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劳动与雇佣

工会在解雇雇员程序中的作用

THE ROLE OF TRADE UNION IN DISMISSING THE EMPLOYEES

在用人单位单方解雇雇员的程序中，很多用人单位认为只要单方解雇的理由充分，解雇的法律行为就应当是有效的。是这样吗？

In the process of dismissing the employees by the company, many companies believe that as long as the ground for dismissal is sufficient, the validity of dismissal shall be recognized. Is it true?

严格来说，光是注重解雇理由的合法性，而没有注意到解雇应当履行的法定程序，有时候可能导致解雇程序违法，进而导致解雇行为被判定为违法解除。

Strictly speaking, it is no doubt to attach importance to the validity of the ground for dismissal. However, if the legal requirement in terms of dismissal procedure is ignored, it may lead to the result the dismissal is declared as illegal.

在此，我们要讨论的是工会在解雇雇员程序中的地位和作用。相信很多用人单位并未注意到工会的作用，而事实情况是，很多中小企业根本就没有工会。这样的情况下，如果没有工会的参与，会对用人单位的解雇行为产生何种影响呢？

In this article, we would like to discuss the role of trade union in dismissing the employees. The fact is that many companies don't notice the role of the trade union, and many of them even don't have trade union in the company. Under such circumstances, what is the impact if the dismissal happens without involvement of trade union?

案例：因为用人单位没有履行通知工会的程序，用人单位解雇雇员被判定违法

Case Study: Dismissal is declared illegal as the company fails to inform the trade union of the fact of dismissal

在上海进兴鞋业有限公司诉马玉环劳动合同纠纷一案二审民事判决书中，上海市第一中级人民法院认为：依据劳动合同法的规定，用人单位单方解除劳动合同，应当事先将理由通知工会。本案马玉环是否存在严重违纪的事实暂且不论，根据马玉环于原审中提供的证据，进兴公司已于 2008 年经原南汇区航头镇总工会批复同意建立独立工会，并无证据证明进兴公司在作出解除双方劳动合同的决定前已通知过该公司工会，因此，原审认定进兴公司违法解除劳动合同并无不当。

In the court decision regarding the labor case Shanghai Jinxing Shoe Co. Ltd vs. Mr. Ma Yuhuan, the Shanghai No. 1 Intermediary court pointed out that according to the Employment Contract Law, the company unilaterally terminated the employment contract

but it shall inform the reason of dismissal to the trade union. In this case, regardless of the fact if Mr. Ma has any misconduct, according to the evidences provided by Mr. Ma, the company has set up its trade union in 2008 which was approved by the general trade union in Hangtong Town, and no evidence indicated that the company has informed the trade union by the company before the dismissal was made. Thus, the dismissal by the company is an illegal one.

法律依据

Legal Basis

上述案例中，用人单位因为没有履行通知工会的程序而被法院判定解雇违法，其法律依据如下：

In above case, the legal basis for declaring illegal dismissal by the court due to failure of informing the trade union includes:

- 《劳动合同法》第43条规定，用人单位单方解除劳动合同，应当事先将理由通知工会。用人单位违反法律、行政法规或劳动合同约定的，工会有权要求用人单位纠正。用人单位应当研究工会的意见，并将处理结果书面通知工会。

According to Article 43 of the Employment Contract Law, in case of unilateral termination of the employment contract, the company shall inform the reason of termination to trade union in advance. If the company breaks the laws and regulations, or the employment contract, the trade union is entitled to request to rectify. The company shall take the opinion of the trade union into consideration and inform the trade union of the result in writing.

- 《最高人民法院关于审理劳动争议案件适用法律若干问题的解释（四）》第12条规定：建立了工会组织的用人单位解除劳动合同符合劳动合同法第三十九条、第四十条规定，但未按照劳动合同法第四十三条规定事先通知工会，劳动者以用人单位违法解除劳动合同为由请求用人单位支付赔偿金的，人民法院应予支持，但起诉前用人单位已经补正有关程序的除外。

According to Article 12 of Interpretation of the Supreme People's Court on Several Issues about the Application of Laws for the Trial of Labor Dispute Cases (IV), in the event the company with established trade union terminates the employment contract according to Article 39 & 40, but fails to inform the trade union in advance according to Article 43 of the Employment Contract Law, it shall be supported by the court if the employee requests for compensation due to illegal termination by the company. However, the company is allowed to make remedy prior to filing to the court.

