

Excessive Dismissal Protection in the Labor Contract Law — Take Company A and Ding as an Example

Wang Deyu

Beijing Wuzi University, Beijing, China

ABSTRACT

The Labor Contract Law takes the principle of preferential protection of workers, but whether the law favors excessive protection of workers has been controversial. The reflection on the excessive protection of workers has again attracted attention after the labor dispute case between Company A and Ding. Through the analysis of the labor and labor dispute between Company A and Ding, this paper finds that there are two main problems in the dismissal protection system in China: the regulation of employers is too rigid, and the level of protection of workers is lacking. In view of the above problems, when the Labor Contract Law is revised in the future, the dismissal protection rules should pay attention to the hierarchical regulation of employers and the classified protection of workers to solve the excessive dismissal protection.

KEYWORDS: *dismissal protection, tilt protection, hierarchical regulation and classified protection*

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1. INTRODUCTION

Dismissal protection is an important concept embodied in the Labor Contract Law of the Peoples Republic of China (hereinafter referred to as the Labor Contract Law). However, excessive termination protection will also cause problems such as inflexible employment and loss of competitiveness of employers. Professor Dong Baohua pointed out that the current Labor Contract Law in China has too strict restrictions on the right to dismiss employers, and there are problems such as the imbalance between one size fits all and stratified application of dismissal protection.¹ However, Professor Shen Jianfeng pointed out that the dismissal protection in the Labor Contract Law is not completely rigid, but in fact, there is a certain flexibility and space in it.² It can be seen that the dismissal protection in the Labor Contract Law of China is highly controversial. Therefore, it is the mission of this paper to rationally examine and reflect on the protection rules of

dismissal through the Ding case, and to seek the solution to solve the existing problems.

1. The manifestation of excessive dismissal protection in Company A and Ding

A. The termination protection in this case

"Beijing Company A cloud computing technology co., LTD., and Ding labor dispute" case, Ding as a senior manager to "headache", "cervical spine problem serious" to apply to the company for sick leave, but the sick leave start travel to Brazil, unit of choose and employ persons to provide false application information and malicious deception company, serious violation of enterprise rules and regulations to notify Ding terminate the labor contract, and Ding claims not to travel to Brazil but rest, the two sides dispute. Ding filed a appeal to the Labor and Personnel Dispute Arbitration Committee of Haidian District, Beijing, and the arbitration committee ruled as follows: Company As decision to terminate the labor contract cannot be established, and both parties shall continue to perform the labor contract signed. Company A company refuses to accept the arbitration award, a lawsuit, the first-

¹ Dong Baohua. Top Ten imbalances in the Labor Contract Law [J]. Exploration and contention, 2016, (04): 10-17.

² Shen Jianfeng. Ability and inability to modify the labor contract Law [J]. Chinese Workers, 2016, (05): 14-19.

instance court that Company A company in the rules and regulations of no employees during sick leave place restrictive rules, so Company A company to Ding serious breach of enterprise rules and regulations to remove the labor contract lack of sufficient facts, so revoked Company A company to Ding decision to terminate the labor contract, the both sides continue to perform the labor contract.³ Company A company refused to accept the first instance judgment, appeal, court of second instance also found that Dings behavior did not seriously violate the rules and regulations of the enterprise and thus ruled that the appeal was rejected and the original judgment was upheld.⁴ Company A still refused to accept the judgment of the second instance, and applied to the Beijing High Peoples Court for a retrial. The retrial court finally made a valid judgment for the termination of the labor contract on the basis of the principle of good faith.⁵

According to the found out the facts of the cases, the use of sick leave travel abroad is the Company A company rules and regulations, the arbitration commission, the court of first instance and the second instance court in accordance with the "labor contract law" article 39 of the case, that the behavior does not conform to the "labor contract law" article 39 negligence dismissed "serious violation of the rules and regulations of unit of choose and employ persons" conditions, thus made the Company A company terminate the labor contract is invalid. The judgment is essentially under the current dismissal protection rules, but in retrial, Beijing high court to avoid dismissal protection rules, that the premise of protecting the laborer legitimate rights and interests is laborer and employing unit in the legal equality and mutual respect, and then skillfully use the principle of good faith, eventually overturned the original judgment. If the retrial court avoids the current dismissal protection rules to complete the correction of the first and second instance courts, does it indicate that the dismissal protection in the Labor Contract Law is excessive.

