company. Any affirmative determination of urgent meangement necessities leading to the reduction of personnel should be supported by objective reasonableness.[9] In this case, the court set forth the requirement that "urgent business necessities" must be supported by the state of the entire company based on consideration of the condition of the entire company, including whether a newly-established part of the enterprise by merger could be managed with other independent property and whether an exchange of personnel between different business parts could be accomplished.

2. Cases Allowing Determinations of Urgent Business Necessities

(a) inevitability of reduction of the Personnel due to Transfer or Assignment of a Part of the Business

Labor contracts are not transfered along with a transfer or assignment of a part of the business to an assignee. Rather the contracts remain between the employees and the assignor company. So, if an employee refuses to continue employment with the assignee company, the assignor company can dismiss the employee, provided there are inevitability of reduction of the personnel and all the other conditions for business dismissal.[10]

(b) A Laborer whose Position will be Abolished by Business Consignment does not Accept Subrogation Agreement

If a building business company agreed to consign its business to a professional service enterprise for business reasons while assuring the present pay (including

9) Administration Court of Seoul 2000.12.8. 99Gu31779

10) Supreme Court 2000.10.13. 98Da11437

retirement pay) of all of its employees, it is just to dismiss laborers who oppose that agreement.[11] Such business dismissals meet the business necessities requirement.

(c) Closedown of a Factory by the Expiration of a Lease Period

If a factory closes because the lease of the factory building and neighboring sites expires and cannot be renewed, and it is impossible to construct a new factory building, then business dismissal of employees is proper since such dismissals satisfy the urgent business necessities requirement.[12]

(d) Necessary to Deal Effectively with Curtailment of Subsidy or Reduction of Personnel

In case of a government-subsidized company, it is appropriate to dismiss the least number of employees in its efforts to deal effectively with the government demands for reduction of personnel and consequent reduction in funds for personnel expenses, provided that the company exerts all possible efforts such as retrenchment of expenses, discontinuance of irregular employees, and enforcement of voluntary resignations and a freeze on wages to minimize the number of persons to dismiss.[13]

(e) Closure of some Part of Business Showing a Chronic Deficit in Business even Though the Business as a Whole Shows a Surplus

Considering the business situation as a whole, even if the entire business shows a surplus, if some part of the business shows a chronic deficit because of inefficiency and that inefficiency is due to the structural defect of that part, it is just to close that part of the business.[14]

11) Supreme Court 1999.5.11. 99Du1809

12) Supreme Court 2000. 9. 8. 99Da42308

13) Administration Court of Seoul 2000.11.8. 2000Nu5601

14) Administration Court of Seoul 2000.11.7. 2000Gu11672

(f) Indisputable Evidence of Continuous Decrease in Earnings

In a given situation, the biggest sources of income of a business entity made up of members who engage in joint selling/buying are the membership fees and the commission they pay to the entity, If this income continuously decreases as a result of reduction of selling activities of the members and reduction of contracting with public institutions due to the curtailed budget of government, and reduction in membership fees due to withdrawal of members, then it is reasonable to reduce the personnel.[15)]

3. Cases Disallowing Determinations of Urgent Business Necessities

(a) Apartment Dwellers' Council's Demand for Reduction of the Personnel in the Consigned Managing Company

When an apartment business company that manages multiple apartment complexes fails to provide the documentation that is requested by the representatives of the dwellers of a particular apartment complex relative to the entire company's situation such as the number of business offices, the number of personnel, operating income, company structure, company's assets and liabilities, there is no urgent business necessities for reduction of the personnel if the company's loss and burden at that particular apartment location is due to the representatives' refusal to pay the personnel expenses at that particular location.[16)]

(b) Employment of New Personnel

No urgent business necessities are found for the retirement by agreed-upon business dismissal of more than the surplus personnel, if new personnel are hired and continuously employed after the business dismissal and there is no sufficient proof of substantial decline in the company's situation about the time of the business dismissal.[17)]

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15) Administration Court of Seoul 2000.8.25. 2000Gu993

16) Supreme Court 1999.4.27. 99Du202

17) Administration Court of Seoul 2000.12.8. 99Gu31779

(c) Excessive Number of Personnel Over the Budget Compilation Standard

It is hard to conclude there are urgent business necessities for reduction of personnel based on the claim that livelihood protection guide and budget compilation standard prohibit social welfare organizations from employing personnel over the number provided for by these standards and the Chogye Order Welfare Foundation behaved inconsistently when it employed new guards and guides but no new dieticians.[18)]

(d) Changing the Apartment Managing form to Consigned Managing System

Changing the apartment managing form from resident autonomy system to consigned business system by apartment resident autonomy council is a sort of business assignment, and dismissal during these processes corresponds to the business dismissal, so there are no proofs for urgent business necessities.[19)]

(e) Decrease on the Net Profit of this Term

It is hard to find urgent business necessities based only on the reason that the company's net profit or selling amount of this term decreased during the IMF situation at the end of 1997.[20)]

(f) Illegal Operation of Laborer Supply Business

Since the company operated a laborer dispatch or supply business which is not allowed for labor security reasons by the law in force, the company is denied a finding of urgent business necessities even though there were notices for reduction of cars and personnel due to the company's limousine operating business guiding principles.[21)]

18) Administration Court of Seoul 2000.10.12. 2000Gu14312
19) Administration Court of Seoul 2000.10.6. 2000Gu10877
20) Administration Court of Seoul 2000.3.28. 99Da1914
21) Administration Court of Seoul 2000.12.8. 99Gu31779

4. assessment of the judicial precedents

The Court presents 'objective reasonableness for reduction of the personnel' as a general standard for urgent business necessities, the applicable extent of that standard being the 'business situation of the whole company'. A summary of the opinions of the Court is that if there is 'objective reasonableness for reduction of the personnel after considering the business situation of the whole company', then there are urgent business necessities. Therefore, the Court does not strictly limit urgent business necessities to calamities such as bankruptcy of the company but rather makes the requirement less strict on condition of objective reasonableness for reduction of the personnel and interprets that requirement generously.