几个问题

Several Questions

I. 在何种情况下，解雇雇员需要履行通知工会的程序

Under which circumstances the procedure of informing the trade union shall be followed in dismissing the employees

根据上述规定，只有在用人单位单方解除劳动合同的情况下，需要事先将理由通知工会。在目前《劳动合同法》中，存在允许用人单位单方解除的情况包括如下：

According to the above regulations, a prior notice to trade union is required only in case of

unilateral termination by the company. The unilateral termination by the company under the Employment Contract Law includes:

- 在试用期间被证明不符合录用条件的;
It has been proved that the employee does not satisfy the recruitment requirements during the probation period;
- 严重违反用人单位的规章制度的;
The Employee is in serious violation of the bylaws of the employer;
- 严重失职, 营私舞弊, 给用人单位造成重大损害的;
The employee causes any severe damage to the employer due to his grave negligence to his duties or seeking private benefits;
- 劳动者同时与其他用人单位建立劳动关系, 对完成本单位的工作任务造成严重影响, 或者经用人单位提出, 拒不改正的;
The employee establishes a labor relationship with other employers at the same time and may seriously influence his completion of the works in this entity, or he refuses to make a correction even though the employer has pointed it out;
- 以欺诈、胁迫的手段或者乘人之危, 使用人单位在违背真实意思的情况下订立或者变更劳动合同, 致使劳动合同无效的;
The employee concludes or modifies a labor contract by way of deception or coercion, or taking advantage of the other party's difficulties, to force the employer to conclude an employment contract, or to make an amendment thereto, that is contrary to the employer's true will, which leads to the labor contracts invalid;
- 被依法追究刑事责任的;
The employee is subject to criminal liabilities according to law;
- 劳动者患病或者非因工负伤, 在规定的医疗期满后不能从事原工作, 也不能从事由用人单位另行安排的工作的;
The employee falls ill or is injured for a non-work-related reason, who is not able to bear the original post after the expiration of the medical treatment period as prescribed, nor can he assume any other position as arranged by the employer;
- 劳动者不能胜任工作, 经过培训或者调整工作岗位, 仍不能胜任工作的;
The employee is incapable of doing his job and remains so upon training or upon adjustment to his post;
- 劳动合同订立时所依据的客观情况发生重大变化, 致使劳动合同无法履行, 经用人单位与劳动者协商, 未能就变更劳动合同内容达成协议的。
The objective circumstance has altered significantly, on which the conclusion of the labor contract is based, which results in that the labor contract is unable to be performed. And no agreement concerning the modification of contents of the labor contract is reached after consultations between the employer and the employee.

此外, 就裁员而言, 因为法律已经明确规定用人单位需提前 30 天向工会或全体职工说明情况, 因此, 裁员程序中, 一般已包括了工会意见征求的程序, 无需再额外关注。

In addition, for lay-off, as the law has made it clear the company shall inform the trade union or all employees 30 days in advance, so the lay-off proceedings has already included the procedure to seek opinion from the trade union.

II. 如果用人单位尚未建立工会, 该怎么办? What if no trade union exists?

实际上，很多中小企业存在尚未建立工会的情况。那么在这种情况下，用人单位解雇雇员，是否还需要履行通知工会的程序呢？

In fact, no trade union exists in many small and medium-sized companies. So in this case, if the company needs to dismiss employee, does it still need to notify the trade union?

对此，目前不同地区有不同的做法。

To this question, so far it seems the practice of various areas is different.

- 《江苏省劳动合同条例》规定，用人单位单方解除劳动合同，应当事先将理由通知工会；用人单位尚未建立工会的，通知用人单位所在地工会。
According to Jiangsu Employment Contract Regulation, if the company terminates the employment contract, it shall notify the trade union of the reason of termination. If no trade union has been established, it shall notify the trade union where the company is located.
- 《浙江省宁波市中级人民法院关于审理劳动争议案件若干疑难问题的解答（三）》认为，即使用人单位尚未建立基层工会，也可通过告知并听取职工代表意见或者向当地工会组织（行业工会组织）征求意见等变通方式来履行告知义务。
According to Reply to Several Questions in Handling Employment Dispute Case issued by Zhejiang Ningbo Intermediate Court III, if the company has not established its trade union, it can also fulfill its obligation of notice by informing employee representatives and seeking their opinion, or seeking opinion from the local trade union organization (industrial trade union organization).

就上海地区而言，由于目前尚未有地方性法规对此予以明确，司法实践中存在不同的意见：

In Shanghai area, due to the fact that no local regulation has clarified this issue, the judicial practice seems not consistent:

- 认为用人单位单方解除劳动合同时未通知工会，系程序违法。
It is believed that as the notice of termination is not sent to trade union, the termination is illegal from the procedure perspective.

