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Collective Dismissal in China

Case Presentation:

Ms. Xu joined the Company "X" ("**Employer**") in Shanghai in 2003. In 2017, the Employer determined to implement a collective dismissal due to serious difficulties encountered in its business operation, and planned to dismiss part of its employees.

For the purpose of collective dismissal, the Employer notified and explained the situations to its internal trade union, proposed the dismissal plan and listened to the opinions of the trade union, and then reported the dismissal plan to local Human Resource and Social Security Bureau ("**HR Bureau**") which issued a Receipt of Acceptance.

Till 2017, Ms. Xu would attain her retirement age in less than 5 years, and her husband was unemployed and her daughter was a minor.

On December 28, 2017, the Employer released the Implementation Proposal on Collective Dismissal with the name list of dismissed employees, and Ms. Xu was also on the name list. In the middle of January, 2018, Ms. Xu received a written notice from the Employer, indicating: 1) the employment relationship was terminated on December 28, 2017; 2) the Employer would pay the economic compensation based on the dismissal plan.

Then Ms. Xu sued the Employer for double economic compensation due to the Employer's unjustified dismissal.

During the process of litigation, the Employer confirmed it was undergoing the liquidation procedure.

Viewpoint of the Judge:

- Whether the concerned collective dismissal is lawful?

The Employer has already ceased its production and business, and carried out the retrenchment after completing the following procedure: 1) explain the situations to the trade union thirty days in advance; 2) listen to and seek the opinions of the trade union; 3) report the dismissal plan to the HR Bureau, which is in strict compliance with Article 41 of Labor Contract Law[1]. Hence, the concerned collective dismissal is lawful.

- Whether Ms. Xu can be exempted from the collective dismissal or has the priority to maintain the employment relationship?

[1] Article 41 of Labor Contract Law: "*Under any of the following circumstances where an employer needs to retrench 20 or more employees or where the number of employees to be retrenched is less than 20 but comprises 10% or more of the total number of employees of the enterprise, the employer shall explain the situation to the labor union or all staff 30 days in advance and seek the opinion of the labor union or the employees, the employer may carry out the retrenchment exercise upon reporting the retrenchment scheme to the labor administrative authorities……*"

Pursuant to Article 42 of Labor Contract Law, where an employee has worked 15 years consecutively for the employer and will attain his/her statutory retirement age in less than five years, the employer is not entitled to terminate his/her labor contract on the ground of Article 41 of Labor Contract Law.

The Court considers that although Ms. Xu will attain her statutory retirement age in less than 5 years, her seniority with the Employer is less than 15 years; hence, she is not within the range of exemption provided by Article 42 of Labor Contract Law.

Furthermore, pursuant to Article 41 of Labor Contract Law, an employee who has entered into a fixed-term labor contract for a longer period with the employer, or an employee whose family members are unemployed or who needs to support aged or under-aged family members, such employee shall have the priority to remain the labor relationship under the collective dismissal. In this case, the judge considers that Ms. Xu's situation did not satisfy the retain conditions provided by the law, hence, Ms. Xu's assertion of maintaining the employment relationship in priority lacks factual and legal basis.

Finally, the judge rejected all her claims.

DS Comments:

Collective dismissal can only be implemented when the number of dismissed employee is no less than 20; or if the number of the dismissed employees is less than 20, but representing more than 10% of the total employees in the company will be dismissed.

Besides, the employer shall meet both substantial and procedure conditions.

- **The Substantial Conditions**

1) The employer undergoes a restructuring according to the Enterprise Bankruptcy Law of the PRC ("**Situation 1**");
2) The employer suffers serious difficulties in production and business ("**Situation 2**");
3) The employer undergoes a change of production, significant technological reform or a change of the operation mode, and upon the variation of the labor contract, it still needs retrenchment ("**Situation 3**"); or
4) The objective economic circumstances upon which the labor contract is concluded have undergone significant changes and as a result thereof, the labor contract can no longer be performed ("**Situation 4**")

In practice, the enterprise shall assume the burden of proof to prove that it has reached any of the substantial conditions as listed above. In China, when an enterprise determines to file bankruptcy, it shall file the application to the court. Hence, Situation 1 can be proved by a civil award of the court.

Due to the impact of COVID-19, many companies in China are suffering serious difficulties in production and business operations, and Situations 2 and 4 may be the main reasons for which the companies consider to carry out the collective dismissal.