On the basis of this standard, the Court found objective reasonableness for reduction of the personnel for business assignment (changing the apartment managing form to consigned managing system), reduction of the personnel caused by closure of some part of business or positions, reduction of the personnel due to the curtailment of governmental subsidy, and reduction of the personnel in case of indisputable circumstances of continuous decrease in earnings. But the Court declined to find objective reasonableness for reduction of the personnel for excessive dismissal over the surplus personnel followed by unreasonable employment of new personnel, and for decrease of profit in short term.

But the fundamental problem is, on what ground and by what methods to judge objective reasonableness for reduction of the personnel. Considering the essential nature of business dismissal, the mutual agreement between labor and business is required for a proper evaluation of objective reasonableness for reduction of the personnel, and for this, transparency of business and information offer in advance from the company to the laborer are required. In our nation's current situation, not supported by these strictures,it is difficult to evaluate a company's ex post facto business information. In addition, if there is an information offer in advance, it is open to further theoretical discussion about the range of post judicial investigation of economic reasonableness.

B. Endeavors to Avoid the Dismissal

If it is possible to resolve the urgent business situation by other means than dismissal, the employer owes a duty to avoid dismissal. This is to guarantee the laborers' right to have the occupation, that is to say, the right to enjoy his job ultimately to the last moments. Essentially, measures to avoid dismissal are employment guarantee measures that are achieved through the modification of labor conditions. Therefore, what becomes an issue in judging endeavors to avoid the dismissal is whether those measures practically correspond to the purpose of guaranteeing the employee's right to labor. It becomes important to apply the avoidance measures so as to cause the least damage to the laborers' benefits. Let's examine the attitudes of the Court.

1. General Standards

(a) Measures to Minimize the Number and Scope of Dismissal

Considerable endeavors to minimize the number and scope of dismissal means that the employer must take proper actions such as rationalization of business policy and operation mode, prohibition of new employment, application of lay-off or volunteer retirement, and enforcement of other possible measures such as transfer or position conversion.[22] However, if, in spite of the employer making every possible effort to solve the business crisis before executing reduction of personnels, it was impossible to overcome the business difficulties with those endeavors or there were inevitable circumstances where such avoidance measures were inapplicable, then the business dismissal can be deemed to be reasonable.[23]

(b) Amelioration of Business Through Cut Down on Expenses is the Fundamental Purpose of Business Dismissal

In one case,[24] the Court said that the company needs to examine from many

22) Supreme Court 1992.12.22. 92Da14779

23) District Court of Seoul 2000.11.8. 2000Nu5601

24) Administration Court of Seoul 2000.8.22. 99Gu27282

different angles the possibility of decreasing expenses by measures other than personnel reduction, since it could not be said that it was impossible to reduce expenses by unpaid layoff or wage decrease, and the fundamental purpose of business dismissal was amelioration of business through cut down on expenses, not personnel reduction.

2. Cases in Which Endeavors to Avoid the Dismissal Were Found

(a) The Company Could not Reduce Wages Because of Objection of Labor Union

If the company could not reduce wages because of objection of labor union, the company is not liable for business dismissal.[25)]

(b) Collection of Volunteer Retirement by Government-Contributed Corporation

Unlike private corporations which can avoid business dismissal by structural reform through a rotating layoff system or part time system, government-subsidized corporations have limited modes of structural reform. Further, the ranges of structural reform are decided by the government directly or indirectly. Therefore, while the company tried to reduce personnel by volunteer retirement before business dismissal, when the labor union objected to the wages being cut down, there was no other way to reduce operating costs; so it seems the company made all reasonable efforts to avoid the dismissal.[26)]

3. Cases in Which Endeavors to Avoid the Dismissal were not Found

(a) Position Conversion was not Inapplicable Considering the actual Condition of the Entire Business

The apartment managing company could rearrange the people who could not work at specific managing site by transfering them to other managing sites or the main

25) District Court of Seoul 2000.11.8. 2000Nu5601

26) Administration Court of Seoul 2000.6.16. 99Gu30967

office, so as to render the dismissal unnecessary.[27]

(b) Measures to Avoid the Dismissal Which are Ineffective for Reduction of Personnel Expenses

Considering that reduction of personnel expenses rarely follows the resignation of an employee who would reach regular retirement age within 9 months of the resignation, the company's dismissal of that employee after his rejection of the resignation was neither reasonable nor adequate.[28]

(c) Mere Proposals of Volunteer Retirement

If there were no other measures taken before business dismissal such as transfer or layoff to minimize the number or scope of dismissal except for requests to the employees for volunteer resignation, then that business dismissal is not reasonable.[29]

(d) Curtailed Volunteer Retirement Allowance Against the Collective Agreement

If the company did not devise any proper means to avoid the business dismissal except for the volunteer resignation, and gave curtailed volunteer retirement allowance against the collective agreement, that business dismissal did not occur through proper endeavors.[30]

(e) More Employees were Dismissed than the Arranged Quota

If the company dismissed more than the arranged quota, and moreover, announced personnel promotion in less than 2 months from the dismissal date, the need for the dismissal is unconvincing and indicates that the company had an intention of breaking

