

Labor-Related Disputes on Foreign Employment In Shanghai

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The *Rules for the Administration of Employment of Foreigners in China*, promulgated by former Labor Ministry, Public Security Ministry and Ministry of Foreign Affairs, is an old provision since 1996 without any revision. Recently with the internationalization of the employment market in Shanghai, there are more and more foreign labor-related disputes in new style emerging. From the judgment of legitimate employment by focusing on working permit, to the application of severance payment to foreigners, and the judicial view of discretion clause on termination criteria of foreigners, all these typical issues require a conclusion from judicial practice.

This article picks *Ms. Pan v. Company A* (case no. (2018) Hu 01 Min Zhong No. 7590) from Shanghai 1st Intermediate Court as a lead to analyze the above issues based on practical experience and researches into other cases.

I. Case Analysis

1. Facts

Ms. Pan was hired in August 2013 by Company A. On October 16, 2017, Company A unilaterally terminated the employment with Ms. Pan due to her serious misconducts (i.e. 5 days' absence). Ms. Pan raised a case for illegal termination against Company A to the court and requested for the compensation for illegal termination (*according to the PRC Employment Contract Law, if the unilateral termination by the employer is deemed as illegal, then the employee has the right to request (i) double statutory severance or (ii) reinstatement of his/her employment relationship with the employer*).

2. Judgment and Reasons

Although the courts of the first and second instance in Shanghai both ruled that the unilateral termination by Company A is an illegal one, the compensation for illegal termination is not supported.

The main reasons are: (i) both courts thought *Rules for the Administration of Employment of Foreigners in China* stipulates that, for foreign employees in China, their salaries shall not be lower than local minimum salary standard, and their working time, holidays, labor safety and hygiene, and social securities shall be subject to corresponding national regulations, which is an exhaustive listing stipulation in the law. Other labor rights and obligations (such as termination) apart from the aforementioned can be stipulated by mutual employment contracts or other agreements; and (ii) both

executed offer letter and employment contract between Company A and Ms. Pan are silent about the detailed legal liability for the illegal termination.

Hence, based on this case, it seems that a foreign employee cannot directly apply for the stipulations under the PRC Employment Contract Law, unless he/she reaches the related detailed agreements into the executed employment contract or agreement with the employer, according to the opinion from Shanghai 1st Intermediate Court.

II. Legal Analysis

1. Legitimacy of Foreign Employment

Legitimate employment refers to circumstances when the foreign employee and domestic employer have accordingly conducted each procedure for domestic employment (mainly the “work permit”), and maintained employment relationship as declared; on the contrary, illegitimate employment refers to circumstances when the foreign employee and domestic employer have not accordingly conducted each procedure for domestic employment, or maintained employment relationship as declared.

To determine legitimacy in employment, there are two factors in need of clarification: one is the procedures when establishing employment relationship, the other is the procedures during maintaining such relationship. Legitimate employment cannot be established without either of them. Main factors of illegitimate employment may include but are not limited to: working out of registered region (including long-term cross-regional work in the name of business trip); working other than registered position; working for multiple employers while out of conformance with legal conditions; part-time working foreign students without applying for filling in the residence permit; other illegal circumstances.

In addition, according to the *Judicial Explanation IV on Labor-Related Disputes* issued by the Supreme Court, if an employment contract is signed with domestic employer without obtaining working certificates, the courts will not support any party’s claim for confirmation of employment relationship. In this regard, the “Employment Permit” is a pre-condition and also a major consideration factor in judicial practice to judge whether there exists employment relationship under the PRC labor laws.

2. Discretionary Clauses in Employment Contract

In reference to the statement of the court in the above case, Article 22 and 23 in *Rules for the Administration of Employment of Foreigners in China* regulate that for foreign employees in China, their salaries, working time, holidays, labor safety and hygiene, and social insurance shall be subject to corresponding national regulations. Other items can be stipulated by mutual employment contracts or other agreements. Moreover, Shanghai Labor Bureau states in *Opinions on Implementing Rules for the*

Administration of Employment of Foreigners in China that, it shall be stipulated in the employment contracts regarding the hiring duration, position, remuneration, insurance, working time, termination criteria and breach liability between employers and their approved foreign employees. However, among these items, the termination criteria and breach liability has caused many disputes in practice due to its relevance to the employment termination.

In Shanghai judicial practice, two intermediate courts hold different opinions regarding this issue. According to our research, the judicial approach of Shanghai 1st Intermediate Court and other inferior courts in its jurisdiction regarding the discretionary clauses normally would be based on the above laws and regulations; while Shanghai 2nd Intermediate court has specified in *White Paper of Labor Disputes Trials of Year 2010* that based on the general judicial doctrine for application of law, the new and superior law (i.e. the PRC Employment Contract law) would prevail, and if the discretionary clause regarding labor standard stipulated by the employer and foreign employee contradicts with the compulsory stipulations in the law, it will be deemed invalid. In other words, “termination at will” clause in the executed employment contract will be supported by Shanghai 1st Intermediate Court and other inferior courts in its jurisdiction; but will be deemed as invalid by Shanghai 2nd Intermediate court and its inferior courts.

3. Severance Payment for Foreign Employees?

As we have discussed previously, the two intermediate courts in Shanghai differ in their judicial opinions in labor disputes trials for foreign employees. Shanghai 1st Intermediate Court holds the view that, due to the existence of *Opinions on Implementing Rules for the Administration of Employment of Foreigners in China*, the court will not support severance payment claim for foreign employees, unless otherwise related severance payment stipulated in the employment contract.

However, the some cases trialed by Shanghai 2nd Intermediate Court have different opinions towards this issue: it ruled to grant severance payment to foreign employees without related stipulation, e.g. (2010) *Hu Er Zhong Min San (Min) Zhong Zi No. 2271 and 2187*.

4. Double statutory severance due to illegal termination for Foreign Employees?

As reflected by the case at the beginning of this article, Shanghai 1st Intermediate Court holds the view that the foreign employee shall not be entitled to the compensation liability for the illegal termination, if no specific agreements are reached with the employer. However, Shanghai 2nd Intermediate Court supports the compensation claim for the illegal termination (i.e. double statutory severance) according to the PRC Employment Contract Law, regardless whether there is any specific agreements between the parties.

II. Conclusion and Suggestion

To conclude, it is apparent that there is certain particularity in the employment of foreign employees, the change and diversity of judicial opinions on this issue also caused major uncertainty on the outcome of such cases, both of which has increased the difficulties for the employer in the management of foreign employees.

Thus, we would suggest that in the management of foreign employment, the employer should ensure the legitimacy and compliance of relevant procedure during the employees' work period to prevent the legal risks of illegitimate employment. In addition, from the perspective of flexible employment, the employer could also consider to specify the termination condition and separation compensation in the employment contract clearly, in order to avoid or reduce further labor disputes.