Regarding Situation 2, local authorities always publish their own specific judgment criteria on the "serious difficulties in production and business operations", e.g. according to the Regulation of Tianjin[2], effective as from 2001, after ceasing the recruitment for 12 consecutive months, in event of meeting the following conditions simultaneously, the enterprise could dismiss employees according to Article 41 of Labor Contract Law:

[2] Temporary Regulation on Collective Dismissal by The Enterprises of Tianjin Municipality, released on August 1, 2001, currently valid

1) an increasing loss during 3 consecutive financial years and the business cannot be improved;
2) within 2 consecutive years the operation capacity rate has been less than 60%, and more than 50% of the employees are temporarily laid off;
3) incapability to pay salaries according to local minimum salary for 6 consecutive months;

The authorities of Beijing[3] and Shanghai[4] used to release the specific judgment criteria on the "serious difficulties in production and business operations" separately, which have been abolished due to the economic environment changes. However, regardless of the validity, the rules and regulations released can still be the reference for the enterprise when determining the implementation of collective dismissal.

As such, when implementing the collective dismissal under Situation 2, the enterprise shall note to keep sufficient evidences including but not limited to financial report, production documents and accounting books.

Regarding Situation 4, it is a catch-all clause which makes supplement to the previous 3 situations in flexible. The application of this situation relies on the evidences presented by the company, the specificity of the case and the discretion of the court.

- **The procedure conditions**

Article 41 of Labor Contract Law has published a general procedure for the implementation of a collective dismissal. In addition, some local authorities have published their own procedures. We take Shanghai for example, combining the practice and the Notice Regarding Reports on the Lawful Dismissal by Employers released by Shanghai Human Resource and Social Security Bureau on January 8, 2009, it is mandatory for enterprises in Shanghai to strictly follow the below procedure:

1) Convene a meeting with the trade union or all the employees thirty days in advance, and explain the situations faced by the company;
2) Propose the dismissal plan for discussion, which shall include the name list of the dismissed employees, the time schedule and the economic compensation plan;
3) Seek the opinions of the trade union or all the employees for the dismissal plan, which shall be modified and improved further;
4) Submit the dismissal plan and file the registration in the local HR Bureau;
5) After obtaining the opinions of local HR Bureau, the enterprise may release the official dismissal plan and carry out the corresponding formalities with the dismissed employees.

- **Special Notes**

As mentioned above, Article 42 of Labor Contract has listed the employees who are entitled to be exempted from the collective dismissal, including:

1) An employee who has engaged in work exposed to occupational hazards has not undergone post-employment occupational health check or during the period where an employee is suspected to have contracted an occupational illness or under medical observation;
2) An employee who has contracted an occupational illness or suffered a work injury while working for the employer and is confirmed to have lost his/her labor capability wholly or partially;
3) An employee who is within the stipulated medical treatment period due to illness or non-work-related injury;
4) A female employee who is within the pregnancy, maternity leave or lactation period;
5) An employee who has worked for 15 consecutive years with the employer and will attain his/her retirement age in less than 5 years, or;

[3] Regulation on Collective Dismissal by The Enterprises of Beijing Municipality, released on March 22, 1995, currently invalid.
[4] Rules on The Implementation of Collective Dismissal by The Enterprises of Shanghai Municipality, released on February 18, 2000, currently invalid.

6) Any other situations stipulated by laws and regulations.

It shall also be noted that according to the Notice on Properly Handling Labor Relation Issues during the Period for Prevention and Control of COVID-19, currently, the following employees are also within the exemption range: (i) the employees placed in isolation, on observation or required medical treatment (due to pneumonia, or because they are considered as part of the at-risk group, or have been in close contact with someone infected by the virus); (ii) the employees against whom emergency measures are taken by the government and who cannot work normally.

Tips for DS clients:

In spite of the above, the judicial review by the courts on the application of Article 41 is relatively strict. Furthermore, due to the impact of COVID-19, we understand many companies are considering to apply collective dismissal in order to save costs. The spirit indicated by the relevant rules and regulations released during the COVID-19 period is to "stabilize jobs", which means the government encourages the enterprises to take all measures (e.g. shorten the working hours, adjustment of salary, rotation of work and rests, arrangement of annual leave and compensation leave) to avoid the collective dismissal. Therefore, it is suggested to take all flexible measures in order to avoid implementing a collective dismissal during this period.

For the company finally determines to implement a collective dismissal, it is recommended to consider the following points:

- The company shall note to review the background of the dismissed employees at the beginning of the collective dismissal, in order to avoid involving any employee protected by the law.

- The company shall note to keep all the evidences to prove its qualification to implement the collective dismissal.

- The company shall strictly comply with the legal procedure for the collective dismissal, and keep the relevant evidences (e.g.: the meeting minutes for seeking the opinions of the employees and the trade union; the sound or video records; the attendance record of the employees attending the meeting), which could be a preparation for any labor disputes in the future.

- The company shall closely keep communication with local HR Bureau, and seek relevant opinions, in order to ensure that the registration will proceed smoothly.

- During the period of implementing collective dismissal, it is suggested to persuade the employees to accept termination of labor contract through friendly negotiation instead of terminating their labor contract unilaterally on the ground of collective dismissal.

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