27) Supreme Court 1999.4.27. 99Du202

28) District Court of Seoul 1998.7.16. 97Da47660

29) Administration Court of Seoul 2000.12.8. 99Gu31779

30) Administration Court of Seoul 2000.8.22. 99Gu27282. From the beginning, the Central Labor Relations Committee retried and declared that the dismissal in this case was legal(1999.7.29. 99Buhae162), but this retrial decision was repealed.

personnel congestion by improper business dismissal.[31]

(f) Expedient Transfer as a way to Reduce the Surplus Personnel

Although it was possible to solve the surplus personnel problem by volunteer retirement or early retirement, the company's transfer of the 15 people in the teaching profession to a non-teaching profession was against the personnel rules, and therefore illegal and deemed to be improper dismissal-inducing acts.[32]

4. Evaluations of the Judicial Decisions

The Court understands that the purpose of business dismissal is 'not reduction of personnel, but amelioration of business through reduction of the expenses' and shows that the standard for endeavors to avoid the dismissal is 'all possible business means to minimize the extent of dismissal'. So the general standard for endeavors to avoid the dismissal can be summarized as 'all means of reducing expenses to minimize the number and scope of dismissal'. This opinion in the judicial precedents seems to indicate an understanding that the business dismissal is the 'last choice' for amelioration of business.

Therefore the Court finds the presence of endeavors to avoid the dismissal when these two requirements are satisfied, i) for the business as a whole ii) other possible means for the expense reduction were taken. The Court declines to find the presence of endeavors to avoid the dismissal if either of these two requirements is not satisfied. So, the Court denied finding of endeavors to avoid the dismissal which are ineffective for reduction of personnel expenses, are in reality expedient transfers, requests for voluntary resignations, and position conversions which did not consider the condition of the business as a whole.

The Court's attitude is proper since the measures to avoid the dismissal are based on pain sharing principles between labor and business, but it is an imperfect explanation that misses the fulfillment by stages of the measures to avoid the dismissal. The Court does not condone the use of voluntary retirement as an initial measure to

31) Administration Court of Seoul 2000.8.22. 99Gu27282

32) Administration Court of Seoul 2000.6.1. 99Gu28247

avoid the dismissal, but supports the use of it as a later measure to avoid the dismissal. But voluntary retirement is retirement in literal sense of the words and is not a good measure to be used to avoid the dismissal. In this sense, it is questionable whether a comparatively long unpaid layoff can be accepted as a suitable means to avoid the dismissal. In fact, there are many problems relative to the cut-down of working hours or vocational training for transfers. I question the worth of these issues in deciding cases.

C. Reasonable and Fair Standards for the Selection of the Subjects for Dismissal

If a company ultimately cannot avoid a business dismissal and must sacrifice some laborers for the continuation of the company or for amelioration of the business, then the standards for selecting the employees to be dismissed must be established concretely, impartially, and rationally applied. But "rationality" and "impartiality" are abstract concepts. Therefore, it is important to grasp these concepts firmly. Above all, one must resolve the all-important issue of which concept should play more prominent role in weighing the competing interests of the laborer's personal circumstances and the company's business circumstances, and how to maintain fairness between laborers. Let us examine carefully the judicial precedents on this point.

1. General Standards

(a) Laborers' Living Conditions and Fairness Between Laborers

Business dismissal is committed not on grounds of the laborer's responsibility but on grounds of company's need, and upon consideration not only of laborer's working ability but his living conditions and the equity between the laborers. The employer has considerable discretion in business dismissal, especially if the standards and process for dismissal were decided upon with labor union's consent since member laborers of the union can be deemed to have agreed to the standards and the process. So unless the standards and process for dismissal are extremely arbitrary or unreasonable, we can not deny the rationality of the union-supported standards and process.[33)]

(b) Entire Business as Selection Range

Despite urgent business necessities for business dismissal, if the company made the selection of the employees to be dismissed only from the business component that is to be reduced, then the selection standard is not objective or reasonable.[34]

(c) Standards in Duly Considering Laborer's Subjective Reasons and the Company's Objective Circumstances

1) In selecting the subject for business dismissal, placing more weight on either of rationality or impartiality is not proper. The standards should be balanced and the selection for dismissal should be made with due regard to laborer's subjective criteria such as the extent of damage to be suffered by the laborer, necessities for protecting the society and the company's objective goals such as its survival, the company's personnel structure, constituents' perception of the dismissal, the company's future growth capacity and so forth.[35]

2) Considering that business dismissal is to reduce personnel for maintenance and improvement of reasonable business or for conversion of business structure, selecting the subject for business dismissal needs to consider not only the laborer's subjective personal reasons but also company's objective circumstances for harmony with equity rules.[36]

(d) Allotting Priority to the Many Criteria Used as Standards

If the employer utilizes several criteria as standards for business dismissal, assignment of priority rating among the criteria is required for the objective concrete

33) High Court of Seoul 2000.11.8. 2000Nu5601

34) High Court of Seoul 1998.7.16. 97Da47660

35) Administrative Court of Seoul 2000.6.1. 99Gu28247

36) Central Labor Relations Committee 1998.12.22. 98Buhae554

reasonable selection for dismissal.[37]

2. cases finding reasonable and fair standards for dismissal

(a) Standards for Exception from Dismissal Based on Necessities for Protection as Industrial Disaster Victims

Measures prepared by the company to except certain employees from dismissal in order to protect them based on necessities for protection as industrial disaster victims and to distribute them to empty positions within the company has reasonableness and impartiality.[38]

