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LABOR JUDGEMENT ASSESSMENT

Important legal precedent concerning termination of a labor contract due to restructuring

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Judgement No.: 01/2018/LD-PT (see the details HERE)
Judgement level: Appellate level
Judgement court: High-level People's Court in Da Nang
Matter: Dispute on unilateral termination of a labor contract
Plaintiff: Mr. Alparslan M ("***Mr. M***") – Employee
Defendant: AVN Travel and Trading Company Limited ("***AVN Company***") – Employer

Summary of facts:

- Mr. M is a foreigner. He signed a definite-term labor contract with AVN Company for the position of Operation & Supervision Expert for the working period between December 01, 2016 and September 30, 2018. He was granted a work permit No.239/2016/GPLD dated December 01, 2016.

- On March 24, 2017, the Human Resource Manager of AVN Company provided Mr. M a "Decision on terminating the labor contract" dated March 23, 2017 ("***Decision dated 23***"). This Decision had no signature of the legal representative of AVN Company but had its stamp affixed on the first page. The reasons for termination were stated as: Mr. M did not comply with regulations of AVN Company as well as decisions by his line manager, had repeated violations, did not swipe the timekeeping card, and failed to complete the assignment as requested by his line manager.

- On March 25, 2017, AVN Company issued another Decision on terminating the labor contract with Mr. M dated March 25, 2018 ("***Decision dated 25***"). The reason for the termination stated was due to restructuring. Before this, however, as per its Labor Utilization Plan when restructuring, AVN Company planned to transfer Mr. M to the accounting department because Mr. M had accounting expertise, provided that he would be issued a work permit for such new position by the Department of Labor- Invalids and Social Affairs.

- Requests of the plaintiff: By issuing Decision dated 23, Mr. M claimed that AVN Company illegally unilaterally terminated his labor contract as well as violated the advance-notice obligation. Therefore, Mr. M requested that AVN Company (i) revoke Decision dated 23, (ii) reinstate him, (iii) pay him the salaries and other benefits for the period during which he was not allowed to work, (iv) compensate him 02 months' salary, and (v) additionally compensate him in other amounts if not reinstating him.

- Defendant's opinion: AVN Company disagreed with the requests of Mr. M by arguing that Decision dated 23 was invalid.

- Decisions of the Court:

  - » To accept the argument of AVN Company to not recognize the validity of Decision dated 23.

  - » To accept the termination by AVN Company of Mr. M's labor contract due to restructuring under Decision dated 25.

  - » To force AVN Company to pay Mr. M a job-loss allowance in accordance with the law.

Relevant legal issues and assessment:

1. Validity of decision on terminating the labor contract

In the above-mentioned case, there were two decisions on terminating the labor contract with two different reasons, respectively Decision dated 23 and Decision dated 25. The Court rejected the validity of Decision dated 23 because it was without the signature of the legal representative of AVN Company. The Court's rejection was reasonable. This is because under Article 3 of Decree No.05/2015/ND-CP (amended by Decree No.148/2018/ND-CP), the signer of a labor contract on behalf of the employer must be its legal representative as provided in the company's charter or a person authorized by its legal representative under written authorization. Accordingly, the termination must be also made by the legal representative or the person authorized by the legal representative under written authorization. Decision dated 23 was sent to Mr. M by the Human Resource Manager of AVN Company but had no signature of the legal representative and, therefore, was invalid.

As shown from the above precedent, companies should pay attention to sending any termination notice to employees. This is because any mistake can later be used against the company in any lawsuit filed by the employee. Returning to the case mentioned above, it was explained that Decision dated 23 was just a draft which was sent by the Human Resource Manager of AVN Company to Mr. M for his comments before officially being presented to the management of AVN Company for approval. Regardless of this justification, Mr. M considered it as evidence of illegal unilateral termination and subsequently sued AVN Company to claim compensation. In practice, the human resource departments of not only AVN Company but also many other companies have got into the "administrative" habit of sending drafted documents (e.g. notices, agreements, etc.) of labor contract termination to relevant parties, especially emails notifying the employees of the companies' termination plan in advance. However, often the human resource departments fail to foresee the potential risks of this action. Specifically, if there is any inappropriate content in these documents or emails, they can become decisive evidence against companies in a dispute regarding illegal unilateral termination, which can lead to heavy compensation to be paid by the company. Therefore, before issuing any official decision on terminating the labor contract with any employee, the company must be careful and should restrict providing employees with any information in any form which can be recorded.

2. Proving restructuring as the reason for termination of the labor contract

In practice, it is very difficult to prove restructuring as the reason for termination of the labor contract. Specifically, the company must successfully prove (i) restructuring is necessary due to actual business demands and (ii) that the company has put all its efforts into retraining its employees for new positions after restructuring but does not have positions available for all transitioned employees and, as a result, has to terminate employment. In the above-mentioned case, AVN Company intended to transfer Mr. M from an Operation & Supervision Ex-

pert position to accounting according to its Labor Utilization Plan. However, the Department of Labor - Invalids and Social Affairs issued its opinion about AVN Company's plan in that: many current colleges and universities in Vietnam provide perfectly adequate training for accounting majors, thus, employing a foreigner for such a position was unnecessary. Therefore, the Department of Labor- Invalids and Social Affairs did not agree to issue a work permit for Mr. M for his new position as an accountant. The opinion of the Department of Labor - Invalids and Social Affairs was one basis on which the Court accepted the reason why AVN Company could not transfer Mr. M to a new position but had to terminate his labor contract. Nevertheless, it was AVN Company's mistake to issue Decision dated 25 to terminate Mr. M's labor contract before getting the full and official opinion from the Department of Labor- Invalids and Social Affairs denying the work permit for Mr. M's new position. As a matter of fact, it is noteworthy that when terminating employment due to restructuring, companies must comply with the regulation of "giving a 30-day advance notice to the provincial labor competence authority" before termination (Article 44.3 of the 2012 Labor Code) to ensure that the termination is legal. Meanwhile, compliance with the regulations of work permits when the restructuring affects foreign employees' job should be also taken into account.

3. Giving notice to employees when terminating a labor contract due to restructuring

When terminating a labor contract due to restructuring, companies are not responsible for giving advance notice to the employees. On the contrary, this is a must in cases of unilateral termination of a labor contract under Article 38 of the 2012 Labor Code (i.e. giving an at least 30-day advance notice if it is a definite-term labor contract, or an at least 45-day advance notice if it is an indefinite-term labor contract). This was re-confirmed by the Court in AVN Company's case. However, based on this precedent, it can be seen that there is only a thin line to distinguish between the termination of a labor contract due to restructuring (Article 44 of the 2012 Labor Code) and unilateral termination of a labor contract (Article 38 of the 2012 Labor Code), which is based primarily on the ability of the company to prove the reason for labor contract termination. Any minor mistake during the termination procedure during restructuring can lead to classification as an illegal unilateral termination because the nature of termination due to restructuring is still basically a unilateral action by the companies. Therefore, though it is not required by law, the companies should give advance notice to the employees referring to Article 38.2 of the 2012 Labor Code, i.e. notifying the employees in advance at least 30 days in case of a definite-term labor contract, or at least 45 days in case of an indefinite-term labor contract.

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