B. The excessive termination protection in this case

It is undeniable that the dismissal protection rules protect the legitimate rights and interests of the vulnerable workers to a large extent, but the dismissal of the workers should be a right of the employer. The excessive dismissal protection of the workers will greatly limit the dismissal right of the employer, and then affect the development of the employer itself.

In this case, the court held that Company A did not restrict the place of leave during sick leave, and therefore found that Dings sick leave in Brazil did not violate the companys rules and regulations. However, the rules and regulations of the company cannot regulate the daily behavior of the workers in detail. When the employee makes some behaviors that harm the employer outside the rules and regulations, the employer has no legal reason to dismiss them immediately, which is actually the result of the too rigid dismissal protection rules.

In addition, the court ignored Dings identity in the dismissal protection. As a senior management personnel of the company, Ding is lower than other workers, and he does not belong to the weak workers in the traditional sense. When Ding, a senior executive, lost his credibility in performing his labor contracts, the basis for maintaining labor relations, Company A should have fired him. Unfortunately, based on the existence of dismissal protection rules, it is difficult for employers to fire workers, even if the basis for maintaining the labor relationship has been lost.

2. The termination protection rules in the Labor Contract Law

A. The theoretical basis of Article 39,40 and 42 of the Labor Contract Law

There are two termination theories in the world today: termination freedom and termination protection. The theory of dismissal freedom comes from the principle of autonomy of meaning in civil law. This theory reflects the freedom of employers in the termination of labor contract, but it does not consider the sociality of workers right to survival.⁶ The theory of dismissal protection holds that there is inequality between labor and management in the employment relationship. In order to achieve substantial equality, the right of dismissal should be limited.⁷ The dismissal system in the Labor Contract Law is based on the theory of dismissal protection. "As for the dismissal protection system, there are three theories in Chinese academic circles,⁸ namely, strict restriction, equal authorization and appropriate restriction", among which the strict restriction theory is based on the basis of "strong labor and weak" and "right to survival priority". In China, "strong labor and weak" is embodied in the particularity of labor payment and labor management. The workers belong to the employer in the

3 Case No. (2015) Hai Min Chu Zi No. 23607.

4 Case No. (2015) Yi Zhong Min Zhong Zi No. 650.

5 Case No. (2017) Jing Min Zai No. 65.

6 Huang Yueqin. The New Theory of Labor Law [M]. Beijing: China University of Political Science and Law Press, 2003:156.

7 Su Yinghua. Study on legal issues of termination protection in China [D]. Guangxi University, 2012.

8 Liu Lizhen. Analysis of the dismissal protection system [D]. East China University of Political Science and Law, 2009.

personality, economy and organization of the employer, so the workers are in a relatively weak position compared with the employer.⁹ The employer in a strong position often fires workers for their own development for various reasons, the most basic source of living of workers is work income, most of the workers after being fired have re-employment difficulties and other problems, they are in a long period of time. The loss of the basic source of living leads to some damage to the right to survive. If the proportion of such workers increases repeatedly, it may also lead to a series of social risks. Therefore, in order to realize substantial equality, it must rely on the principle of "right to survival first" to protect the workers.

The design idea of dismissal protection rules in the current Labor Contract Law is generally consistent with the strict restriction theory, which is designed on the basis of "strong labor and weak" and "right to survival priority". Specifically reflected in the "Labor Contract Law" for article 39, article 40 adopts the enumerated provisions of the employer to unilaterally terminate the labor contract, in addition, in the "Labor Contract Law" article 42 reverse stipulates that the employer shall not terminate the labor contract. In practice, such rules play a great role in maintaining the stability of labor relations and preventing and controlling social risks.