(b) Standards Using Degree of Contribution and Social Ability Without Objective Evaluation Data

Even though the standards for selection for dismissal by mutual consent between the company and labor union are abstract but reasonable and well-grounded, if there are no objective evaluation data such as performance rating data or attendance records due to the opposition of labor union, then the company has no other way but to select employees subjectively for dismissal based on office reorganization committees' usual data. These standards for selection for dismissal select the personnel who has low degree of contribution and social ability, but the standards are not deemed unreasonable. On the contrary, there is a judicial precedent opining that to request objective standards in circumstances such as this is tantamount to making inordinate demands.[39]

(c) Standards Using Driver's Traffic Accident Record and Disciplinary Punishment Record

The standards for business dismissal are created by mutual agreement between

37) Administrative Court of Seoul 2000.8.22. 99Gu27282

38) Supreme Court 2000.10.13. 98Da11437

39) High Court of Seoul 2000.11.8. 2000Nu5601 / the first verdict reversed. The first verdict of this case showed that because standards for dismissal did not take laborer's subjective reasons into consideration, this management

labor and business. So even if they are not equipped to consider all laborers' concrete circumstances, since they have somewhat objective aspects based on traffic accident record and disciplinary punishment record which are important indications of the bus driver's working ability and competence, they appear to be justifiable and reasonable.[40]

(d) Standards for Dismissal Based on the Order of Performance Record

After several meetings of reorganization committee composed of labor representatives, the subjects of business dismissal were selected in order of the lowest performance record. The selection was accomplished through rational and fair examination of the company's size which is less than 30 personnel, business content, personnel organization, standards for performance and performance record.[41]

(e) Standards Based on Business Performance and Exclusion of Workers who Served for Less than One Year

In case of car salesmen, their business performance is the most important factor for performance rating and closely related to the profit and loss of the employer. So if the company selects the employees to be dismissed based on business performance of recent 10 months during which business faced difficulties but excludes laborers who served for less than one year according to the several agreements with labor union, the selection is objective and reasonable.[42]

(f) Business Dismissal Focused Only on Union Members

The company instructed the non-union workers like supervisor profession manager profession workers to resign, thereby performing a part of the employment control. Afterward, the company dismissed union members according to the agreements with

dismissal is unfair, and decided retrial judgment which denied the plaintiff's petition for a retrial is lawful. (the Administrative Court of Seoul 2000.4.19. 99Gu20403)

40) High Court of Seoul 2000.6.9. 99Nu11235

41) Administrative Court of Seoul 2000.8.25. 2000Gu993

42) Administrative Court of Seoul 2000.3.15. 98Gu18472

labor union. Such business dismissal focused only on union members was not arbitrary.[43]

3. Cases not Finding Reasonable and Fair Standards for Dismissal

(a) Discrimination of Evaluation Term to Apply Standards for Dismissal

The particular prioritization of the criteria to be applied as standards for dismissal can lead to considerable differences of evaluation points between laborers. Therefore, such prioritization obviously requires agreement in advance with labor representatives, so that any discrimination between the general managing profession and the crew is deemed to be reasonable.[44]

(b) No Objective Work Performance Evaluation at All

Evaluation criterion which is an efficiency rating by the head of a team is subjective, as it involves no objective work performance evaluation but is used only to select the candidate for business dismissal. Thus there are not sufficient requisites for business dismissal.[45]

(c) no evaluation standards at all

If a company one-sidedly dismisses all personnel of a managing agency without ever setting evaluation standards, then the dismissals do not meet the requirements of proper business dismissals.[46]

(d) Imprecise Evaluation Standards and Lack of Comparative Evaluation

Among the standards for business dismissal, a standard stated as “easy-going, indolent personnel or being hindrance to development of company or presenting a

43) Administrative Court of Seoul 2000.6.1. 99Gu5770

44) Administrative Court of Seoul 2000.12.8. 99Gu31779

45) Administrative Court of Seoul 2000.12.8. 99Gu31779

46) Administrative Court of Seoul 2000.10.6. 2000Gu10877

sense of incongruity" is so imprecise that it is an improper standard. Considering that there are no sufficient and clear explanations of the way any comparative evaluation was done between the dismissed and the retained, any dismissal based on such a standard is not reasonable and fair.[47]

(e) Standards Reflecting Managerial Interests of the Company

1) Considering the basic nature of business dismissal, which is executed on account of employers' business circumstances and not on account of employees' faults, and the extent of potential damage to the employees, it is important to deliberate carefully on laborers' personal circumstances and select the laborers who need less social protection than others. Therefore standards for business dismissal that do not reflect age, the existence or nonexistence of any duty to support others financially, etc. are not proper.[48]

2) In the case of business dismissal accomplished by accepting laborers' resignation, if the criteria for acceptance reflect mainly business interests of the company without agreement with labor representatives and do not reflect the age of the resignee, whether the resignee has family, his years of continuous service, financial situation, possibility of re-employment elsewhere or health conditions, then these are not reasonable and objective standards.[49]

(f) Selection Through Committee's Vote Only Without Objective Evaluation

Considering the damage of business dismissal to the employees and the harmful effects on their relationships, selection of business dismissal through committee votes

