

Contents

■ Labor Column ■

- Recent court decision trends on the “current employee” requirement in deciding ordinary wage ...2

■ Case Highlights ■

- Successful representation of employer in an ordinary wage action filed by local agricultural cooperative employees7
- Successful representation of employer in a claim for retirement allowances filed by consigned sellers at a department store.....8
- In a case where the employees of an agricultural cooperative were subjected to disciplinary dismissal on account of embezzlement, JIPYONG successfully appealed on behalf of the cooperative and obtained reversal of the lower court decision which found the disciplinary dismissal void9

■ News ■

- Economic, Social & Labor Council reaches agreement on improvement of flexible work hour system.....10
- Ministry of Employment and Labor published “manual on identification, prevention of & countermeasures against harassment at work”11

■ Latest Court Decisions ■

■ Labor Column ■

Recent court decision trends on the “current employee” requirement in deciding ordinary wage

1. Introduction

Recently the Seoul High Court has decided that the requirement of being in employment, i.e., holding status of a current employee as of the payment date, attached to payment of regular bonus in the form of a fixed compensation is invalid as long as it is construed that an employer would not be required pay for the work a retired employee had already provided (Seoul High Court 2017Na2025282 decided December 18, 2018 later referred as “this decision”). Many companies having this “current employee” requirement for their regular bonuses appear to be in confusion because of the potential impact that this High Court decision may have on the scope of ordinary wages.

However, this decision invalidating the “current employee” requirement (and thus recognizing the regular bonus as part of ordinary wage) needs to be reviewed in conjunction with the past Korean decisions regarding ordinary wages, to better understand the impact of the recent decision of the Seoul High Court. In fact, there is a Supreme Court decision in 2018 that upheld a lower court decision, which ruled that the “current employee” requirement attached to regular bonus payment was valid, but that the regular bonus payment that had the “current employee” requirement should not be part of ordinary wages as such payment lacked the element of “fixability”.

We will further discuss below the recent views of Korean courts regarding the ordinary wages and its relationship to “current employee” requirement attached to regular bonus payment.

2. Understanding the ordinary wage and the “current employee” requirement

(1) Ordinary wage

Under the Labor Standards Act of Korea (LSA), the term “wages” refers to wages, salary and any other kinds of money or valuables, regardless of their titles, which the employer pays to a worker as remuneration for work. In addition the term “the ordinary wage” means hourly wage, daily wage, weekly wage, monthly wage, or contract amount to be paid to a worker for a specifically agreed work or entire works on a regular and flat basis. As compared to the “ordinary wages”, we should note the term “average wage,” which refers to the money amount calculated by dividing the total amount of wages paid to a relevant worker during three calendar months immediately before the day grounds for calculating his/her average wages occurred by the total number of calendar days during those months.

Ordinary wage is used as a basis for calculating extended/night/holiday work pay (Article 56, LSA), annual paid leave (Article 60, LSA), advance notice of dismissal pay (Article 26, LSA), minimum standard for average wage (Paragraph 2, Article 2, LSA), and maternity leave payment (Article 76, Employment Insurance Act). On the other hand, average wage is used as a basis for calculating retirement allowance (Article 34, LSA) and shutdown allowances (Article 46, LSA).

(2) “Current employee” requirement

In deciding whether a certain payment is an ordinary wage, all of the following 3 elements need to be met: ① regularity ② uniformity ③ fixability. The “current employee” requirement should be discussed in the context of “fixability” element as the requirement is linked to whether a relevant employee is employed as of a specific date to be eligible to receive a certain payment.

The Supreme Court views the element of “fixability” as, in regard to an employee who has provided his/her labor during any given day, the least amount of wage that should be naturally and definitely paid to the employee in return for such labor provided, even if the employee retires the next day (Supreme court decision 2012Da94643 decided December 18, 2013).

Therefore, in regards to any regular bonus payment conditioned upon meeting the “current employee” requirement, if the “current employee” requirement attached to such payment is

deemed valid, then whether such bonus is an ordinary wage would be determined by the relevant bonus possessing (or not possessing) the element of “fixability”.

3. Court decisions that have invalidated the “current employee” requirement

Except for the above-noted Seoul High Court case, it is difficult to find any other court decisions in which the regular bonus payments were deemed part of ordinary wages by way of invalidating the “current employee” requirement relevant to regular bonus payment. There is one Gwang-ju District Court case, however, in which the court concluded that the existence of the “current employee” requirement alone did not necessarily mean that the fixability of a regular bonus must be denied (Gwang-Ju District Court decision 2014Kahap66690 decided July 7, 2016). But this court case had unusual facts in that the employer proceeded to make the regular bonus payment to the employee on a pro rata basis even after leaving the company; so it is difficult to regard this Gwangju court decision as another court decision that recognized the regular bonus as ordinary wage through invalidation of the “current employee” requirement.

4. Court decisions recognizing validity of the “current employee” requirement

As shown below, the Supreme Court and many district court cases have concluded that regular bonuses with the “current employee” requirement lacks fixability, and thus regular bonuses are not ordinary wage.

(1) Supreme court decision 2016Da15150 decided September 21, 2017

In this decision, the Supreme Court agreed with decision of the lower court that the “current employee” requirement would be valid so long as it is not against mandatory provisions or public order and good morals, and that since the requirement was continuous work during the period subject to regular bonus payment, such payment condition was not contrary to such mandatory provisions or such order.

(2) Supreme court decision 2017Da232020 decided September 26, 2017

In this case, the district court recognized the element of fixability to a regular bonus with the “current employee” requirement, as the requirement was an incidental condition and on this condition alone, it would be difficult to reject the element of fixability.