2. Excessive dismissal protection — The hidden dangers of the dismissal protection system

The Labor Contract Law is permeated with the characteristics of public law, and the object protected is different from the object protected by civil law, realizing the transformation from abstract person to concrete person.¹⁰ Since the labor contract law turned to the protection of specific people, so you should consider the difference between specific people, however, in China "labor contract law" dismissal protection rules is in the "strong capital", "weak laborer" hypothesis design under the premise, ignoring the unit of choose and employ persons and laborer have layered reality, it is actually the abstract of unit of choose and employ persons and workers. In labor relations abstract equality may lead to practical embarrassment, embodied in the dismissal protection rules may appear in the dismissal protection to tilt protection to line single protection of real situation,¹¹

namely dismissal protection rules in some cases exist the problem of excessive protection of workers, especially when the company fired senior managers often encounter because of its bad behavior is not within the scope of the rules and regulations and fired illegal problems.

3. Reflections on excessive dismissal protection in our country

A. The regulation of employers is too rigid

"The coexistence of the violation of permits and the prohibition of the ban is an international dismissal protection rule."¹² China's dismissal protection rules are the same, which is embodied in article 39 of the Labor Contract Law, which stipulates several reasons for the employer to dismiss immediately, and at the same time, article 42 reverse stipulates the reasons against dismissal. Article 39 adopted the method of listing of the unit of choose and employ persons can immediately remove reason, namely only the behavior of the laborer meet the list of several reason unit of choose and employ persons can immediately dismissal, this use simple list, neither like American law countries similar "have reasonable reason" general description, and no set up "other has reasonable and legitimate reason" out sex clause to make up for the defects of enumerated legislation cannot exhaust.¹³ Such legislative ideas in practice will inevitably appear in the case, Ding as a senior manager citing sick rest travel abroad, because Company A did not include the behavior in the rules and regulations of labor contract cannot be lifted in accordance with the law, from the point of the whole case, Ding behavior not only affected the normal operation of Company A company, also make the companys vacation system suffered great challenges, the serious violation of the principle of good faith employees of unit of choose and employ personsThe dismissal is enough to show that the dismissal protection rules are too rigid to the employer.

Perhaps the original intention of the legislator is to give the employer certain dismissal autonomy in article 39 of the Labor Contract Law, that is, the employer will list the serious violations of the rules and regulations in the rules and regulations, and can be terminated when the worker seriously violates the rules and regulations. But in reality, it is impossible for the company to fully anticipate what elusive disciplinary violations its employees will make in the

9 Lin Jia. The legislative value, system innovation and impact evaluation of the Labor Contract Law [J]. Jurist, 2008, (02): 1-8.

10 Su Yinghua. Study on legal issues of termination protection in China [D]. Guangxi University, 2012.

11 Zhang Huiqin, Guo Wenlong. Review the modification of the Labor Contract Law from the principle of inclined protection [J]. Academia, 2017, (01): 42-52 + 322.

12 Qian Yefang, Wang Jizhe. Also talk about the imbalance of the labor contract law — and discuss with Professor Dong Baohua [J]. Zhejiang Academic Journal, 2017, (06): 166-182.

13 Shen Tongxian. The reconsideration of the balance of labor and management interests in the Labor Contract Law — takes the dismissal protection and compulsory contracting provisions as the starting point [J]. Law, 2017, (01): 57-65.

future, and it does not have enough energy to list all the inexhaustible disciplinary violations in the rules and regulations. In addition, "most countries in the world stipulate legitimate reasons for dismissal at three levels: legislation, justice and collective contract."¹⁴ In our country in the "labor contract law" for the dismissal way only reflects the legislative level of dismissal, cause in the judicial process of law applicable without certain interpretation space, often result in the name of the tilt protection of workers, so that the company in an isolated situation. Therefore, the author believes that this kind of enumeration legislation is more rigid but not flexible enough, forming a kind of excessive dismissal protection.