47) Administrative Court of Seoul 2000.8.22. 99Gu27282

48) Administrative Court of Seoul 2000.7.7. 99Gu34600

49) Administrative Court of Seoul 1999.7.16. 98Gu20871. By this judgment, retrial decision of the Central Labor Relations Committee was reversed. The Local Labor Relations Committee of Seoul found the dismissal in this case to be wrongful dismissal (1998.5.27. 97Buhae312, 378), but the Central Labor Relations Committee repealed remedial decree above and retried, subsequently finding that the dismissal in this case is fair dismissal. (1998.9.17. 98Buhae250)

only without objective evaluation is not reasonable and fair, because the results can be distorted. Ultimately, who the voting committee members are leads to great differences as to the results. Therefore, a business dismissal done by committee votes without objective evaluation is unlawful due to its lack of objective reasonableness and social rationality.[50]

(g) Standards Lacking in Equity Insisting Upon the Longevity of the Worker as the Only Reason for Dismissal

1) If a company chooses a diligent employee regardless of age as a candidate for business dismissal on a priority basis only because he/she has served for a long time and if the influence of the longevity of service is greater than that of his performance record, then the selection for dismissal is not reasonable and rational.[51]

2) If an employee who has worked diligently for the company is selected on priority basis for business dismissal only because he/she has been a long continuous worker over an employee who is lacking in diligence or has a past record of disciplinary action, then the standards for business dismissal seem to lack rationality and reasonableness.[52]

(h) Standards for Collective Agreement Against the Purpose of the Labor Standard Act

When deciding standards for business dismissal in a collective agreement, it is required to abide by the purpose of the Labor Standard Act. So, stipulating that "volunteers and longest workers are to be dismissed first in business dismissal" does not sufficiently reflect the purpose of the Labor Standard Act. If dismissing a new member of the staff in accordance with a collective agreement, earlier promotions of senior personnels should be withdrawn as not corresponding to the rationalization of

50) Administrative Court of Seoul 2000.6.16. 99Gu30967

51) Administrative Court of Seoul 2000.7.7. 99Gu34600

52) Administrative Court of Seoul 2000.6.1. 99Gu28247

53) Central Labor Relations Committee 1999.4.7. 99Buno9, Buhae35

business and not reflecting personal ability and circumstances, and thus not being reasonable and proper.[53]

(i) Standards Applied to the Laborers in a Specific Post Lacking Objectivity

In deciding on candidates for business dismissal, it is required to acertain the existence and/or nonexistence of disciplinary actions in the employees' records and evaluate them. The dismissed laborer had worked sincerely without disciplinary action at all and has 18 years of service which is the longest among all personnel but acquired 160 points for performance record while other 15 personnel who did great harm to the company acquired more points. The fact that if no distinction had been made between general occupations and computer-related occupations, then 25 people would have gotten fewer points than the dismissed employee, means that the selection of this laborer for dismissal was lacking in objectivity and impartiality.[54]

4. Evaluations of the Judicial Precedents

The Court proposes "equity reflecting both laborer's personal situation and the company's business circumstances" as the general rule for judging rationality and impartiality of standards for selecting the candidates for business dismissal, and "priority of selection criteria" and "equity between laborers" as the concrete principle for application to maintain objectivity concreteness rationality for standards of selecting the subject for dismissal. The standpoints of the Court can be summarized as supporting dismissal standards that establish priority among the selection criteria and maintain equity between laborers. Such standards are based on impartiality considering laborer's personal situations and the company's business circumstances.[55]

However, the Court is not pursuasive when it finds past record of disciplinary action, performance record and business performance rational and reasonable

54) Central Labor Relations Committee 1998.10.20. 98Buhae329

55) But an influential doctrine presents a view that laborer's personal reasons have priority over the company's management circumstances, but in exceptiona cases the company's management circumstances can be considered equally and the cases decided by rule of balance between benefit and harm. Hyung-bae Kim, *Labor law*, 12th ed., Pakyoung press, p.443-444, Jong-ryul Kim, *Labor law*, 2nd ed., Pakyoung press, p.494-495

standards for dismissal only when agreed upon in advance with laborers. On the contrary,it seems reasonable to refuse to recognize dismissals based on discriminatory evaluation criteria, lack of comparative evaluation, discrimination between specific posts and selection of continuous long term worker purely because of his longevity. Also the Court's judgment that standards reflecting only business interests of the company is unfair is in accordance with the basis of fundamental rules.

Because the standards for selecting the subject for dismissal have fundamental purpose of avoiding unreasonable discrimination between laborers in the process of dismissal, above all it is required to consider equity between laborers.

D. Sincere Conference with Representatives of Laborers in Advance of Dismissals

It is more important to maintain relief measures prior to than post dismissals, so sincere conference in advance with labor representatives or labor union has enormous impact on proper standards for selecting the subject for dismissal and, sometimes, avoids the dismissal altogether. The meaning, legal feature of the prior conference, the degree of "sincerity" in the conference and proper qualification of the other party for conference, therefore, are at the heart of such a conference. Let us examine further the attitude of judicial precedents on this matter.