But the Supreme Court overturned the lower court’s decision, stating that because the regular bonus payments were made to all persons who were employed as of a specific date, it was difficult to view those payments for compensation for the certain labor provided.

(3) Supreme court decision 2016Da237653 decided October 25, 2018

In this case, the lower court decided that the regular bonus with the “current employee” requirement was not ordinary wage, stating, in part, that such requirement “did not force the worker to give up his/her wage beforehand or to work against his/her will.” The Supreme Court concurred with the lower court’s decision that a regular bonus with the “current employee” requirement should not be included in ordinary wage because it lacked fixability, and that the “current employee” requirement was valid.

(4) Discretionary review dismissal decisions and decisions of lower courts

A. Seoul High Court 2015Na25909 decided October 12, 2016, etc.

The court in this case stated that an employer can decide the amount of pay, payment condition and the form of payment upon agreement with employees/labor unions, considering various factors such as the employer’s financial situation and the workers’ level of contribution to production, etc. and, thus, the “current employee” requirement as a payment condition was valid, barring such circumstances as the said requirement not meeting the minimum standard prescribed under the Minimum Wage Act.

B. Seoul High Court 2017Na2033597 decided March 28, 2018

The court in this case stated that “employed as of a specific date” condition on a base performance bonus payment cannot be viewed as unduly restricting workers to such a level that it is against the workers’ freewill and social norm. It also stated that the intent of Article 43 of the Labor Standards Act (Payment of Wages) is that all wages that have become payable upon meeting all necessary conditions must be fully paid, and that this provision does not apply to the case because “employed as of a specific date” condition is one of the conditions giving rise to a wage payment claim.

5. Conclusion

As seen above, most Supreme Court and lower courts are of the view that the “current employee” requirement on regular bonuses is valid, and thus there’s no element of fixability to it. So, the Seoul High Court decision first described above is seen as an exception, and it is expected that the Supreme Court will likely conclude differently.

※ Jipyong provides legal advice relating to matters of labor law. If you have any questions, please do not hesitate to contact Mr. Soo Saeng MOON at ssmoon@jipyong.com or +82-2-6200-1882.

■ Case Highlights ■

Successful representation of employer in an ordinary wage action filed by local agricultural cooperative employees

In a case where the employees of a local agricultural cooperative in Chungcheongbuk-do filed a claim for payment of additional bonus on the ground that welfare pension shall be included in ordinary wages, JIPYONG Labor Practice Group successfully represented the agricultural cooperative in obtaining dismissal of most of the claims based on (1) the provision in the payroll regulations that excluded welfare pension from ordinary wages, and (2) the existing agreement to exclude from ordinary wages.

The court dismissed all of the claims, except for the claim for unpaid overtime allowance of KRW 18,000 for one of the plaintiffs.

[Main Contact]



Seongcheol PARK
Partner

■ Case Highlights ■

Successful representation of employer in a claim for retirement allowances filed by consigned sellers at a department store

In a case where the consigned sellers under consignment sales agreements with a global sportswear company claimed for payment of retirement allowances on the basis of their alleged employee status, JIPYONG Practice Group successfully defended the company on the grounds such as that (1) the shop owner operated its business independently from the company, and (2) the company never checked attendance of the shop owners.

The court accepted such rebuttal and dismissed all of the plaintiffs' claims.

[Main Contact]



Soon Chul KWON
Partner



Seongcheol PARK
Partner

■ Case Highlights ■

In a case where the employees of an agricultural cooperative were subjected to disciplinary dismissal on account of embezzlement, JIPYONG successfully appealed on behalf of the cooperative and obtained reversal of the lower court decision which found the disciplinary dismissal void

JIPYONG Practice Group was retained to appeal the lower court decision in which the employees subjected to disciplinary dismissal on account of embezzlement succeeded on their claim of unfairness of the disciplinary action. We collected additional evidences and reorganized and presented the circumstances which may be taken into consideration in determining the disciplinary action, which the court accepted and thus reversed the lower court decision finding the dismissal just.

The court applied more strict criteria with respect to the liabilities of officers/employees in connection with embezzlement at financial institutions, and this case is expected to serve as an important precedent in the future.

[Main Contact]



Seongcheol PARK Partner
Chang Wook MIN Associate

■ News ■

Economic, Social & Labor Council reaches agreement on improvement of flexible work hour system

The work hour system improvement committee under the Economic, Social & Labor Council agreed to extend the unit period of flexible work hour system from the current 3 months to 6 months, and accordingly the unit periods will be divided into periods of (1) up to 2 weeks, (2) up to 3 months, and (3) more than 3 months/less than 6 months.

■ News ■

Ministry of Employment and Labor published “manual on identification, prevention of & countermeasures against harassment at work”

The recent amendment to the Labor Standards Act dated January 15, 2019 resulted in incorporation of provisions on ‘harassment at work’ into the laws of the Republic of Korea for the first time. As a result, any employer employing 10 or more employees is required to revise its rules of employment accordingly (Article 93, Subparagraph 11 of the Labor Standards Act). The MOEL presented (1) the concept of and prerequisites for harassment at work, and (2) criteria for judgment of harassment at work, etc. in the above manual.

■ Latest Court Decisions ■

1. Decision finding the retirement age of manual laborers to be 65 in accordance with the empirical rule
2. Decision finding that the ordinary wages shall be recalculated and statutory allowances paid additionally, unless such payment is is burdensome on company operations
3. Decision finding interim settlement of retirement allowances without the employee's request invalid
4. Decision finding dismissal immediately following delivery of recommendation for voluntary resignation unjust
5. Decision finding suspension of employment two years after occurrence of the cause for disciplinary action just