B. Lack of levels of protection for workers

The legislation of China's Labor Contract Law embodies the principle of "preferential protection of workers", but in reality, the differences between workers are ignored when the preferential protection of workers. The diversified development of social class structure leads to different types of workers in labor relations. The positions of each worker vary greatly, such as the knowledge level, social status and obligations to undertake during the employment period. However, China's Labor Contract Law does not distinguish between the types of workers, and it is obviously unreasonable to apply the same set of termination protection system to different types of workers.

After the source, the "labor contract law" to protect the root cause of the workers is based on the laborer in a weak position in the labor relationship, the weak position is mainly reflected in the work income is the basic source of workers and reflected in the labor relations three from attribute — personal from attribute, economic attribute, and from the organization. Therefore, the legislative purpose of the Labor Contract Law is to protect the vulnerable workers, so it is necessary to protect the vulnerable workers according to the degree of their weakness. If the stratification phenomenon of workers is ignored, then it will inevitably lead to the applicable embarrassment in reality. For example, Ding in the above case, according to relevant facts, he is not only a senior manager of Company A, but also a travel expert, and has the identity of Weibo V. He even published a book named "Ding Ding See the World" and participated in the recording of some entertainment programs from time to time. Obviously, Ding has a wide source of income, and the salary he earns at Company A is only part of his income. In

addition, as a senior manager, he can exercise his power on behalf of the company and participate in the management affairs of the company. The above shows that Ding and Company A company do not have a strong subordination attribute. Therefore, Ding is not the Labor Contract Law in the strict sense of the object of tilt protection, it should not be excessive dismissal protection. However, the reality is that Ding cheated the company into getting the opportunity to get a vacation for the purpose of traveling abroad, but the company could not dismiss him smoothly due to the current labor termination protection rules. Therefore, the author believes that the dismissal protection rules in the Labor Contract Law of China lack a certain level of protection for workers, which is mainly reflected in the excessive dismissal of workers with senior managers

4. Countermeasures and improvement of Labor Contract Law

A. The hierarchical regulation of employers

Different unit of choose and employ persons in economic strength, operation scale and management ability there are certain differences, our country in 2011 issued on the printing of small and medium-sized enterprise delimit standard notice (hereinafter referred to as: "notice"), "notice", "according to the number of workers, income, total assets, and combined with the industry will be divided into large, medium, small, micro four types."¹⁵ Labor legislation is the original intention of tilt protection principle to reforming strong relationship between unit of choose and employ persons and laborer and the weak body to achieve "equality", in some is called "poor enterprise" small micro enterprise, although there is a unit of choose and employ persons and workers between strength, but still relatively equal, there is no obvious strong weakness. Blindly protecting the interests of workers will not only cause the demise of small and micro enterprises, but also is not conducive to the development and progress of the society. Therefore, the author believes that it is inappropriate to apply the strict dismissal protection rules to small and micro enterprises, and should be regulated according to the size of enterprises.

About the hierarchical regulation of employers, exemption is adopted abroad, which is divided into two ways — overall exemption and partial exemption. Overall exemption refers to the overall exemption of reasons for dismissal, termination procedures and termination treatment for smaller employers. "For example, the Federal German

14 Qian Yefang, Wang Jizhe. Also talk about the imbalance of the labor contract law — and discuss with Professor Dong Baohua [J]. Zhejiang Academic Journal, 2017, (06): 166-182.

15 Chen Jinwen. Research on the difference adjustment provisions on the labor law of small and micro enterprises [D]. Xiamen University, 2019.

Distermination Protection Law stipulates that employers employing less than ten persons shall implement the overall exemption of termination protection.¹⁶ Part of the exemption refers to the exemption of a certain rule for smaller employers, such as the Australian Fair Work Act," small business employers do not need to pay severance pay."¹⁷ Our country is currently in the ranks of developing countries, economic development is relatively backward, small micro enterprises to provide cheap labor workers occupy a larger proportion, using the overall exemption is suspected of overcorrection, so the author thinks that our current dismissal protection system should adopt the way of partial exemption, to regulate the unit of choose and employ persons.