1. General Standards

(a) Purposes and Effects of Agreement on Employment Stability

After business situation started to get worse, a company held several conferences with labor union right before the business dismissal. Thereafter an agreement on employment stability was concluded between labor and business for additional dismissals. Since there was no dissent from labor union at all, it can be reasonably assumed that the labor union consented to additional business dismissals and did not object to the previous dismissals even though they were done without agreement with labor union. So business dismissals were not against the trust of relevant employees or labor union.[56)]

(b) Meaning of Conference and Agreement

Conferences with labor union and collective agreement are different in that "in case of dismissal for urgent business necessities, conference with labor union is needed and within a given period from the date of conclusion of collective agreement, such a conference is needed to obtain agreement in advance of business dismissals". Agreement in advance is different from conference which simply is a stage of collecting opinions for prudent use of the right of personnel business. Prudent use of the right of personnel business requires the coincidence of opinions between labor and business in case of business dismissal within a designated period from the date of conclusion of the collective agreement. So personnel appointments without that process are invalid in principle.[57]

(c) The Party to be Notified and Conferred with in the Endeavors to Avoid Dismissal and Deciding the Standards for Selection of Subjects for Dismissal

According to para. 3 of art. 31 of the Labor Standard Act,the party to be notified and conferred with in the endeavors to avoid dismissal and deciding the standards for selection of subjects for dismissal is "the labor union if there is a labor union composed of the majority of laborers, and the person who represents the majority of laborers if there is no labor union." In the context of the regulations above, if dismissals are limited to specific occupation or positions, the employer should confer with the labor union if a majority of employees in that occupation or positions belong to a union. Otherwise, conference should be held with the person who represents the majority of laborers.[58]

(d) Effects of Collective Agreement and Written Agreement Between Labor and Business

When labor and business agree to work out a solution according to legal procedure in case of disagreements regarding business dismissals, it does not necessarily mean

56) High Court of Seoul 2000.3.29. 99Nu14678

57) Administrative Court in Seoul 2000.3.17. 99Gu20694

58) District Court of Seoul 2000.2.11. 99Gahap55101

limiting the standards for business dismissal to those contained in the collective agreement. Any agreement, regardless of appellations, such as “collective agreement”, “wage agreement”, “written agreement between labor and business” gives labor and business duties to observe and follow the agreement. But an agreement entered into especially for settlement of specific pending problem must be applied prior to application of other agreements between labor and business when dealing with that specific problem unless it is against the law.[59]

2. Cases Finding Sincere Conference in Advance

(a) Joint Labor-Business Conference Prior to the Actual Dismissal

If an agreement was reached, through a joint labor-business conference, on principal standards regarding personnel reduction before the actual dismissal, and if all the labor representatives who attended the conference agreed on the standards, then there can be said to have been sincere agreement in advance with laborers even if there were no agreement in advance with individual laborers and the laborers did not know that such a labor-business conference was held.[60]

(b) No Representatives for Labor Union Because of the Resignation of a Labor Union President

Despite the fact that there were no official representatives for labor because of the resignation of a labor union president, the company met representatives for labor for negotiations nine times prior to dismissal to decide the range, standard and compensation of personnel reduction and the labor representatives who attended the negotiations agreed on personnel reduction plan being aware of the necessities for reorganization. In such a case, the business dismissal was deemed to have occurred through sincere agreement in advance with laborers.[61]

59) Central Labor Relations Committee 1999.4.7. 99Buno9, Buhae35

60) High Court of Seoul 2000.3.29. 99Nu5216

61) Administrative Court in Seoul 2000.11.7. 2000Gu11672

(c) Labor Union's Abuse of its Right of Veto

Under the urgent circumstances of requiring business dismissal, the company makes sincere and serious endeavors for agreement in advance with labor union. However, the labor union steadfastly opposes without good reasons business dismissal by holding demonstrations against business dismissal during the labor-business conferences. Such a case illustrates labor union's abuse of its right of veto, and it cannot be said that the business dismissal in the case is not valid.[62]

(d) Application Range of Standards Agreed to by a Labor Union to Which Almost Half of All Personnel Belonged

If the standards for resignation which were agreed to by the labor union actually correspond to the standards for business dismissal and the contents are rational, then even if the labor union cannot actually represent the dismissed laborers who were not union members, as long as almost half of all personnel were members of the labor union and the company prepared the standards for business dismissal through sincere agreement with labor union that is the only labor representative, then these standards are applicable to all employees regardless of their actual union membership.[63]

(e) Conference on Reorganization with Labor Union of Which Minority of Personnel were Members

When the company agreed on reorganization with the labor union, the company can be deemed to have had sincere endeavors for conference with labor representatives even if the labor union in question was not composed of the majority of laborers,

62) Administrative Court of Seoul 2000.3.17. 99Gu20694. By this judgment, retrial decision of the Central Labor Relations Committee was reversed. The Local Labor Relations Committee of Busan had found the dismissal of this case wrongful (1998.12.31. 98Buhae281), and the Central Labor Relations Committee retried and also found that the dismissal in this case was wrongful.(1999.6.10. 99Buhae47)

63) Administrative Court of Seoul 1999.9.8. 98Gu27636. By this judgment, retrial decision of the Central Labor Relations Committee was reversed. The Local Labor Relations Committee of Seoul had found the dismissal of this case wrongful (1998.8.28. 98Buhae579), and the Central Labor Relations Committee retried and found the dismissal of this case wrongful(1998.11.23. 98Buhae482).

unless there were evidences and proofs that this labor union had special reasons not to represent laborers' interests sufficiently or that there was another person who could represent non-union laborers.[64]

(f) Consents of Employee Union Substituting the Joint Labor-Business Conference

A company that does not have a labor union holds joint labor-business conferences with Korean journalist association's branch association that is composed of journalists under the level of assistant director, council of heads of departments and council of editorialists. In such a case, these bodies, regardless of their appellations, play roles in mutual conversations between labor and business like that played by a labor union. Therefore, if the company held discussions with Korean journalist association's branch association on reorganization and the branch association consented to leave the reorganization plan entirely up to the company, then any business dismissal made under the reorganization plan satisfied the requirements of appropriate business dismissal.[65]

3. Cases not Finding Sincere Conference in Advance

(a) Flaws in the Process of Obtaining a Conference in Advance on Standards for Dismissal

Before the dismissal, there were no explanations at all to the laborers of the necessities for the dismissal, no preparation of the standards for selecting candidates for dismissal, no endeavors to avoid dismissal and no conference in advance with laborers or representatives of laborers on standards of selecting dismissal candidates. Business dismissals made under such circumstances have no objective reasonableness or social rationality.[66]

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64) Administrative Court of Seoul 1999.10.15. 99Gu6230. By this judgment, retrial decision of the Central Labor Relations Committee was reversed. The Central Labor Relations Committee had retried and found the dismissal of this case wrongful (1999.1.18. 98Buhae465, 475).