在上海格兴滤材厂与李燕会劳动合同纠纷一审民事判决书中，上海市青浦区人民法院认为：根据法律规定，用人单位单方面解除劳动合同，应当事先将理由通知工会。未经上述程序，劳动者以用人单位违法解除劳动合同为由请求用人单位支付赔偿金的，应予支持。现用人单位明确公司没有工会，解除员工没有报请上级工会，也没有经过职工代表大会等民主程序，确系程序违法。

In the court decision regarding the labor case Shanghai Gexing Filter Material Factory vs. Ms. Ma Yanhui, Shanghai Qingpu Court is of opinion that according to the law, when the company terminates the employment contract unilaterally, it shall notify the trade union of the reason of termination. The claim for compensation by the employee due to the fact the company does not go through such procedure shall be supported. Now the company has clarified that it has no trade union within the company, and did not report to the upper-level trade union for the termination, then the termination is illegal due to defect in procedure.

- 认为用人单位未建立工会，则无需履行通知工会程序
It is believed that as no trade union exists, then the company is not required to notify the trade union.

在王粤与上海唐码广告有限公司劳动合同纠纷二审民事判决书中，法院认为，工会是职工自愿结合的群众组织，用人单位并无发起设立工会的义务。二审中，依据唐码公司提交的由上海市黄浦区瑞金二路街道总工会开具的《证明》，证实唐码公司至今未组建工会。王粤对《证明》的真实性无异议，但主张唐码公司在注册地并无经营，故应以实际经营地的工会出具证明。因王粤对其主张未提供充分的依据予以佐证，本院对此不予采信。鉴于唐码公司未建立工会，故王粤以唐码公司解除决定未事先通知工会为由主张公司违法解除劳动合同，理由不成立。综上，一审法院认定唐码公司解除与王粤的劳动关系属于合法解除，事实清楚，证据充分，本院认同。

In the appeal court decision regarding the labor case Mr. Wang Yue and Shanghai Tangma Advertising Co. Ltd., the court is of opinion that the trade union is a voluntary organization set up by the employees and the company is under no liability to set up the trade union. According to the document provided by the company, the company does not have any trade union. Mr. Wang does not object to this fact. As no trade union exists, the argument by Mr. Wang that the termination is illegal as no notice was sent to the trade union in advance is not correct. Thus, the termination by the company is a legal one.

III. 解雇行为是否需要征得工会同意

Shall the termination require consent from the trade union?

用人单位单方解雇雇员，需要履行通知工会的程序，但工会是否同意，是否最终出具意见并不影响解雇的效力。

It's true unilateral termination by the company requires the procedure to inform the trade union. However, the fact whether the trade union agrees with the termination or not, and whether a written opinion to the termination is issued or not, will not affect the legal effect of termination.

从举证程序上，用人单位只要将通知工会的书面函件及寄送证明提交法院，即完成了法定举证要件。

Therefore, from the perspective of evidence, as long as the company is able to submit the written letter to the trade union to the court, it shall have completed the requirement of proof.

IV. 程序补正过程中的几个问题

Several issues in procedure correction

根据法律规定，即使存在用人单位未能事先将解雇理由通知工会，用人单位仍然被许可在最早起诉前补正通知程序，从而避免解雇程序违法。

According to the law, even if the company fails to notify the termination to the trade union in advance, the company is still allowed to make remedy latest the litigation is filed so that to avoid illegal termination procedure.

在补正过程中，需要注意的是：

In the process of procedure correction, please note:

- 通知工会的落款时间必须早于起诉日期；
The date of letter to the trade union shall be one which is earlier than the date of litigation filed to the court;
- 起诉一般系指起诉至法院的日期，而非劳动仲裁的日期。

Litigation means the legal proceedings filed to the court, instead of labor arbitration.

建议 Suggestions

针对可能因用人单位未适当履行通知工会义务导致解雇程序违法，进而被认定解雇违法的情况，我们的建议是：

In order to avoid risk of illegal termination due to failure of notifying the trade union of the termination by the company, our suggestions are as below:

1. 在条件许可的情况下，用人单位有必要积极建立工会组织；
The company shall set up trade union if the conditions are permitted;
2. 在向雇员发出解雇通知前，应当妥善完成通知工会的程序并保留通知的证明；
Before the notice of termination is sent to the employee, the company shall have already notified the trade union and kept the proof of such notice;
3. 如用人单位尚未建立工会，应当将解雇事实通知上级工会或用人单位所在地工会。
If no trade union exists within the company, the company shall notify to the upper-level trade union or the trade union where the company is located regarding the fact of termination.

如您对本文有任何问题，请联系：

If you have any questions about this article, please contact us via:



陈祥龙，执行合伙人
Erex Chen, Managing Partner
Tel: +86 21 68556511
Email: erexchen@mylinklaw.com