According to the above analysis, at present our country excessive termination protection is mainly reflected in "labor contract law" article 39, reality there is usually unit of choose and employ persons because rules and regulations are not careful enough to dismiss violations of workers, however, make a set of detailed rules and regulations for micro enterprises is a great burden, imagine in a less than ten small micro enterprises, but before running a set of complete rules and regulations, the pressure is obvious. On the other hand, if a complete set of rules and regulations is not formulated, the company cannot fire the employee when the rules and regulations are not acceptable to the violation of the company. Therefore, the first step of hierarchical regulation of employers in China should be the exemption of rules and regulations for smaller enterprises, and the second step is that smaller enterprises can have legitimate and reasonable reasons when firing workers. The division of scale small enterprises abroad is determined by the number of workers. According to the standard of foreign classification, the number of workers of micro enterprises usually varies from 10 to 30 people, and China may be able to learn from it.

B. classified protection of workers

The termination protection rules in the Labor Contract Law are aimed at vulnerable workers in labor relations. There are also strong and weak points between workers, so the classified protection of workers can achieve the purpose of preferential protection of labor legislation.

In real life, people classify workers into "gold collar", "white collar" and "blue collar" according to the different positions they are engaged in. "gold collar" usually refers to the senior managers of enterprises, who often hold the rights of the company and have more right to speak. Japans Labor Standard Law classifies senior managers in the list of employers.¹⁸ It is obvious that there is a big difference between gold collar and blue collar workers. Therefore, the labor termination rules should divide senior managers and ordinary workers into two categories for different degrees of protection.

From the years of practice, the current intensity of dismissal protection is relatively moderate for ordinary workers, so the current need to solve is only the problem of excessive dismissal protection for senior managers. ZhangHuiQin in the review from tilt protection principle of labor contract law> modify proposed executives should be excluded from the labor contract law, but the executive in enterprise rules and regulations and the company law under the regulation without dismissal protection rules, as the interests of the laborer Im afraid will be damaged. In my opinion, for senior executives, they need to adjust the intensity of their termination protection, rather than excluding them from the termination protection rules.

First of all, adjust the dismissal protection of executives to the efforts of the judicial organs, labor dispute arbitration committee or court in dealing with unit of choose and employ persons fired executives for bill should not apply the law is too rigid, should also be flexible use of honesty and credit to examine the rationality of the dismissal, thus solve the inherent defects in the judicial level. Second, outside the efforts of the judicial organs also need to further improve the law, but to solve the problem need to modify the labor contract law or Germany single legislation is still questionable problem, professor Jian-feng shen in the "change <labor contract law> can and not" put forward "for special labor relations should be through special law" may have certain reference significance.

Conclusion

The termination protection rule is an indispensable part of the Labor Contract Law protecting the protection of workers, and the whole protection rule cannot be completely denied just because there are a few cases of excessive termination protection. We should solve the problem of excessive dismissal

16 Wang Qian. German dismissal protection system [M]. Liang Huixing. Civil and commercial Law Series: vol. 57. Beijing: Law Press, 2009:632.

17 Zhang Huiqin, Guo Wenlong. Review the modification of the Labor Contract Law from the principle of inclined protection [J]. Academia, 2017, (01): 42-52 + 322.

18 Article 10 of the Japanese Labor Benchmark Law: The employer mentioned in this Law means the business owner, the business manager or the person who handles the enterprise on behalf of the business owner.

protection from the hierarchical regulation of employers and the classified protection of workers, so as to realize the harmonious and orderly development of labor relations between employers and workers. In this process, it is necessary to improve the legislative technology and judicial level, so as to reflect the basic essence of preferential protection, and finally realize the stable and harmonious development of the society.

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