65) Central Labor Relations Committee 1998.7.14. 98Buhae132

66) High Court of Seoul 1999.12.2. 99Nu4930. By this judgment, first judgement was repealed. The first judgment

(b) Conference with Labor Union Limiting its Membership to a Specific Occupation

1) When the company held the first joint labor-business conference with the representatives of limousine labor union, there was no proposal for reorganization of managing positions but at a subsequent joint labor-business conference the company presented a plan to include managing positions into the reorganization. But the limousine labor union limits its membership to stewards and cannot be considered as representing general managing personnels since there was no representation conference between the labor union and representatives of majority of general managing personnels. Therefore, business dismissal of employees from managing positions after conference with the limousine labor union does not satisfy the requisites.[67]

2) If business dismissals are to be limited to specific occupations or positions, the company is required to confer with the labor union if the majority of the candidate laborers are union members; otherwise with the person who represents the majority of laborers. If the subjects of reduction are limited to classes of laborers who do not have or qualify for union membership, then the company should sincerely confer with the person who represents the majority of all laborers in those classes, or in each class. A simple conference with the labor union is not considered to be sincere endeavors of conference.[68]

(Administrative Court of Seoul 1999.4.7. 98Gu15466) and the retrial decision (Central Labor Relations Committee 1998.7.22. 98Buhae211) found the dismissal of this case to be reasonable.

67) Administrative Court of Seoul 2000.12.8. 99Gu31779.

68) District Court of Seoul 2000.2.11. 99Gahap55101. But the Supreme Court did not deny the validity of conference with labor union limiting its membership to specific occupation and a conference with the labor union which does not represent the non-union labores as basis for management dismissals of the non-represented labores(Supreme Court 2002.7.9. 2001Da29452).

(c) Conference with the Labor Union Which Cannot Represent the Non-Union Laborers

If the business dismissal was focused on the middle and upper class managing positions where the employees are not members of the labor union and are further likely to have conflicts with the labor union, coming to agreements with the labor union for business dismissal of such middle and upper class employees can lead the company into risky legal waters. So, considering that (i) the company first dismissed the middle and upper class personnel and then conferred with the labor union that does not represent the non-union personnel, and that (ii) there were no other conferences on standards for dismissal or means to avoid dismissal and the company accomplished the dismissal right after giving a unilateral notice of standards for dismissal to the labor union president, this dismissal is not based on sincere conference with the laborers.[69)]

(d) Notice to Labor Union Without Conference with the Non-Union Laborers

As long as the subjects for business dismissal were all non-union laborers, the company should confer with the person who represents the non-union laborers on the standards of resignation acceptance, standards for dismissal and protection measures for the dismissal, not with the labor union that does not represent the laborers. If the company deals only with the union in such a case, the company fails in its duty of faithful performance of advance notice and reaching a conference with the proper representative.[70)]

(e) Selective Acceptance of Resignation of a Wholesale Resignation

After allowing all personnels to submit a wholesale resignation, the company made a selective acceptance of them. Such selective acceptance of resignations is tantamount to actual business dismissal. Therefore, each dismissal was against the legal process of business dismissal and invalid. There was no need to examine substantial legality of

69) Administrative Court of Seoul 2000.8.22. 99Gu27282.

70) Administrative Court of Seoul 1999.7.16. 98Gu20871.

71) District Court of Seoul 1999.1.14. 98Gahap73256.

each resignation acceptance.[71]

4. Evaluations of the Judicial Precedents

The Court seems to interpret the meaning of "conference in advance" as "simple process of collecting opinions for prudent enforcement of the right of personnel business", and differentiate it from "agreement in advance" which means the coincidence of opinions between labor and business by sincere exchange of opinions for enforcement of the right of personnel business".[72] But since an conference in advance is comprehensively effective in meeting the requirements for business dismissal and "sincere conference" is expressly provided for by the statute, it is doubtful that the opinion of the Court which understands the meaning of conferende as simple process of collecting opinions is a correct one.[73] Therefore, it is proper to understand the meaning of conference in advance as laborers' understanding or comprehension of the means by which the company plans to accomplish business dismissals as well as reflecting laborers' opinions through sincere exchange of opinions between labor and business on the requisites for business dismissal.[74]

It is proper that the Court recognized as valid the consent of the joint labor-business conference or the employee union, agreement on employment stability, collective agreement and written agreement between labor and business. However there is some question as to whether the Court found as valid the conference on reorganization with labor union of which minority of personnel were members. But it is reasonable that the Court denied the validity of conference with labor union limiting its membership to

72) Professor Hyung-bae Kim says that "agreement in advance does not mean 'consent'", and insists on the legal features of agreement in advance "Especially the conference of labor union on this can be interpreted as collective bargaining on working conditions. But the para. 3 of that art. providing 'agree sincerely and notice ... about the measures to avoid dismissal and the standards for dismissal... to the labor union' is regulating the duties of agreement of the employer, does not seem to admit the right of collective bargaining on management dismissal of labor union." Hyung-bae Kim, *ibid*, p.444-445.

73) Professor Jong-ryul Lim seizes the meaning of agreement as "a series of process of exchanging opinions or discussing which includes explaining one's opinion to the other party, listening to the opinion of the other party, answering the questions of the other party, admitting the right of the other party and persuading the other party of the wongfulness of some its positions. And it is different from conference." Jong-ryul Lim, *ibid*, p.496.

74) Heung-jae Lee, *procedural restriction of management dismissal*, Seoul national university, The jurisprudence no. 3 4 of vol. 34, 1993, p.199.

specific occupation and a conference with the labor union which does not represent the non-union laborers as basis for business dismissals of the non-represented laborers.

IV. Other Restrictions on Business Dismissal

A. Advance Notice, Statement and Protective Measures of Government

The employer should give notice to labor union or representatives of laborers regarding the measures to avoid dismissal and the standards for any unavoidable dismissal 60 days before the actual dismissal (para. 3 of art. 31 of the Labor Standard Act). Further, when dismissing personnel on a certain scale, the employer should notify the minister of labor department according to the enforcement ordinances. Such a notification must include the reasons for dismissal, the scale of the dismissal, the contents of the agreement with the representatives of laborers, the schedule of the dismissal, etc. (para. 4 of art. 31 of the Labor Standard Act and para. 2 of art. 9-2 of the enforcement ordinances). The government, then, should take any necessary measures prior to the dismissal to promote livelihood stabilization, re-employment and vocational training of the dismissed (para. 2 of art. 31-2 of the Labor Standard Act).

The duties of employers to give advance notice is a requisite for starting and ultimately reaching an agreement in advance with the employee party, as business dismissal without such an advance agreement is invalid. But the duties of notification of employers are for purposes of administrative guidance and supervision on mass dismissal, as there are no regulations dealing with the violation of the notification duties. Therefore, business dismissals done without the initial advance notice to the labor union or other labor representatives are valid, if all other conditions have been met.

There was an amendment to Employment Insurance Act to provide unemployment allowance according to the regulations of protective measures to those dismissed for business reasons.

B. Bmployers' Duties to Endeavor to Re-Employ Laborers Dismissed in a Prior Dismissal Action

When an employer who made business dismissal wants to employ personnel within 2 years from the date of dismissal, he/she should try to re-employ the laborers who

were dismissed in the prior dismissal action provided that the dismissed laborer wants the re-employment and upon consideration of the work performed by the laborer prior to the dismissal (para. 1 of art. 31-2 of the Labor Standard Act). The Court does not state that such re-employments are required by the law, however. The attitudes of the Court are as follows.

1. Re-Employment of the Dismissed in a Different Position

Re-employment of the dismissed to a different position without confirming the laborers' opinions is not seen as violating the para. 1 of art. 31-2 of the Labor Standard Act.[75]

2. Effects of Employers' Failure to Re-Employ Laborers Dismissed in a Prior Business Dismissal Action

If the business dismissal was not unfair labor practice, then the mere fact that the company did not re-employ the dismissed first when making new hires which is against the para. 1 of art. 31-2 of the Labor Standard Act does not affect the legitimacy of the previous business dismissal.[76]

V. Conclusion

We have examined the recent tendency of judicial precedents regarding the requisites and restrictions of business dismissal, and will now examine briefly and in general the principal problems of the judicial precedents and the actual functions of the statutes.

It is unsatisfactory that after the amendments of the statutes, the Court at once seized four requisites for effective business dismissal, in essence clinging to old precedents which require "the dismissal to be admitted as completely and objectively reasonable and socially rational when considered as a whole". The purposes of the statutes are to enact uncertain concepts into four certain requisites to maintain "objective reasonableness and social rationality" in business dismissals unlike general

75) District Court of Seoul 2000.9.22. 99Nu14593

76) District Court of Seoul 2000.9.22. 99Nu14593

dismissal. Then, a dismissal lacking even one requisite is to be considered illegal dismissal that is deficient in “objective reasonableness and social rationality”. Consequently, there is no need for checking the whole requisites. The Court judges the urgent business necessities with “objective rationality for personnel reduction.” This is a fallacy in logics, as pointed out above, which does not present the urgent business necessities as a requisite among the four requisites for objective rationality for personnel reduction and makes an uncertain general concept a criterion for interpretation of individual certain concept. Consideration of a sincere conference in advance with the laborer party as a comprehensive effective requisite means that the meaning of the conference should be interpreted not as “a simple process of collecting opinions” just like the Courts do, but as “laborers’ understanding or comprehension” through sincere exchange of opinions.

The actual functions of the laws on restrictions of business dismissal differ from country to country, with each country’s law having good and bad points and Korea is no exception. These laws have large impacts on protecting the laborers from unilateral dismissal of the employer, but also have undesirable impact of enabling evasion of the law to avoid the restrictions on dismissal or underground dealings between labor union and business. Actually, to avoid the restrictions on dismissal, enterprises reduce a huge personnel by resignation under instruction which is nearly compulsory, volunteer dismissal and improper change of occupation and, in case of a strong labor union, closed written agreement between labor and business or closed agreement on stabilization of employment. Besides, these laws have certain limitations in their application to small and medium-sized enterprises on general principles. Therefore, the problem of how to maximize the good impacts of the laws on business dismissal should be studied further in the future, but it is also a structural problem related to the legal conventions of Korea. Considering these points and because the Court plays an important role, how to lead the change of the Courts to ameliorate the problems as pointed out above is a formidable task.